

ADMINISTRATIVE PROCEDURE ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

FIRST SESSION

ON

S. 1160, S. 1336, S. 1758, and S. 1879

BILLS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT,
AND FOR OTHER PURPOSES

MAY 12, 13, 14, AND 21, 1965

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ADMINISTRATIVE PROCEDURE ACT

WEDNESDAY, MAY 12, 1965

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 1318, New Senate Office Building, Senator Edward V. Long (chairman of the subcommittee) presiding.

Present: Senators Long and Javits.

Also present: Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; Kathryn M. Coulter, special assistant; Charles H. Helein, assistant counsel; and Gordon H. Homme assistant counsel.

Senator Long. The committee will be in order.

Today, we are to start our hearings on four bills, S. 1160, S. 1336, S. 1758, and S. 1879.

I have an opening statement which I generally read into the record at this time, but in order to expedite the hearing, without objection I am going to have the statement inserted in the record at this time.

(The statement of Senator Long is as follows:)

OPENING STATEMENT BY SENATOR EDWARD V. LONG, WEDNESDAY, MAY 12, 1965,
HEARINGS ON S. 1160, S. 1336, S. 1758, AND S. 1879

Today we begin hearings on S. 1336, a bill to amend the Administrative Procedure Act of 1946. This bill seeks to update and improve the procedural rules that govern most proceedings before the Federal administrative agencies.

S. 1336 also incorporates two proposals that were separately introduced. S. 1160 is set forth in section 3 of S. 1336. It is more commonly referred to as the freedom of information bill. Its purpose is to give meaning to the right of a citizen to be informed of its Government's activities.

S. 1758 can be found in section 6 (b) and (c) of S. 1336. This bill is better known as the attorneys' practice bill. Under its provisions, qualified members of the bar would be able to practice before the administrative agencies without having to meet superfluous admission requirements of individual agencies.

In the 88th Congress, similar bills were pending. The freedom of information bill passed the Senate by a unanimous vote, as did the attorneys' practice bill. Unfortunately, both bills were tied up in the House at adjournment.

The predecessor of S. 1336 was S. 1663 of the 88th Congress. The latter was the subject of extensive studies and hearings in the summer of 1964. The studies were carried on by an expert panel of administrative law professors, the American Bar Association, the agencies of the Federal Government, interested attorneys, and others.

The hearings that were held in July of 1964 provided further opportunity for discussion and consideration of the most complex subject. Finally, after much review and revision, S. 1336 was drafted.

The authors of S. 1336, believe it to be the answer, though not the complete answer, to a speedier, fairer and less expensive administrative process. The people most involved in this area have been searching for this answer for some 10 years. It has not been easy to find.

Accomplishing a fairer, faster, and less costly administrative process is of no small importance. It has been said before, and undoubtedly will be said again, that the administrative process is of vast consequence to every American citizen. Stating this fact so often runs the risk of its losing its impact. However, failure to repeat this fact, runs a greater risk of its being lost sight of and forgotten.

S. 1336 would apply to the departments and agencies which regulate, supervise, control, and police vast segments of our national economy, national security, and our personal liberties and rights. As our country has grown, so has the administration of its affairs. As the complexity and coverage of this administration has grown, so has its costs both in terms of time and money.

S. 1336 would reduce these evils of the administrative process. It will not get rid of them. It is a step in the right direction and a very necessary and urgent step.

Twenty years have elapsed since any successful attempt was made to update and streamline administrative procedures. Further delay will only add to an existing conundrum that now threatens to bog down a major portion of governmental activity. If this occurs, the only result will be bureaucratic rule and ultimate administrative chaos.

S. 1336 has too many important provisions to detail in this opening statement. However, some of the highlights should be mentioned briefly.

There is a new definition of rule which is shorter and more accurate. Generally, ratemaking has been placed under the adjudicatory process.

Section 3 incorporates the freedom of information bill.

Section 5, dealing with agency adjudication has been revised; its scope broadened. Procedures are provided that guarantee the fullest due process appropriate, and at the same time allow expedited procedures for a speedy decision when the requirements of due process are minimal and an expedited decision will be more beneficial to the parties.

Section 8 has bestowed new status upon the hearing examiner and given his decisions more weight. It will no longer be necessary for agency heads to duplicate the actual hearing process and taking of evidence. This will only be done before the examiner.

In addition, the new weight accorded the examiner's decision should behoove the examiner to write more precise and accurate decisions.

I would like to say a few words about S. 1160, the freedom of information bill. In my view, the provisions of this bill are essential to the American citizen's exercise of some of his basic rights. The citizen must be informed in order to exercise his basic political right—the right to vote. He must be informed in order to meaningfully enjoy his basic rights of freedom of speech and freedom of the press.

In the past, Congress has heard great lamentation about the difficulties this bill presents to the agencies. Congress has heard at the same time, the agencies' praise for the object and purpose of this bill. Of course, when it comes down to cases, most agencies are adamantly opposed to any enactment by Congress that will in any way limit their discretion to withhold any information they wish to withhold.

The agencies have been singularly remiss and derelict in offering any constructive suggestions as to how Congress can strike the balance of the right-to-know and the necessity to withhold certain information. The lack of such suggestions only emphasizes the fact that only absolute discretion is acceptable to the agencies.

Congress realizes that some discretion is necessary in order for the proper functioning of our Government. But the power to exercise discretion carries with it the heavy responsibility of answering for each exercise truthfully and promptly. Yet, if there is any more invisible or hard-to-find individual than the Abominable Snowman, it is the bureaucrat hiding from those who seek to fix responsibility for a discretionary act.

To take the position that Congress should abandon to the discretion of some nameless, faceless, impersonal, and uncaring bureaucrat, the right of the people to know, is to propose that Congress irresponsibly abandon its role of guardian of the people for the sake of bureaucratic peace of mind. Congress cannot and will not accept such a proposal.

Senator LONG. At this point I am pleased to insert into the record the statement of my distinguished colleague Senator Ervin, concerning these measures to amend the Administrative Procedure Act. Senator Ervin has long been interested in this legislation and has himself introduced bills designed to improve the Administrative Procedure Act.

(The statement follows:)

STATEMENT OF SENATOR SAM J. ERVIN, JR.

Mr. Chairman, I welcome the opportunity to comment on the measures to revise and amend the Administrative Procedure Act. I have cosponsored two of them: S. 1160, to clarify and protect the right of the public to information, and S. 1758, to provide for the right of persons to be represented by attorneys before Government agencies. These measures are meaningful and significant. Based on sections of the omnibus bills, they were passed by the Senate last year. I hope that they receive as prompt consideration this year.

I introduced a third measure before the subcommittee, S. 1879, to recodify the Administrative Procedure Act. This bill is similar in principle to S. 1336, but embodies a slightly different approach in certain areas. I introduced it so that the subcommittee might have both measures before it as it studied the problems involved.

The revision of the Administrative Procedure Act is a monumental task, and one to which this subcommittee as it pursues its studies and hearings under its able chairman is contributing in a diligent and scholarly manner.

The issues and problems involved in this task of revision are countless. While I am not now wedded to particular language, I do support the efforts to amend the act to take into account experience under it since 1946, the increase in the number of agencies, and the broadening of the scope of Government activities.

I shall study carefully the different opinions registered before the subcommittee in these hearings with the assurance that any draft which is reported by the subcommittee will be the product of the most careful study.

A noted legal scholar has said that liberty is wedged in the interstices of procedure.

The studies by the Constitutional Rights Subcommittee over the last 10 years and the investigation by this subcommittee has dramatically illustrated the threats to individual rights and liberties which may be posed in the name of the administrative process. Complaints received by our subcommittee show that Government employees, Indians, the mentally ill, military personnel, and many other citizens from every walk of life have found to their sorrow that substantial liberties may become wedged in the vise of administrative procedure. As a result of administrative failings, wrongdoing, neglect, or delay, the lives of these people, their reputations and their employment prospects, have sometimes been damaged beyond repair. As we have dealt with these cases, I have been shocked to find how often the redtape of our bureaucracy, the maze of procedures, the written and unwritten precedents, the rules, the regulations, and the myriad policy statements can defeat the unwary citizen, who has been led to believe that under our system, the individual has a voice in the administration of his government, and that the administrative rules will take into account his needs and demands.

Because we believe in the consent of the governed, he expects that public administration will be imbued with that spirit of rationality and fairness which is basic to our traditions. And he has a right to expect this. Wherever he deals with the agencies of his government, or when he is affected by their rulings, he has a right to expect that decisions affecting his welfare and interests will be made rationally, fairly, and efficiently, with a minimum of cost to him and to other taxpayers.

The thousands of complaints received by our subcommittee amply demonstrate that this is not always so. Furthermore, it is not only the unwary citizen who is often vanquished in the lists by the administrative procedures governing our lives. It is often the attorney initiated into the secrets of the maze. It is often the member of Congress seeking to prod a weighty lethargic bureaucracy into action, attempting to acquire simple facts from a department, or under-

taking to guide a bewildered constituent through cumbersome procedures and mountains of regulations.

There is, I have found, inherent in the Federal administrative process of today a tyranny more subtle than any danger to our liberties which our Founding Fathers might have envisaged.

It is self-generating and, in view of the rapidity with which Congress has multiplied the number of Federal activities it is, to a great degree, unavoidable. Each new agency requires countless hundreds more rules and regulations.

Congress has attempted to offset these effects by stipulating that there be in the decisionmaking, rulemaking process some semblance of organization, reason, due process and fair play. It did this on a grand scale in 1946 when it enacted the Administrative Procedure Act. But the great expectations of Congress have not been entirely fulfilled. As so often happens when an entire new system is created, there were procedural gaps. In some cases, the intent of Congress has been circumvented or distorted or ignored, often to the detriment of individual rights.

FREEDOM OF INFORMATION

A case in point is the freedom of information section of the Administrative Procedure Act. Through this provision, Congress meant to guarantee that the public's right to information would be respected. Instead, this section has been cited frequently by Government officials as authority for withholding information from the Congress, the press and the public.

Far from "taking the mystery out of administrative procedure," therefore, this section has been used to increase it. This is not entirely the fault of the executive departments and agencies. The terms of the statute were less than precise and left considerable leeway for administrative discretion.

Access to information about the activities of Government is crucial to the citizen's ability to cope with the bigness and complexity of Government today. His grasp of the facts about those Government activities which affect not only the general welfare, but his particular interest as well, is the counterweight which tips the scale in his favor.

There is no validity therefore to the frequently heard argument that these proposals impinge on executive privilege for they would not affect the proper exercise of authority of the President and department heads. Certainly, the exceptions go very far in meeting the objections of the departments regarding administrative problems, confidentiality, privacy and national security. Even these stated exceptions however, cannot be relied on to withhold information from Congress. If, indeed, this proposal might entail a bit more paperwork, require a little more time on the part of our civil servants, I think the principle involved here far outweighs these considerations.

I have cosponsored this legislation for several years, and have found solid and widespread support for it, especially in my State. I have received hundreds of letters from newspaper editors and publishers, owners of radio and television stations, businessmen and lawyers, and many other citizens with no special interest beyond their determination that Government officials shall not deny, distort or delay Government information.

The value of the individual's privacy in our society can have meaning only as long as we have a free society, and we shall enjoy such a society only as long as the Congress, the press, and the public have complete access to information about the activities of the executive branch of our Federal Government. Everything in our common law heritage and the history of our Constitution demands that this be recognized as a "right to know," endorsed by Congress, that it not be a privilege granted at the passing whim of Government officials. Congress has a duty to safeguard this right and to see that the administrative procedures of our Government respect it. S. 1160 will go far to achieve these ends.

S. 1758

I would also like to give my support to section 6(b) of S. 1336 which provides that any person who is a member of the bar of the highest court of a jurisdiction may represent others before any agency. This section is identical with S. 1758, which I have cosponsored. In addition to the myriad rules and regulations, many agencies have established special enrollment procedures for those attorneys who must represent a client before the agency. Even if an attorney has only an isolated matter before one of these agencies he must complete a

complicated application form, swear to its accuracy, pay a substantial enrollment fee, and then wait several weeks before he can represent his client.

If a person must appear before an agency, he should have the right to be represented by the attorney of his choice. However, the formal enrollment procedures and the attendant trouble and delay often discourages many highly qualified attorneys from taking a single case before the agencies. Such unnecessary formalities have some earmarks of an unspoken conspiracy between the agency and the attorneys who habitually practice before it to restrain the practice of law before the agency.

The studies of the Subcommittee on Constitutional Rights have shown that the right to counsel in administrative proceedings is often less highly regarded than it is in criminal cases. There have been, in fact, instances wherein the right has been qualified to such an extent by rules promulgated by the agencies that the individual is denied effective representation.

As chairman of the Subcommittee on Constitutional Rights, I have been concerned about possible deprivations of due process where the Federal Government exercises any control over the choice of counsel; a Federal limitation on the choice of counsel abrogates the right to counsel itself.

This legislation would recognize that a license to practice in State or Federal courts would be proof of an attorney's qualifications to practice before an agency tribunal. Moreover, it would be recognition of the right of the individual to make his own choice as to who will represent him and would make the client the sole judge of an attorney's qualification for representing him before an administrative board. Whether a hearing is considered to be investigative or adjudicative, the individual's property rights are necessarily involved, and due process requirement in the fifth amendment demands that close scrutiny be given the conduct of the proceedings.

S. 1879 AND S. 1336

I have introduced in several Congresses the Code of Administrative Procedures drafted by the American Bar Association. The code has received substantial recognition in the process of revising the Administrative Procedure Act.

As I have indicated, S. 1879, the code, and S. 1336 to a large degree now recommend the same or very similar changes in the present act. Both would dispense with many of the exceptions which were written into the present law, exceptions which have proved to be either meaningless or unfortunate. Evidently this time we can expect to have a general statute which will truly have general application. The definition of rules will be limited to statements of general applicability. This is certainly a proper change. Rulemaking has been described as legislative in its nature and legislation should have a general rather than a particular objective.

Both bills have improved on the act in dealing with rulemaking, and accord the public more than an illusory right to be heard. Provision has been made to insure that petitions for rules, if they are not granted, will have at least the courtesy of a prompt and specific denial. This section also provides a procedure for issuing temporary rules that seems a workable compromise between the needs of the agencies and the public.

The bills attempt to free the members of the various agencies from the burden of deciding a host of cases that are now largely brought before them. Both bills allow a wide delegation of the decisionmaking power to hearing examiners, and, on review, to appeal boards. In theory, this should free the agency members themselves to deal primarily with broad questions of policy and, to the extent possible to deal with them through the rulemaking process. As for the process of adjudication, itself, it would now provide for the more liberal use of subpoenas, greater use of discovery, and more effective pleading—to name only a few of the significant changes. There is also language designed to make the declaratory order an available and effective instrument. Much was hoped from the use of such orders under the APA; the new language should insure that such orders will become of increasing importance.

The section on judicial review in both bills represents, I believe, an advance over the present law. Both state more clearly the very narrow limits within which administrative discretion is not reviewable. Moreover, both bills—with S. 1879 doing more—revise the present law with respect to standing to seek review. S. 1879 does not qualify the right to seek review by requiring, as does S. 1336, that one be adversely affected in fact.

The new subsection on the form of judicial review is also an improvement over the similar provision in the APA. Both bills are in agreement on this matter, as on most of the other issues of substance involved in judicial review.

There are, of course, a number of differences between S. 1879 and S. 1336. Many of them are no more than stylistic. S. 1879 is an altogether new version of the present statute. S. 1336 maintains much of the language and framework of the original statute, but revises and rearranges it. S. 1879 thus is free from the existing language, but there are advantages to refashioning the present law in the manner of S. 1336.

Although the major differences between the two bills are few, three of them are worth noting in detail. First, the code takes a stricter line than S. 1336 in dealing with the separation of functions. The code provision applies to agency members; the provision in S. 1336 does not. Agency adjudication has by now become litigation of major importance. S. 1336 forbids the decision-making officers at the lower level from talking informally to third persons about the facts in a case before them, while the code forbids such consultation on issues both of fact and of law. S. 1336 gives agency members complete freedom to consult outside the record as to issues of both fact and law; the code applies to agency members as it does to the other decisionmaking officers of the agency.

A revision similar to section 1009(g) of S. 1879, "Proceedings in Excess of Jurisdiction," should also be considered. There was similar language in one of the earlier versions of S. 1336. We are all aware of the doctrine of exhaustion of remedies, but this is to prevent a party from going through long and expensive proceedings when—to quote the language of S. 1879—"The proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency." Such an issue is one of law and since it is ultimately one for the courts to decide, the bill makes it possible for them to dispose of it sooner rather than later. The code, according to the drafters would restore rights that were formerly recognized as a matter of law. The law today is uncertain at best. In revising the Administrative Procedure Act we have an opportunity to establish and clarify the law in a way to benefit both the agencies and the public. S. 1879 is designed to give relief in those instances when agency action is clearly *ultra vires*.

The provision in S. 1879 gives a party to an informal adjudication the right on request to receive a statement of reasons in support of the agency's decision. This is also a matter which should be seriously considered in any redraft of S. 1336. It relates to the individual's right to know as do most of the provisions in these measures.

The drafting and enactment of a good revision of the Administrative Procedure Act will improve the administration of the business of government.

More important, it will provide greater protection for the rights of the individual whenever he deals with the Federal Government.

Senator LONG. Also, copies of the four bills I mentioned, S. 1160, S. 1336, S. 1758, and S. 1879 without objection will be placed in the record at this time.

(S. 1160, S. 1336, and S. 1879 are as follows:)

[S. 1160, 89th Cong., 1st sess.]

A BILL To amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

"Sec. 3. Every agency shall make available to the public the following information:

"(a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal pro-

cedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

“(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: *Provided*, That in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.

“(c) AGENCY RECORDS.—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and information and to order the production of any agency records or information improperly withheld from the complainant. In such cases the court shall determine the matter *de novo* and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

“(d) AGENCY PROCEEDINGS.—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection.

“(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

“(f) **LIMITATION OF EXEMPTIONS.**—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

“(g) **PRIVATE PARTY.**—As used in this section, ‘private party’ means any party other than an agency.

“(h) **EFFECTIVE DATE.**—This amendment shall become effective one year following the date of the enactment of this Act.”

[S. 1336, 89th Cong., 1st sess.]

A BILL To amend the Administrative Procedure Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Administrative Procedure Act (5 U.S.C. 1001-11) is amended to read as follows:

“SHORT TITLE

“SECTION 1. This Act may be cited as the ‘Administrative Procedure Act of 1965’.

“DEFINITIONS

“SEC. 2. As used in this Act—

“(a) **AGENCY.**—‘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, Commonwealths, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act courts-martial and military commissions, and military or naval authority exercised in the field in the time of war or in occupied territory. Except as to the requirements of sections 3 and 4, there shall be excluded from the operation of this Act, agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them.

“(b) **PERSON AND PARTY.**—‘Person’ includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. ‘Party’ includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes. ‘Private party’ means any party other than an agency.

“(c) **RULE AND RULEMAKING.**—‘Rule’ means the whole or any part of any agency statement of general 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 any exception from a rule. ‘Rulemaking’ means agency process for the formulation, amendment, repeal of, or exception from a rule.

“(d) **ORDER, OPINION, AND ADJUDICATION.**—‘Order’ means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) by any agency in any proceeding, including licensing, to determine the rights, obligations, and privileges of named parties. ‘Opinion’ means the statement of reasons, findings of fact, and conclusions of law, upon all the material issues of fact, law, or discretion presented on the record, issued in explanation or support of an order. ‘Adjudication’ means agency process for the formulation, amendment, or repeal of an order.

“(e) **AGENCY LICENSE AND LICENSING.**—‘License’ includes the whole or any 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, or modification of a license, and the prescription or requirement of terms, conditions, or standards of conduct for named licensees thereunder.

“(f) **SANCTION AND RELIEF.**—‘Sanction’ includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting

the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

"(g) AGENCY PROCEEDING AND ACTION.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

"PUBLIC INFORMATION

"SEC. 3. EVERY AGENCY SHALL MAKE AVAILABLE TO THE PUBLIC THE FOLLOWING INFORMATION—

"(a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction; provided, that in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used, or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.

"(c) AGENCY RECORDS.—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and

information and to order the production of any agency records or information improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

"(d) AGENCY PROCEEDINGS.—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection.

"(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

"(f) LIMITATION OF EXEMPTIONS.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

"RULEMAKING

"SEC. 4. (a) INFORMAL CONSULTATION PRIOR TO NOTICE.—Prior to notice of proposed rulemaking and either with or without public announcement, an agency may afford opportunity to interested persons to submit suggestions for rulemaking or with respect to proposed rules.

"(b) NOTICE.—Notice of rulemaking to be undertaken by the agency on its own motion or pursuant to petition shall (1) be published in the Federal Register, (2) give all interested persons a reasonable time in which to prepare and submit matter for consideration, and (3) state the time, place, and manner in which any interested person may submit matter for consideration, the authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.

"(c) PROCEDURES.—After notice required by this section—

"(1) The agency shall afford interested persons an opportunity to participate in rulemaking through the submission of written data, views, or arguments with an opportunity to present the same orally unless the agency determines that oral argument is inappropriate or unwarranted; and, after consideration of all relevant matter presented, the agency shall make its decision.

"(2) Where rules are required by the Constitution or by statute to be made on the record after opportunity for an agency hearing, the requirements of section 7 shall apply in place of the provisions of subsection (c) (1) except that the presiding officer may be any responsible officer of the agency.

"In proceedings in which the agency has not presided at the hearing, the officer who presided shall make a recommended decision. The parties may file exceptions to the recommended decision within such time and in such form as the agency shall provide by rule. After prompt consideration of the recommended decision and all exceptions thereto, the agency shall make its decision. In any proceeding, the agency may omit a recommended decision when the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires. When the recommended decision is omitted or when the agency has presided at the hearings, the agency, after prompt consideration of all relevant matter presented, shall make its decision.

"(3) The agency shall incorporate in any rules adopted a concise general statement of the basis and purpose of such rules.

"(d) EMERGENCY RULES.—In any situation in which an agency finds (and incorporates the finding and a brief statement of the reasons therefor in the rule issued) that rulemaking without the notice and procedures provided by subsections (b) and (c) of this section is necessary in the public interest, an agency may issue an emergency rule which shall be effective for not more than six months from the effective date thereof. The agency may extend such emergency rule for a period not to exceed one year only by commencement, prior to the expiration of the original effective period, of a rulemaking proceeding dealing with the same subject matter as did the emergency rule and upon giving notice required by subsection (b) of this section. Such notice shall contain an express statement of the extension of such emergency rule and the period for which it is extended. Nothing herein shall preclude use of emergency rulemaking procedures as provided by other statutes.

"(e) RULEMAKING DOCKETS.—Each agency shall maintain a rulemaking docket showing the current status of all published proposals for rulemaking.

"(f) EFFECTIVE DATES.—The required publication of any rule shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

"(g) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, exception from, or repeal of a rule.

"(h) EXEMPTIONS.—The provisions of this section shall not apply to (1) rulemaking required by an Executive order to be kept secret in the interest of the national defense or foreign policy; (2) rulemaking that relates solely to internal personnel rules and practices of an agency; (3) advisory interpretations and rulings of particular applicability; (4) minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights; and (5) rules of agency organization.

"ADJUDICATION

"SEC. 5. (a) In those cases of adjudication which are required by the Constitution or by statute to be determined on the record after opportunity for an agency hearing—

"(1) NOTICE.—Persons entitled to notice of an agency proceeding shall be timely informed of (A) the nature of the proceedings; (B) the legal authority and jurisdiction under which the proceeding is to be held; (C) the matters of fact and law asserted; and (D) the time and place of each hearing; and (E) if the issues or matters at the hearing are to be limited, the particular issues or matters to be considered at the hearing. In fixing the times and places for hearings, due regard shall be had for the convenience of the parties or their representatives.

"(2) PLEADINGS AND OTHER PAPERS.—Every agency shall provide adequate rules governing its pleadings, including responsive pleadings, and other papers. To the extent practicable, such rules shall conform to the Rules of Civil Procedure or the Rules of Criminal Procedure for the United States district courts.

"(3) PREHEARING CONFERENCES.—Every agency shall by rule provide for prehearing conferences for use in such proceedings as the agency or the presiding officer may designate. Prehearing conferences shall provide for a discussion and, to the extent practicable, determination of the facts and issues involved in the proceeding. Such conferences shall be conducted by a presiding officer who may at any appropriate time require (A) the production and service of relevant matter upon all parties; (B) oral or written statements of the facts and issues; and (C) arguments in support thereof. At the conclusion of a prehearing conference, the presiding officer shall issue an order setting forth all action taken at the conference, amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered. The order shall limit the issues for hearing to those not disposed of by admissions or agreements and shall control the subsequent course of the proceedings, unless modified thereafter to prevent manifest injustice.

"(4) REGULAR HEARING PROCEDURE.—Where modified procedures have not been designated or to the extent that the controversy has not been settled or adjusted, there shall be a hearing and decision upon notice and in conformity with sections 7 and 8.

"(5) MODIFIED HEARING PROCEDURE.—Every agency shall by rule provide for abridged procedures which shall be on the record and be reasonably calculated

to promptly, adequately, and fairly inform the agency and the parties as to the issues, facts and arguments involved. The agency may designate hearing examiners or agency personnel of appropriate ability to conduct such abridged proceedings. The procedures shall be for use by consent of the parties in such proceedings as the agency may designate. Without delay after the conclusion of the abridged proceeding, the officer who conducted it shall make his decision based on the record and subject to the provisions of section 8.

“(6) SEPARATION OF FUNCTIONS.—(A) No officer who presides at the reception of evidence shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating, prosecuting, or advocating functions for any agency. No officer, employee, or agent, other than a member of an agency, engaged in the performance of investigating, prosecuting, or advocating functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, or in agency appeal or review pursuant to section 8, except as witness or counsel in public proceedings.

“(B) Save to the extent required for the disposition of *ex parte* matters as authorized by law, no presiding officer or member of an agency appeal board, other than a member of an agency, shall consult with any person or agency on any fact in issue unless upon notice and opportunity for all parties to participate, except that a member of an agency appeal board may consult with other members of the appeal board.

“(7) EMERGENCY ACTION.—Upon a finding that immediate action is necessary for the preservation of the public health or safety, or where otherwise provided by law, an agency may take action without the notice or other procedures required by this subsection. Such action shall be subject to immediate judicial review in accordance with the provisions of section 10, unless the agency provides for an immediate hearing to be conducted in accordance with this Act and takes such other action as will effectively protect the rights of the persons affected. Nothing herein shall be construed to preclude a person from obtaining injunctive relief to stay the taking of emergency action by the agency in appropriate cases.

“(b) In all other cases of adjudication except those involving inspections and tests, the agency shall by rule provide procedures which shall promptly, adequately and fairly inform the agency and the parties of the issues, facts and arguments involved. Without delay after conclusion of the proceeding, the officer who has conducted it shall make his decision. Such decision shall constitute final agency action, subject only to such appeal and review as may be provided by agency rule.

“(c) SETTLEMENT.—The agency shall afford all parties an opportunity, at such time in advance of the hearings as the agency may by rule prescribe, or, in the discretion of the agency, at any time thereafter where time, the nature of the proceeding, and the public interest permit, to submit and have considered offers for the settlement or adjustment of the questions presented.

“ANCILLARY MATTERS

“SEC. 6. Except as otherwise provided in this Act—

“(a) APPEARANCE.—Any person appearing voluntarily or involuntarily before any agency or representative thereof in the course of an investigation or in any agency proceeding shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding or investigation. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers of employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function.

“(b) PRACTICE BY ATTORNEYS.—(1) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency; and whenever such a person acting in a representative capacity appears in person or signs a paper in practice before an agency, his personal appearance or signature or any paper filed in the proceeding shall constitute a representation that he is both properly qualified and authorized to represent the particular party in whose behalf he acts.

“(2) Nothing herein shall be construed either (A) to grant or to deny to any person who is not a lawyer the right to appear for or represent others before

any agency or in any agency proceeding; (B) to authorize or to limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; (C) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation of an agency; or (D) to prevent an agency from requiring a power of attorney before the agency transfers funds to the attorney for the party whom he represents.

“(c) SERVICE.—When any participant in any matter before an agency is represented by an attorney at law or other qualified representative, and that fact has been made known in writing or in person by the representative to the agency, any notice or other written communication required or permitted to be given to or by such participant shall be given to or by such representative in addition to any other service specifically required by statute. If a participant is represented by more than one attorney or other qualified representative, service by or upon any one of such representatives shall be sufficient.

“(d) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person who submits data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof.

“(e) SUBPENAS.—Unless otherwise provided by statute, every agency shall by rule provide for the issuance of subpoenas and shall issue subpoenas upon request to any party to an adjudication and shall by rule designate officers, including the presiding officer, who are authorized to sign and issue such subpoenas. When objection is made to the general relevance or reasonable scope of such subpoena, the presiding officer or the agency may quash or modify the subpoena. Agency subpoenas authorized by law shall be issued to any party to a rulemaking proceeding upon request upon a showing of general relevance and reasonable scope of the evidence sought. Upon contest in the district court in the judicial district in which the appearance is required or in which the person to whom the subpoena is directed is found, resides, or has his principal place of business, the court shall upon request by the agency or by any party sustain any such subpoena or similar process or demand to which no objection has been made or which has been sustained by the presiding officer or the agency, to the extent that it is found to be in accordance with law. In any proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence of data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

“(f) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial, or where the denial is self-explanatory or of an application for agency review such notice shall be accompanied by a simple statement of reasons.

“(g) COMPUTATION OF TIME.—Any period of time prescribed or allowed by this Act, by any other statute administered under this Act, or by rule or order of an agency, shall not include the day of the act, event, or default after which the designated period of time begins to run. However, the last day of the period so computed is to be included unless it is a Saturday, Sunday, holiday or half holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, holiday nor half holiday.

“(h) DEPOSITIONS AND DISCOVERY.—Depositions and discovery shall be available to the same extent and in the same manner as in civil proceedings in the district courts of the United States except to the extent an agency deems such conformity impracticable and otherwise provides for depositions and discovery by published rule.

“(i) CONSOLIDATION.—Upon reasonable notice an agency may consolidate related proceedings or order joint hearings on common or related issues in different proceedings.

“(j) NATIONAL DEFENSE OR FOREIGN POLICY.—Every agency proceeding or action exempted by this Act because the national defense or foreign policy is involved, from the procedures otherwise required by this Act shall be governed by rules of procedure which conform to the greatest extent practicable to the procedures provided in this Act.

"(k) **DECLARATORY ORDERS.**—An agency shall act upon requests for declaratory orders and is authorized with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove an uncertainty. Any action taken shall constitute final agency action within the meaning of section 10.

"(l) **SUMMARY DECISIONS.**—An agency is authorized to dispose of motions for summary decisions, motions to dismiss or motions for decision on the pleadings.

"HEARINGS

"SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

"(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with sections 4(c)(2) and 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon, the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as part of the record and decision in the proceeding. In any proceeding in which a presiding officer is disqualified or otherwise becomes unavailable, another presiding officer may be assigned to continue with the proceeding unless substantial prejudice to any party is shown to result therefrom. In event substantial prejudice is shown, the agency may determine the manner in which and the extent to which the proceeding shall be reheard.

"(b) **HEARING POWERS.**—Presiding officers shall have, if within the powers of the agency, authority to (1) administer oaths and affirmations; (2) sign and issue subpoenas; (3) rule upon offers of proof and receive relevant evidence; (4) take or cause depositions to be taken and require compliance with other discovery procedures as the ends of justice require; (5) regulate the course of the hearing; (6) direct the parties to appear for prehearing conferences and such other conferences as may be desirable for the settlement or simplification of the issues by consent of the parties; (7) dispose of procedural requests or similar matters; (8) dispose of motions for summary decisions, motions for decisions on the pleadings or motions to dismiss; (9) make decisions in conformity with section 4(c)(2) or 8; and (10) take any other action, including action to maintain order, authorized by agency rule consistent with this Act.

"(c) **EVIDENCE.**—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall provide for the exclusion of irrelevant, immaterial, or unduly cumulative or repetitious evidence. No sanctions shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any presiding officer may, where the interest of any party will not be prejudiced thereby, require the submission of all or part of the evidence in written form.

"(d) **RECORD.**—The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision in accordance with section 4(c)(2) and (8) and, upon payment of lawfully prescribed costs, shall be made available to the parties. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. Where any decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

"(e) **INTERLOCUTORY APPEALS.**—A presiding officer may certify to the agency, or allow the parties an interlocutory appeal on, any material question arising in the course of a proceeding, where he finds that to do so would prevent substantial prejudice to any party or would expedite the proceeding. No interlocutory appeal

shall otherwise be allowed, except by order of the agency upon a showing of substantial prejudice and after a denial of such appeal by the presiding officer. The presiding officer or the agency may stay the proceeding during the pendency of the interlocutory appeal to protect the substantial rights of any party. The agency, or one or more of its members as it may designate, shall determine the question forthwith, and further proceedings shall be governed accordingly.

"DECISIONS

"SEC. 8. In all adjudications subject to section 5(a)—

"(a) GENERAL.—The same officers who preside at the reception of evidence shall make the decision except where such officers become unavailable to the agency. In the absence of either an appeal to the agency or review by the agency within time provided by statute or by rule, such decision shall without further proceedings then become the decision of the agency. In proceedings in which the agency presides at the taking of evidence, its decision shall be the final agency action in the proceeding.

"(b) SUBMITTALS AND DECISIONS.—Prior to each decision of presiding officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions and (2) supporting reasons for such proposed findings and conclusions with the opportunity, in the discretion of the presiding officer, for oral argument thereon. The record shall show the ruling upon each such finding or conclusion presented. All decisions shall become a part of the record, shall be served by the agency on the parties, and shall include (A) the opinion, and (B) the appropriate order, sanction, relief, or denial thereof.

"(c) APPEAL AND REVIEW.—(1) Any party may appeal the decision of the presiding officer by serving upon the agency and the other parties, within the time prescribed by agency rule after being served with the decision, written exceptions and the reasons in support thereof which shall state specifically and concisely the manner in which (A) prejudicial error was committed in the conduct of the proceeding; (B) the findings or conclusions of material fact were clearly erroneous; (C) the conclusions of law were erroneous; (D) the decision was contrary to law or to the duly promulgated rules or decisions of the agency; or (E) there was a novel question brought into issue. The record for appeal shall include all matters constituting the record upon which the decision of the presiding officer was based. Any portion of the record relied upon shall be identified by detailed page references. Except for good cause shown, no exceptions by any party shall rely on any question of fact or law upon which the presiding officer had not been afforded an opportunity to pass. The appeal shall be limited to the questions raised by the exceptions.

"(2) Except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress, each agency shall establish by rule one or more agency appeal boards composed of agency members, hearing examiners (other than the presiding officer), or both. Proceedings before the appeal board shall be as provided by agency rule and shall include oral argument if requested by a party. If an appeal board has been established, exceptions shall be considered and determined by the appeal board unless a private party shall promptly file an application for a determination of the exceptions by the agency. If the agency denies the application, it shall be deemed to have considered and denied each exception and affirmed the decision of the presiding officer. If the agency grants the application, it shall determine the exceptions after considering the reasons therefor.

"If no appeal board has been established, the exceptions shall be considered and determined by the agency after considering the reasons therefor.

"(3) Except where the agency simply affirms the decision of the presiding officer by denying the application for a determination of the exceptions, there shall be a ruling upon each material exception; the record shall show the ruling and the reason therefor; and the decision of the presiding officer shall be affirmed, set aside, or modified to conform with such rulings or remanded with instructions.

"(4) After entry of the decision of the presiding officer or after the action of the appeal board, the agency in its discretion may, within the time prescribed by agency rule, order the case before it for review but only upon the ground that the decision or action may be contrary to law or agency policy, that the agency

wishes to reconsider its policy, or that a novel question of policy has been presented. The agency shall state in such order the specific agency policy or novel question of policy involved. On such review the agency shall have all the power it would have if it were initially deciding the proceeding, provided that if the agency raises any issue of fact it deems material, the agency shall remand the case with instructions for further proceedings before the presiding officer.

"(5) The action on review or on appeal if no review is taken shall be on the record and be the final action of the agency except when the decision is remanded or set for reconsideration or rehearing.

"SANCTIONS AND POWERS

"SEC. 9. In the exercise of any power or authority—

"(a) IN GENERAL.—Every agency shall have a duty, with due regard for the rights and privileges of all interested parties or adversely affected persons and with reasonable dispatch, to set and complete any investigation or proceedings required to be conducted pursuant to this Act or other proceedings required by law and to make its decision. No sanction shall be imposed, investigation commenced, or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

"(b) PUBLICITY.—Publicity, which a reviewing court finds was issued by the agency or any officer, employee or member thereof, to discredit or disparage a person under investigation or a party to an agency proceeding, may be held to be a prejudicial prejudging of the issues in controversy, and the court may set aside any action taken by the agency against such person or party or enter such other order as it deems appropriate.

"(c) LICENSES.—Except in cases of willfulness or those in which the public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

"JUDICIAL REVIEW

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) judicial review of agency discretion is precluded by law—

"(a) RIGHT OF REVIEW.—Any person adversely affected in fact by any reviewable agency action shall have standing and be entitled to judicial review thereof.

"(b) JURISDICTION, VENUE, AND FORM OF ACTION.—The district courts of the United States shall have (1) jurisdiction to review agency action reviewable under this Act, except where a statute provides for judicial review in a specific court; and (2) jurisdiction to protect the other substantial rights of any person in an agency proceeding. Agency action shall also be subject to judicial review in civil or criminal proceedings for judicial enforcement of agency action except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law. The form of the proceeding for judicial review shall be any special statutory review proceeding or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments, proceedings in the nature of mandamus, writs of prohibitory or mandatory injunction or habeas corpus). The proceeding for judicial review of agency action shall be commenced by the filing of a complaint in the district court in the judicial district in which the complainant resides or has his principal place of business, or in which the acts giving rise to the agency action took place, or in which any real property involved in the action is situated, except where a special judicial review procedure is otherwise provided by statute. The action for judicial review may be brought against the agency by its official title.

"(c) REVIEWABLE ACTIONS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject of judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly re-

quired by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of any review proceedings.

"(e) SCOPE OF REVIEW.—So far as necessary to decision, and where presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

"EXAMINERS

"SEC. 11. Subject to the civil service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

"CONSTRUCTION AND EFFECT

"SEC. 12. (a) GENERAL.—Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provisions of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

(b) **EFFECTIVE DATE.**—This Act shall take effect six months following the date of its enactment. No change in procedure shall be mandatory with respect to any proceeding initiated prior to the effective date of such change.

[S. 1753, 89th Cong., 1st sess.]

A BILL To provide for the right of persons to be represented by attorneys in matters before Federal agencies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 101. PRACTICE BY ATTORNEYS.—(a) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency; and whenever such a person acting in a representative capacity appears in person or signs a paper in practice before an agency, his personal appearance or signature or any paper filed in the proceeding shall constitute a representation that he is both properly qualified and authorized to represent the particular party in whose behalf he acts.

(b) Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding; to authorize or limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation of an agency; or to prevent an agency from requiring a power of attorney before the agency transfers funds to the attorney for the party whom he represents.

SEC. 102. SERVICE.—When any participant in any matter before an agency is represented by an attorney at law or other qualified representative, and that fact has been made known in writing or in person by the representative to the agency, any notice or other written communication required or permitted to be given to or by such participant shall be given to or by such representative in addition to any other service specifically required by statute. If a participant is represented by more than one attorney or other qualified representative, service by or upon any one of such representatives shall be sufficient.

[S. 1879, 89th Cong., 1st sess.]

A BILL To recodify, with certain amendments thereto, chapter 19 of title 5 of the United States Code, entitled "Administrative Procedure"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1001 to 1011, inclusive, of this Act shall constitute the "Code of Federal Administrative Procedure" and may be cited as such.

DEFINITIONS

SEC. 1001. As used in this Act, except where the context clearly indicates otherwise—

(a) **AGENCY.**—"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 of the United States, the Tax Court of the United States, the Court of Military Appeals or the governments of the possessions, territories, Commonwealths, or the District of Columbia. Except as to the requirements of section 1002 of this Act, functions of courts-martial and military commissions, and military or naval authority exercised in the field in time of war or in occupied territory, shall be excluded from the operation of this Act. Except as to the requirements of sections 1002 and 1003 of this Act, arbitration and mediation functions shall be excluded from the operation of this Act. No agency or function shall be exempt from any provision of this Act, except by amendment to section 1012 of this Act.

(b) **PERSON AND PARTY.**—"Person" includes individuals, partnerships, corporations, associations, and public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as

a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding; but nothing herein shall prevent an agency from admitting any person or agency as a party to an agency proceeding for limited purposes.

(c) **AGENCY RULE AND RULEMAKING.**—"Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy, or setting forth the procedure or practice requirements of any agency. "Rulemaking" means agency process for the formulation, amendment, or repeal of a rule.

(d) **AGENCY ORDER, ADJUDICATION, AND OPINION.**—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) by any agency in any matter other than rulemaking. "Adjudication" means agency process for the formulation, amendment, or repeal of an order, and includes licensing. "Opinion" means the statement of reasons, findings of fact, and conclusions of law in explanation or support of an order.

(e) **AGENCY LICENSE AND LICENSING.**—"License" includes the whole or any 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, limitation, or modification of a license, and the prescription or requirement of terms, conditions, or standards of conduct thereunder.

(f) **AGENCY SANCTION AND RELIEF.**—"Sanction" includes the whole or any part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person, (2) withholding of relief, (3) imposition of any form of penalty or fine, (4) destruction, taking, seizure, barring access to, or withholding of property, (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees, (6) requirement, revocation, or suspension of a license, or the prescription or requirement of terms, conditions, or standards of conduct thereunder, or (7) other compulsory or restrictive action. "Relief" includes the whole or any part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy, (2) recognition of any claim, right, immunity, privilege, exemption, exception, or remedy, or (3) any other action upon the application or petition of, and beneficial to, any person.

(g) **INITIAL DECISION AND INTERMEDIATE DECISION.**—"Initial decision" means a decision made by a presiding officer which will become the action of the agency unless reviewed by the agency. "Intermediate decision" means a recommended decision in a rulemaking proceeding made by a presiding officer or any authorized official of the agency.

(h) **AGENCY PROCEEDING AND ACTION.**—"Proceeding" means any agency process for any rule or rulemaking, order or adjudication, or license or licensing. "Action" includes the whole or any part of any agency, rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 1002. In order to provide more adequate and effective information for the public—

(a) **ORGANIZATION, RULES, AND FORMS.**—Every agency shall separately state and promptly file for publication in the Federal Register and for codification in the Code of Federal Regulations: (1) descriptions of its central and field organization, including statements of the general course and methods by which its functions are channeled and determined, delegations by the agency of final authority, and the established places at which, and the methods whereby, the public may obtain information or make submittals or requests; (2) all procedural rules; (3) all other rules; (4) descriptions of all forms available for public use and instructions relating thereto, including a statement of where and how such forms and instructions may be obtained; and (5) every amendment, revision, and repeal of the foregoing.

(b) **ALTERNATIVE METHODS.**—An agency may, pursuant to a published rule, use an alternative method of publishing the information specified in subsection (a) or of communicating it to all interested persons, when to do so will achieve economy and expedite dissemination of information to the public. No information published by such alternative method shall be relied upon or cited against any person who had not received actual notice thereof.

(c) **ORDERS AND OPINIONS.**—Every agency shall promptly publish its orders and opinions or make them available to the public in accordance with published rule stating where and how they may be obtained, copied, or examined.

(d) **PUBLIC RECORDS.**—Every agency shall promptly make available to the public, in accordance with a published rule stating where and how such records may be obtained or examined and copied, all matters initiating or placed of record in agency proceedings, including but not limited to docket pleadings, evidence, exhibits, reports, and actions taken therein, and all other records, files, papers, communications, and documents, submitted to or received by an agency, connected with the operations of the agency, and all records of action by the agency thereon, except as the agency by published rule finds that the subject matter is exempted from disclosure by subsection (f) hereof: *Provided*, That records, files, papers, and documents submitted by another agency or received from another agency which are exempt in the hands of such other agency under subsection (f) hereof continue to be exempt in the hands of the receiving agency. Every individual vote of the members of the body comprising the agency shall be entered of record and made available to the public.

(e) **EFFECT OF FAILURE TO PUBLISH.**—No rule, order, opinion, or public record shall be relied upon or cited against any persons unless it has been duly published or made available to the public in accordance with this section. No person shall in any manner be required to resort to organization or procedure not so published.

(f) **EXEMPTIONS.**—The provisions of this section shall not require disclosure of subject matter which is (1) specifically exempt from disclosure by statute, (2) required to be kept secret in the protection of the national security, (3) submitted in confidence pursuant to statute or published agency rule, (4) the disclosure of which would be a clearly unwarranted invasion of personal privacy, or (5) related solely to matters of internal management. Nothing contained in this section shall be deemed to authorize the withholding of information or limiting availability of records to the public except as specifically stated in this subsection.

RULEMAKING

SEC. 1003. In order to establish procedures for rulemaking by agencies and to accord interested persons an opportunity to participate therein—

(a) **NOTICE.**—Notice of proposed rulemaking shall be published in the Federal Register and shall state (1) the time, place, and nature of public rulemaking proceedings, which shall not be held less than twenty days after such publication, (2) the authority under which the rule is proposed, and (3) either the terms or the substance of the proposed rule, or a description of the subjects and issues involved. A notice of proposed rulemaking shall not be effective after one year from date of publication, unless extended by renewed publication.

(b) **PROCEEDINGS.**—Each agency shall adopt and separately state for publication in the Federal Register rules specifying the procedures whereby interested persons may participate in rulemaking. (Whenever rulemaking is initiated, public announcement of the initiation may be given and opportunity afforded interested persons to submit views or otherwise participate informally in conferences on the proposals under consideration, for publication in the Federal Register. After notice of proposed rulemaking has been published in the Federal Register, the agency shall afford interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments, with opportunity to present the same orally, upon request therefor, unless the agency deems it unnecessary. The agency shall fully consider all submissions. Except with regard to rules of procedure, the agency shall, when requested by an interested person, issue a concise statement of the matters considered in adopting or rejecting the rule and the reasons therefor. Where rules are required under the Constitution or by statute to be made on a record after opportunity for hearing, the proceedings shall also be in conformity with sections 1006 and 1007 of this Act, except that the provision in section 1005(c) requiring separation of functions shall not be applicable and that, in lieu of an initial decision pursuant to section 1007, an intermediate decision may be issued which shall be subject to exceptions before promulgation of the rule. Each agency shall maintain a rulemaking docket showing the current status of published proposals for rule-making.

(c) **EFFECTIVE DATES.**—The required publication by any agency of any rule, other than one which solely grants or recognizes exemption or relieves restriction, shall be made not less than twenty days prior to the effective date thereof,

except where the agency finds that timely execution of its functions imperatively requires the rule to become effective within a shorter period and publishes its finding together with a statement of the reasons therefore, with the rule.

(d) EMERGENCY RULES.—Emergency rules may be adopted without compliance with the procedures prescribed in subsection (b) above, and with less than the twenty days' notice prescribed in subsection (a) above (or where circumstances imperatively require, without notice) where an agency finds that (1) immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare, or (2) compliance with the requirements of this section would be contrary to the public interest. Such findings and a statement of the reasons for the action shall be published with the rule in the Federal Register. Emergency rules shall have effect for not more than six months from the adoption thereof unless extended in compliance with subsections (a) and (b) of this section.

(e) PETITIONS.—Every agency shall accord all interested persons the right to petition for the issuance, amendment, or repeal of a rule. Where the agency does not undertake rulemaking on the petition, it shall promptly state and transmit to the petitioner its reasons therefor. Whenever an agency undertakes rulemaking, all related petitions for the issuance, amendment, or repeal of the rule, which have been filed within a period fixed by the agency, shall be considered and acted upon in the same proceeding. The petition and the action taken by the agency, or its statement of the reasons for not doing so, shall be matters of public record.

(f) EXEMPTION.—This section shall not require notice of or public participation in rulemaking (1) required to be kept secret in the protection of the national security, (2) relating to public property, loans, grants, benefits, or contracts to the extent that the agency finds and publishes, with a statement of supporting reasons, that such public participation would occasion delay or expense disproportionate to the public interest; or (3) relating solely to internal management or personnel of the agency.

ADJUDICATION

SEC. 1004. In order that there may be a fair determination in every case of adjudication—

(a) FORMAL ADJUDICATION.—In all such proceedings in which an opportunity for agency hearing is required under the Constitution or by statute, the parties shall be entitled to a hearing and decision in conformity with sections 1006 and 1007 of this Act. Where time, the nature of the proceeding, and the public interest permit, the agency shall afford all interested persons an opportunity, in advance of the hearing, to submit offers for the adjustment or settlement of the controversy, or for limitation of the issues. Persons entitled to notice of the hearings shall be given timely notice of (1) the time, place, and nature thereof, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law asserted. Pleadings, including the initial notice, shall conform with the practice and requirements of pleading in the United States district courts, except to the extent that the agency finds conformity impracticable and otherwise provides by published rule. In fixing the times and places for proceedings, due regard shall be had for the convenience of the parties and their representatives. The parties to a hearing shall be entitled to submit and to have considered proposals for the settlement or adjustment of the controversy.

(b) INFORMAL ADJUDICATION.—In all cases of adjudication not covered by subsection (a) and affecting private rights, claims, or privileges including but not limited to matters relating to public property, loans, grants, benefits or contracts, and determinations based upon inspections, tests, or examinations, decisions of subordinate officers may by rule be made subject to review within the agency by the agency or designated boards or superior officers. If requested, the reviewing authority shall furnish to a party a statement of the reasons for its decision. The decision of the reviewing authority or, if the agency fails to establish an intragency review procedure, the decision of the subordinate officer shall, subject to section 1009(a), constitute agency action subject to judicial review, in which case the record on review shall be made in the reviewing court.

(c) EMERGENCY ORDERS.—Nothing contained in this Act shall affect existing powers to issue emergency orders where the agency finds, and states of record the reasons for so finding, that (1) immediate issuance of the order is im-

peratively necessary for the preservation of public health, safety, or welfare, and (2) observance of the requirements of this section would be contrary to the public interest. Where an emergency order has been issued, any person who would otherwise be entitled to a hearing pursuant to subsection (a) hereof shall be entitled upon request to an immediate hearing in accordance with this Act, in which proceeding the proponent of the emergency order shall be deemed the moving party.

AUXILIARY PROCEDURAL MATTERS

SEC. 1005. (a) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigatory act or demand shall be initiated, issued, made, or enforced by any agency in any manner or for any purpose unless it is within the jurisdiction of the agency and the authority conferred by statute. Every person compelled to testify or to submit data or evidence to any agency shall be entitled to the benefit of counsel and to retain or, on payment of lawfully prescribed costs, to procure a copy of the transcript of such testimony, data, or evidence. Upon a showing of irreparable injury, any Federal court of competent jurisdiction may, in accordance with the provisions of section 1009(g), restrain action clearly beyond the constitutional or statutory jurisdiction or authority of the agency.

(b) SUBPENAS.—Subpenas shall be issued upon request to any party to an adjudication subject to section 1004(a) and shall be enforced without discrimination between public and private parties. Any person subject to a subpoena may, before compliance therewith and upon timely petition, obtain from any Federal court of competent jurisdiction a ruling as to the lawfulness thereof. Such suit may be brought in the judicial district in which the subpoena is served or wherein the defendant resides. The court shall quash the subpoena or similar process or demand to the extent that it is found to be unreasonable in terms, irrelevant in scope, beyond the jurisdiction of the agency, not competently issued, or otherwise not in accordance with law. Any person at whose instance a subpoena was issued, or the agency which issued the subpoena, may upon timely petition apply to any Federal court of competent jurisdiction for an order enforcing the subpoena. In any proceeding for enforcement, the court shall sustain such subpoena to the extent that it is found to be in accordance with law and shall issue an order requiring the appearance of witnesses or the production of data within a reasonable time, under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court.

(c) SEPARATION OF FUNCTIONS.—No presiding or deciding officer acting pursuant to section 1006 of this Act shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for any agency. Except upon notice and opportunity for all parties to be present or to the extent required for the disposition of ex parte matters as authorized by law, no such presiding or deciding officer or agency or member of an agency acting pursuant to sections 1006 and 1007 of this Act shall consult with any person or party on any issue of fact or law in the proceeding, except that, in analyzing and appraising the record for decision, any agency member may (1) consult with other members of the agency, (2) have the aid and advice of one or more personal assistants, (3) have the assistance of other employees of the agency who have not participated in the proceeding in any manner, who are not engaged for the agency in any investigative functions in the same or any current factually related case and who are not engaged for the agency in any prosecutory functions; any member of a board specifically authorized by statute to conduct designated classes of proceedings may consult with other members of such board; and any member of such a board, and any other presiding or deciding officer other than an agency member, may have the aid and advice as personal assistants of one or more employees of the agency who have not participated in the proceeding in any manner, who are not engaged for the agency in any investigative functions in the same or any current factually related case and who are not engaged for the agency in any prosecutory functions. "Agency member" as used herein means a cabinet officer, an agency head, or a member of a board or commission, and does not include any person exercising delegated functions.

(d) EXPEDITION AND DENIALS.—Every agency shall proceed with reasonable dispatch to conclude any matter presented to it with due regard for the con-

venience of the parties or their representatives, giving precedence to rehearing proceedings after remand by court order. Prompt notice shall be given of the refusal to accept for filing or the denial in whole or in part of any written application or other request made in connection with any agency proceeding or action, with a statement of the grounds therefor. Upon application made to any Federal court of competent jurisdiction by a party to any agency proceeding or by a person adversely affected by agency action, and a showing to the court that, notwithstanding due request to the agency, there has been undue delay in connection with such proceeding or action, the court may direct the agency to decide the matter promptly. In any such case the agency may show that the delay was necessary and unavoidable.

(e) **DECLARATORY ORDER.**—Every agency shall provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders to terminate actual controversies, or to remove uncertainties in actual controversies as to the applicability to the petitioners of any statutory provisions or of any rules or orders of the agency. The order disposing of the petition shall constitute agency action subject to judicial review.

(f) **NATIONAL SECURITY.**—In the case of agency proceedings or actions which involve the national security of the United States and for that reason must be kept secret, the agency shall provide by rule for such procedures parallel to those provided in this Act as will effectively safeguard and prevent disclosure of classified information to unauthorized persons with minimum impairment of the procedural rights which would be available if classified information were not involved.

HEARINGS

SEC. 1006. In order to assure that all parties to agency hearings governed by section 1004(a) or rulemaking required under the Constitution or by statute to be made on a record after opportunity for hearing shall be accorded due process of law—

(a) **PRESIDING OFFICERS.**—At the taking of evidence only one of the following may preside: (1) the agency, (2) one or more members of the body which comprises the agency, if authorized by law, (3) a hearing commissioner, or (4) an individual or a board specifically authorized by statute to conduct designated classes of proceedings. All evidence, whether written or oral, shall be submitted to and considered by the presiding officer. The functions of all presiding officers, as well as officers participating in decisions in conformity with this Act, shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified, and, upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of any such officer, he shall forthwith determine the matter as part of the record in the case. In any case in which the presiding officer is disqualified or otherwise becomes unavailable because of extended illness or absence, another presiding officer may be assigned to continue with the case, unless substantial prejudice to any party is shown to result therefrom. In the event of substantial prejudice the agency may determine the manner in which and the extent to which the case shall be reheard.

(b) **POWERS OF PRESIDING OFFICERS.**—Presiding officers shall have authority to (1) administer oaths and affirmations; (2) sign and issue subpoenas; (3) rule upon offers of proof and receive evidence; (4) permit or require depositions or discovery upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the proceeding, and dispose of motions relating to the discovery and production of relevant documents and things for inspection, copying, or photographing; (5) regulate the course of the hearings, set the time and place for continued hearings, subject to agency calendar practice, and fix the time for the filing of briefs and other documents; (6) direct the parties to appear and confer to consider the simplification of the issues, admissions of fact or of documents to avoid unnecessary proof, and limitation of the number of expert witness, and issue appropriate orders which shall control the subsequent course of the proceeding; (7) dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground; (8) dispose of motions to amend, or to dismiss without prejudice, applications, and other pleadings; (9) dispose of motions to intervene, procedural requests or similar matters; (10) make initial decisions; (11) reprimand or exclude from the hearing any person for any improper or indecorous conduct in their presence; and (12) take any other action authorized by agency rule con-

sistent with this Act or, in the absence thereof, in accordance to the extent practicable with the procedure in the United States district courts.

(c) **INTERLOCUTORY APPEALS.**—A presiding officer may certify to the agency, or allow the parties an interlocutory appeal on, any material question arising in the course of a proceeding, where he finds that to do so would prevent substantial prejudice to any party or would expedite the proceeding. The presiding officer or the agency may thereafter stay the proceeding if necessary to protect the substantial rights of any party. The agency, or such one or more of its members as it may designate, shall determine the question forthwith, and further proceedings shall be governed accordingly. No interlocutory appeal shall otherwise be allowed, except by order of the agency upon a showing of substantial prejudice and after a denial of such appeal by the presiding officer.

(d) **EVIDENCE.**—Except as otherwise provided by statute, the proponent of an order shall have the burden of proof, and every party to the proceeding shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Subject to these rights and requirements, where a hearing will be expedited and the interests of the parties will not be substantially prejudiced thereby, a presiding officer may receive all or part of the evidence in written form. In rulemaking subject to this section and in cases of adjudication involving the approval of prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, or practices bearing upon any of the foregoing, any reliable and probative evidence shall be received. In all other cases, the rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the United States district courts. The complete transcript of the record shall be made available to the parties upon payment of lawfully prescribed costs which shall be equitably divided among the parties and the agency.

(e) **OFFICIAL NOTICE.**—Agencies or any presiding officer in an agency proceeding may take official notice of judicially cognizable facts and technical, scientific, and other facts within their specialized knowledge. When an agency takes official notice of a fact, other than a judicially cognizable fact, not appearing in the record and that fact is material to the decision of the case, the agency or presiding officer shall bring that fact to the attention of the parties and shall afford every party before decision an opportunity to controvert the fact or dispute its bearing upon the decision.

(f) **AGENCY PARTICIPATION.**—Whenever an agency shall find upon its own motion or that of a party in a proceeding that the public interest may be substantially affected by the outcome of that proceeding, the agency shall act to protect that interest by appointing such members of its staff or such counsel or consultants as it may deem necessary to appear in the proceeding and develop whatever evidence and make whatever arguments may be required to clarify all the issues material and relevant to a determination of the proceeding in accord with that interest.

DECISIONS AND AGENCY REVIEW

SEC. 1007. In cases in which a hearing is required to be conducted in conformity with section 1006 of this Act—

(a) **SUBMITTALS AND DECISIONS.**—Prior to each decision by an agency which presides, or the initial decision by a presiding officer in an agency proceeding, the parties to the proceeding shall be afforded an opportunity to submit (1) proposed findings of fact and conclusions of law, and (2) both written and oral argument. The record shall show the ruling upon each material finding or conclusion presented. Upon review of any initial decision, the agency shall, by rule, afford the parties an opportunity to submit (1) written exceptions to the decision, and (2) written briefs. Upon review of initial decisions, a party shall be granted opportunity for oral argument upon request, unless the agency deems it inappropriate or unwarranted. All decisions and initial decisions shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, sanction, relief, or denial thereof; and such decisions and initial decisions shall become a part of the record. The grounds for any decision shall be within the scope of the issues presented on the record.

(b) **RECORD FOR DECISIONS.**—For the purpose of the decision by the agency which presides or the initial decision by a presiding officer, the record shall include (1) all pleadings, motions, and intermediate rulings, (2) evidence received or considered, including testimony, exhibits, and matters officially noticed, (3) offers of proof and ruling thereon, and (4) the findings of fact and conclusions of law proposed by the parties. No other material shall be considered by the agency or by the presiding officer. In cases in which the agency has presided at the reception of the evidence, the agency shall prepare, file, and serve upon the parties its decision. In all other cases the presiding officer shall prepare and file an initial decision which the agency shall serve upon the parties, except where the parties to the proceeding, with the consent of the agency, expressly waive their right to have an initial decision rendered by such officer. In the absence of an appeal to the agency or a review upon motion of the agency within the time provided by rule for such appeal or review, every such initial decision shall thereupon become the decision of the agency.

(c) **RECORD FOR REVIEW BY AGENCY.**—For the purpose of review by the agency of the initial decision of the presiding officer, the record shall include (1) all matters constituting the record upon which the decision of the presiding officer was based, (2) the rulings upon the proposed findings and conclusions, (3) the initial decision of the presiding officer, and (4) the exceptions and briefs filed. No other material shall be considered by the agency upon review. By consent of the parties, the records for review may be reduced or the issues therein limited. The grounds of the decision shall be within the scope of the issues presented on the record. The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the presiding officer shall not be set aside by the agency on review of the presiding officer's initial decisions unless such findings of evidentiary fact are contrary to the weight of the evidence. The agency either may remand the case to the presiding officer for such further proceedings as it may direct or it may affirm, set aside, or modify the order or any sanction or relief entered thereon, in conformity with the facts and the law.

LICENSING

SEC. 1008. (a) PROCEEDING.—In any case in which application is made for a license required by law, the agency, with due regard for the rights and privileges of all interested persons, shall set and conduct the proceedings in accordance with this Act unless otherwise required by law.

(b) **TERMS AND CONDITIONS.**—Terms, conditions, or requirements limiting any license shall be valid only if reasonably necessary to effectuate the purposes, scope, or stated terms of the statute pursuant to which the license is issued or required.

(c) **REVOCATION, SUSPENSION, AND MODIFICATION.**—No revocation, suspension, annulment, limitation, or modification by any agency of a license shall be lawful unless, before institution of agency proceedings therefor, the agency shall have (1) given the licensee notice in writing of facts or conduct that may warrant such action, (2) afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and (3) except in cases of willful violation, given the licensee a reasonable opportunity to comply with all lawful requirements. Where the agency finds that the licensee has been guilty of willful violation, or that the public health, safety, or welfare imperatively requires emergency action, and incorporates such findings in its order, it may institute revocation proceedings without compliance with the provisions of this subsection. Where the agency finds that the public health, safety, or welfare imperatively requires such action, and incorporates such finding in its order, it may summarily suspend the license pending proceedings for revocation which shall be promptly instituted and determined upon the request of any interested person.

(d) **RENEWAL.**—In any case in which the licensee has made timely and sufficient application for the renewal of a license or for a new license for the conduct of a previously licensed activity of a continuing nature, the existing license shall not expire until (1) such application has been finally acted upon by the agency and, (2) if the application has been denied or the terms of the new license limited, judicial review has been sought or the time for seeking judicial review has elapsed or, if no time for seeking judicial review is specified, then sixty days after the denial.

JUDICIAL REVIEW

SEC. 1009. In order to assure a plain, simple, and prompt judicial remedy to persons adversely affected or aggrieved by agency action, and notwithstanding any limitation by statute on the minimum jurisdictional amount in controversy—

(a) **REVIEWABLE ACTS.**—Every agency action made reviewable by statute and every final agency action which is not subject to judicial review in an action brought by a person adversely affected or aggrieved shall, except as expressly precluded by Act of Congress hereafter enacted, be subject to judicial review under this Act: *Provided*, That such judicial review shall not be exclusive of remedies otherwise available including actions for declaratory judgment or proceedings to restrain or compel agency action or for habeas corpus. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by the statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise required by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(b) **STANDING TO SEEK REVIEW.**—Any person adversely affected or aggrieved by any reviewable agency action shall have standing to seek judicial review thereof, except where expressly precluded by Act of Congress hereafter enacted.

(c) **FORM OF ACTION.**—A person may obtain judicial determination of the jurisdiction or statutory authority of the agency in a civil or criminal case brought by the agency, or in its behalf, for judicial enforcement of such agency action, regardless of the availability or pendency of administrative review proceedings with respect thereto, except where expressly precluded by Act of Congress hereafter enacted. All other cases for review of agency action shall be commenced by the filing of a petition for review in a United States district court of appropriate jurisdiction, except where a statute provides for judicial review in a specified court. Proceedings for review may be brought against the agency by its official title, in any judicial district where a petitioner resides, where all or a substantial part of the events or omissions giving rise to the claim occurred, or, if any property is involved in the proceeding, where all or a substantial part of the property is situated. The petition shall state (1) the grounds upon which jurisdiction and venue are based, (2) the facts upon which petitioner bases the claim that he has been adversely affected or aggrieved, (3) the reasons entitling him to relief, and (4) the relief which he seeks.

(d) **INTERIM RELIEF.**—Upon a finding that irreparable injury would otherwise result and that the balance of equities favors such action, (1) the agency, upon application therefor, shall postpone the effective date of the agency action pending judicial review, or (2) the reviewing court, upon application therefor and regardless of whether such an application previously shall have been made to or denied by any agency, shall issue all necessary and appropriate process to postpone the effective date of the agency action or to preserve the rights of the parties pending conclusion of the review proceedings.

(e) **RECORD ON REVIEW.**—In every case of agency action subject to sections 1006 and 1007 of this Act, the record on review shall, unless the parties concerned stipulate to something less, include (1) all matters constituting the record for action or review by the agency, including the original or certified copies of all papers presented to or considered by the agency, (2) rulings upon exceptions, (3) the decision, findings, and action of the agency, and (4) as to alleged procedural errors and irregularities not appearing in the agency record, evidence taken independently by the court. In all other cases, the record on review shall be made in the reviewing court.

(f) **DECISION ON REVIEW.**—If the court finds no error, it shall affirm the agency action. If it finds that the agency action is (1) arbitrary or capricious, (2) a denial of statutory rights, (3) contrary to constitutional right, power, privilege, or immunity, (4) in excess of statutory jurisdiction, authority, purposes, or limitations, (5) not in accord with the procedures or procedural limitations of this Act or otherwise required by law, (6) an abuse or clearly unwarranted exercise of discretion, (7) based upon findings of fact that are clearly erroneous on the whole record in proceedings subject to sections 1006 and 1007 of this Act, (8) unsupported by the evidence in cases in which the record is made before the court, or (9) otherwise contrary to law, then in any such

event the court shall hold unlawful and set aside the agency action and shall (i) restrain the enforcement of the order of rule under review, (ii) compel any agency action to be taken which has been unlawfully withheld or unduly delayed, and (iii) afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. In all cases under review the court shall determine all relevant questions of law and interpret the statutory and constitutional provisions involved and shall apply the court's own interpretation to the facts duly found or established.

(g) **PROCEEDINGS AN EXCESS OF JURISDICTION.**—Upon a showing of irreparable injury, any Federal court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the petitioner in such proceedings costs, a reasonable sum for attorneys' fees (or any equivalent sum in lieu thereof), and damages (which may include damages to the public interest) incurred by other parties, including the United States.

When any such case is brought, the Attorney General may file with the clerk of court a certificate that the case, in his opinion, is of general public importance. Said certificate shall be immediately furnished by said clerk to the chief judge of said court who shall upon receipt thereof immediately designate a judge to hear and determine the case. The judge so designated shall set the case for hearing at the earliest practicable date and he shall cause the case to be in every way expedited. Said case shall have precedence on the calendar of the trial court and of the appropriate appellate courts and Supreme Court at every stage.

LIMITATIONS OF AUTHORITY

SEC. 1010. In the exercise of any power, authority, or discretion by any agency or by any officer or employee thereof—

(a) **AUTHORITY.**—No agency action shall be taken except within the jurisdiction delegated to the agency and as authorized by law. Agency action shall not be deemed to be within the statutory authority and jurisdiction of the agency merely because such action is not contrary to the specific provisions of a statute.

(b) **PUBLICITY.**—Agency publicity, which a reviewing court finds was issued to discredit or disparage a person under investigation or a party to an agency proceeding, may be held to be a prejudicial prejudging of the issues in controversy, and the court may set aside any action taken by the agency against such person or party or enter such other order as it deems appropriate.

GENERAL PROVISIONS

SEC. 1011. (a) **CONSTRUCTION AND EFFECT.**—All laws or portions thereof which are inconsistent, or conflict, with the provisions of this Act are hereby repealed: *Provided, however,* That nothing in this Act shall be interpreted to diminish the constitutional rights of any person or to limit or repeal any additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. Every agency shall have all the powers necessary to enable it to carry out the provisions of this Act, including the authority to make and enforce rules thereunder. The courts shall have all the powers necessary to enable them to carry out the provisions of this Act. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. The affirmative requirements and specific prohibitions of this Act shall be broadly construed, and exemptions from, and exceptions to, this Act shall be narrowly construed.

(b) **SEPARABILITY.**—If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

(c) **EFFECTIVE DATE.**—This Act shall supersede the Administrative Procedure Act of 1946 and take effect on the one hundred and eightieth day after the date of its enactment, but (1) insofar as the amendments made by this Act to the

Administrative Procedure Act of 1946 provide for changes, requirements imposed by such changes shall not be mandatory as to any agency proceeding with respect to which hearings under title 5, United States Code, section 1006, have been commenced prior to the effective date of this Act; (2) the amendments made by this Act to title 5, United States Code, section 1009 (relating to judicial review of orders and decisions), shall not apply with respect to any action or appeal which is pending before any court on the effective date of this Act.

REPEAL OF EXEMPTIONS FROM ADMINISTRATIVE PROCEDURE ACT

SEC. 1012. All laws or parts of laws in force on the one hundred and eightieth day after the date of enactment of this Act which, either expressly or impliedly, grant exemption from the provisions of the Administrative Procedure Act of 1946 are hereby repealed, including specifically such parts of laws as the following:

1. Section 483 of the Federal Coal Mine Safety Act, title 30, United States Code.
2. Section 2027 of the Export Control Act of 1949, title 50, United States Code, appendix.
3. Section 2231 of the Atomic Energy Act of 1954, title 42, United States Code.
4. Section 5 of the Second Decontrol Act of 1947 (61 Stat. 323).
5. Section 501(b) of Public Law 155, Eighty-second Congress, first session (65 Stat. 364).
6. Section 1221 of the Renegotiation Act of 1951, title 50, United States Code, appendix.
7. Section 1642 (i) of the International Wheat Agreement Act of 1949, title 7, United States Code.
8. Section 2159 of the Defense Production Act of 1950, title 50, United States Code, appendix.
9. Section 3 of Public Law 564, Eighty-second Congress, second session (66 Stat. 732).
10. Section 463 of the Universal Military Training and Service Act, title 50, United States Code, appendix.
11. Sections 1881-1884 and 1891-1902 of the Housing and Rent Acts, title 50, United States Code Annotated, appendix.
12. Sections 1622 and 1641 of the Surplus Property Act of 1944, title 50, United States Code, Annotated, appendix.
13. Sections 1822, 1830, and 1833 of the Veterans Emergency Housing Program, title 50, United States Code Annotated, appendix.
14. Sections 101, 103, and 105-125 of the Termination of War Contracts Act, title 41, United States Code Annotated.
15. Sections 1738, 1739, 1743, and 1744 of the War Housing Insurance Act, title 12, United States Code Annotated.
16. Sections 1226(a) and 1252(b) of the Immigration and Nationality Act of 1952, title 8, United States Code Annotated (to the extent that they authorize special procedures).
17. Section 401(b) of Public Law 534, Eighty-second Congress, second session (66 Stat. 624).

Senator LONG. Our first witness this morning is Mr. Edwin F. Rains, the Assistant General Counsel of the Treasury Department.

Mr. Rains?

BIOGRAPHICAL STATEMENT OF EDWIN F. RAINS

Name: Edwin F. Rains. Residence: 2829 Marshall Street, Falls Church, Va., 22042. Permanent residence: Same.

Present occupation: Assistant General Counsel, U.S. Department of the Treasury.

Marital status: Married to Marjorie D. Rains, 1941. Children: Gerald Lewis, Robert Edward.

Born: April 4, 1915, New York. Son of Lewis E. Rains and Teresa Friend Rains.

Education: City College of New York, B.S.S., 1934; Columbia Law School, LL.B. 1937.

Military service: U.S. Naval Reserve, 1944-46, ensign and lieutenant (jg.). Service in European theater of operations.

Professional career: Following graduation from law school and brief service as research assistant to Prof. Walter Gellhorn at Columbia Law School joined staff of the Treasury Department, Bureau of Customs. Served as an attorney in the Bureau of Customs, later with the Foreign Funds Control and as an attorney handling matters involving the Office of International Finance. Served as Chief Counsel of Foreign Assets Control from 1951 to 1960. Appointed Assistant General Counsel April 1, 1960. Presently responsible for the legal work of the Bureaus of Customs, Narcotics, and Engraving and Printing, and the U.S. Coast Guard.

Bar memberships: New York, District of Columbia, and U.S. Supreme Court.

**STATEMENT OF EDWIN F. RAINS, ASSISTANT GENERAL COUNSEL,
U.S. TREASURY DEPARTMENT; ACCOMPANIED BY CHARLOTTE T.
LLOYD, SPECIAL ASSISTANT TO GENERAL COUNSEL**

Mr. RAINS. Mr. Chairman, I have brought with me Mrs. Charlotte T. Lloyd, Special Assistant to the General Counsel of the Treasury Department.

Senator LONG. Mrs. Lloyd, we are happy to have you here with us today.

Mr. RAINS. Mr. Chairman, I am pleased to appear before your committee to testify with respect to S. 1336 to amend the Administrative Procedure Act and other related bills. My task in this respect is a somewhat difficult one in view of the fact that I so thoroughly approve of the objectives of this legislation and yet, at the same time, have to express a series of grave objections because of a number of serious problems which the proposed legislation presents to the Treasury Department and, I am sure, to other agencies of the Federal Government.

As you know, we have had the opportunity to report and testify with respect to similar bills which were before this subcommittee during the last Congress. In this connection, the Treasury Department submitted voluminous reports and our then General Counsel, Mr. Belin, testified at considerable length and in great detail. Because so much of what is contained in the present proposed legislation was also before Congress when Mr. Belin testified, I shall not attempt to cover all aspects of these bills. Although there have been a number of notable improvements from our point of view in the present proposed legislation as compared with earlier versions, a great deal of what we objected to still remains.

I would like leave, Mr. Chairman, to depart from the printed statement which has been presented to you and go through this, if I may, in a somewhat different fashion.

Senator LONG. That will be entirely agreeable. And if you desire, your entire printed statement may be printed in the record.

Mr. RAINS. Thank you, sir.

Senator LONG. Without objection, such will be done.

(The entire printed statement of Mr. Rains is as follows:)

**STATEMENT OF EDWIN F. RAINS, ASSISTANT GENERAL COUNSEL, U.S. TREASURY
DEPARTMENT**

Mr. Chairman, I am pleased to appear before your committee to testify with respect to S. 1336 to amend the Administrative Procedure Act and other related bills. My task in this respect is a somewhat difficult one in view of the fact that I so thoroughly approve of the objectives of this committee and yet at the same time have to express a series of grave objections because of a number of serious

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I fear I must state at the outset that our general adverse conclusion with respect to S. 1336 persists; that the public who are the intended beneficiaries of this legislation would be adversely affected by its enactment, because this legislation would make the administrative process more complex, more prolonged and more expensive. We believe, moreover, that it would unnecessarily expose the private affairs of individuals to public scrutiny and that it would hinder efficient criminal law enforcement and the execution of other vital laws. We believe it would lead to premature and unwise disclosure of pending agency operations and we believe that it would be detrimental to the private citizen who deals with administrative agencies in that it would open to collateral attack administrative determinations favorable to those persons.

These conclusions will be demonstrated, I believe, in the following discussion of certain major difficulties which our Department, in particular, and, I am sure, other Federal agencies find in the present revision. These difficulties relate to sections 3, 4, 5, 6, 9, and 10.

SECTION 3 : PUBLIC INFORMATION

Section 3 of the Administrative Procedure Act is a measure intended to allow all persons concerned with the administrative process of an agency to obtain all necessary information from the agency. S. 1336 would transform section 3 into a measure whereby any person whatever his motive could obtain almost any sort of information relating to or arising out of any agency's operations and plans for operations, regardless of the person's need for the information and, to a large extent, regardless of the harm which disclosure of the information might cause. S. 1336 would achieve this result (1) by requiring the publication of all "statements of general policy," even those relating only to internal management of no concern to the public; (2) by providing access to all agency records except those dealing with the matters described in the narrow exemptions; (3) by requiring these records to be made available to any person; (4) by virtually eliminating executive discretion in this area; (5) by undoing the effectiveness of agency action and by penalizing the agency officers if the requirements are not met; and (6) by requiring the indexing of the millions of agency opinions, statements of policy, interpretations and instructions in circumstances in which this expensive action cannot be of value to anyone.

Our principal objections to this metamorphosis of section 3 are that such extreme requirements for disclosure will prevent the executive branch from enforcing the laws responsibly and will multiply the cost to the taxpayer, and may reduce the necessary cooperation of private businesses and citizens in complying with the law.

THE SPECIFIC EXEMPTIONS

Let me illustrate these dangers by examining the scope of the specific exemptions provided in section 3(e). It will be seen that among the matters which cannot be withheld from disclosure are internal advisory communications which underlie decisions reached by an agency with respect to the law and facts before it. This is because the exemption for interagency memorandums (5) is limited to communications dealing solely with matters of law and policy. Any legal or policy problem rests upon its factual foundation. Internal communications must deal with facts to be useful, but inclusion of facts would turn them into public documents. Agency advisers could not give advice to agency officials without such advice being furnished with the reservations natural to one who knows that he is speaking on the public record where his expressions may be misinterpreted by those who do not have a full background in the matters involved. The

frank expression of the views of subordinates, which are vital to informed judgments by their superiors, could not be expected to flourish in such an atmosphere. The courts have recognized the need of the Government, or any organization, for internal advice free from the danger of public disclosure and have therefore recognized an evidentiary privilege in such communications.

The exemptions would not protect the agency's instructions to its staff on methods of law enforcement since the proposed section removes the present exemption for matters of "internal management of an agency" and provides only an exemption for "internal personnel rules and practices" (2). In fact, subsection (b) would require public inspection of staff manuals and instructions to staff "that affect any member of the public." All Treasury's law enforcement staff manuals affect members of the public, particularly those who would violate the law and those who would be victimized by such violation. The Narcotics Bureau's instructions, for example, could hardly be effectively enforced if any narcotics dealer could examine the Bureau's instructions to Treasury agents.

The exemptions would not protect the trade secrets of the Government which have been developed from Government research and operations. This is because exemption (4) for trade secrets and commercial and financial information relates only to such matters "obtained from the public." Thus, the taxpayers' investment in such research would be lost and the essential need to keep secret such processes as the production of currency and Government securities would be disregarded.

Although the exemptions are obviously intended to preclude disclosure of personal and financial information where such disclosure would constitute an unwarranted invasion of privacy, due to the way the bill is drafted the disclosure would only be precluded if the information was contained in certain classes of Government records. If it was contained in other kinds of Government records, nothing would prevent its disclosure. No bill would be satisfactory insofar as this Department is concerned unless it made it entirely clear that the mass of personal information in the files of the Internal Revenue Service, the Bureau of Customs and the Bureau of the Public Debt would be exempt from disclosure.

The bill provides no exemption to protect from premature public disclosure the vast area of fiscal management and monetary stabilization the successful operation of which undergirds our economy and national strength. The Treasury provides ample information on all of those operations at the appropriate time, but disclosure to the financial world of the facts of the plans for such fiscal activities before they occur would destroy the usefulness of the plans.

Many other examples could be given on the injurious effect on Government and on the public resulting from the proposed deletion of those provisions now in section 3 of the APA which permit the withholding from indiscriminate disclosure of matters relating solely to the internal management of an agency and matters which for good cause or in the public interest should be held confidential. We doubt that under our constitutional system the executive may be deprived of all discretion regarding disclosure of Government records; moreover, even if such a step could be taken constitutionally we believe that it would be unwise to take it.

THE CURRENT INDEX REQUIREMENT

Another major difficulty with the proposed section 3 is the requirement of indexing a vast amount of material of no precedential or permanent importance. Subsection (b) would require every agency to maintain for the public a current index of every final opinion and order in the adjudication of cases, every statement of policy and interpretation adopted by the agency, and every staff manual and instruction to staff that affect any member of the public. The problem here is that the bill would require an enormous amount of costly work which when accomplished would have no conceivable utility. Every customs liquidation or appraisal is an adjudication. Millions of these decisions are reached each year. A minute percentage of these have precedential or permanent value to the public, and yet the requirement of indexing each one would compel expenditure of tax money for a large staff, needless paperwork and filing space for the useless product of this unnecessary work. To index all of the decisions of the IRS on the assessment of taxes and of the Bureau of Public Debt on ownership of securities, to name only the larger areas of adjudications, would lead to a similar unnecessary and costly burden on our economy. The Treasury already indexes all of the Customs and Internal

Revenue rulings and interpretations which have precedential value in its publications relating to these matters.

THE COURT PROVISIONS

A further major objection is the accumulation of advantages to be given under section 3 to a complainant against an agency in a suit in the district court. Not only is the complainant's case to take precedence on the docket but the normal rules of judicial procedure are to be reversed against the Government. The complainant does not need to prove any right to, or need for, the information or any basis of complaint other than an unsatisfied curiosity. To obtain Government documents any private litigant could avoid the discovery rule (rule 34) of the Federal Rules of Civil Procedure, which requires a showing of "good cause," by following the section 3 route of forced disclosure.

From the foregoing it is evident that our problems with respect to section 3 are so basic that a discussion of changes in specific provisions would not offer solutions.

SECTION 4: RULEMAKING

We know of no constitutional principle or precedent which would require a rule, as it is defined in section 4(c)(2) of the bill, to be made after hearing and on the record. A rule is a quasi-legislative promulgation of general applicability and future effect. Therefore, we believe that the reference in section 4(c)(2) to rules required by the Constitution to be made on the record after hearing is meaningless and would result in fruitless litigation, and should be omitted.

Moreover, the provision in section 4(d) is unreasonable in limiting rules, which were initially promulgated in an emergency, to a 1-year life even after re-adoption pursuant to the formal requirements of notice and hearing. This Department finds no purpose in this arbitrary time limitation and recommends its elimination.

SECTION 5: ADJUDICATIONS

The Treasury believes that a presiding officer or member of an agency appeal board should be permitted to consult with the specialist staff of the agency not involved in investigating, prosecuting or advocating functions on a fact in issue without notice and opportunity for all parties to participate. This should improve the decision without affecting its impartiality. Section 5(a)(6) should be suitably amended.

We recommend that section 5(a)(7) be amended to authorize emergency action for the preservation of the "public health, interest, or safety." This added flexibility is necessary in the conduct of such matters as foreign assets control and foreign transactions control. The public appears to be adequately protected by the provision for immediate judicial review.

Most important, adjudications which are not required to be made on the record should not be subjected to the notice and decision formalities implied in subsection (b). Any such requirements would affect millions of informal adjudications made annually by Customs and by the Internal Revenue Service. Formalities are unnecessary since these adjudications are subject to a trial de novo in court if the importer or taxpayer believe the agency decision to be improper.

SECTION 6: ANCILLARY MATTERS

Subsection (b) would permit any attorney who is a member of the bar of any State to represent others before the Internal Revenue Service. This would abolish the present enrollment to practice before that Service which Congress has previously considered necessary and which experience has justified. Our vast and unique internal revenue system requires that, as far as possible, taxpayers and the Government will be protected against representatives who violate the tax laws or are otherwise unethical. Because the enforcement of ethical standards in many States is lax, because even vigilant State bars are unaware of tax frauds or violations by bar members, and because attorneys frequently belong to the bar of more than one State, a simple requirement of bar membership in one State by no means insures that a bar member will be a reliable representative of taxpayers.

Another objectionable feature of subsection (b) is the required acceptance of a person's bare assertion by oral or written word that he is authorized to represent a taxpayer. Such a bare assertion is inadequate to protect confidential

tax information from disclosure to unauthorized persons and to assure the Service that it is dealing with the actual taxpayer. The protection of a power of attorney by the taxpayer should be included.

SECTION 9: SANCTIONS AND POWERS

The new provision in section 9(b) would authorize a court to set aside agency action adverse to a complainant if it finds that the agency issued publicity to discredit or disparage him and holds that the publicity was a prejudicial prejudging of the issues. We recognize that no agency should issue publicity for the purpose of discrediting a person having business before the agency. But section 9(b), though desirable in intent, may establish unsound administrative procedure. It invites the person who was the subject of any sort of publicity to await the agency decision and, if it proves adverse, to complain to a court that the publicity disparaged him and was a prejudicial prejudgment. Under existing section 7(a) of the Administrative Procedure Act (and this would not be changed by S. 1336) a person before an agency who, in good faith, believes the presiding officer, including the agency, is personally biased or otherwise disqualified should file an affidavit and have the matter determined as part of the record.

Further, section 9(b) would appear to be unnecessary inasmuch as under normal court review of agency decision a court reviewing for abuse of discretion is free to consider whether there was prejudgment, and to set aside action as arbitrary and capricious if it was based on prejudice or prejudgment.

SECTION 10: JUDICIAL REVIEW

The revision of this section would throw open to uncertainty two cardinal provisions now governing judicial review which the courts have clarified over the years. The provision of section 10 of the Administrative Procedure Act as it now stands, excludes from judicial review agency action which is "by law committed to agency discretion." The language of this bill would change section 10 so as to exclude review of actions where "judicial review of agency discretion is precluded by law." This change may or may not be substantial. If there is no change in meaning, the change is unnecessary and, for this reason, undesirable. But the change is still more undesirable if it is intended to mean that the discretion of a court should ever be substituted for that of the agency in a matter within the agency's discretion. It should be noted that agency action which is discretionary may be judicially reviewed to determine if it is arbitrary, unreasonable, capricious, or within the area of discretion conferred. We can see no valid reason for providing any further review for discretionary agency action.

Section 10 of the present bill would also allow any person "adversely affected in fact" to obtain judicial review of agency action. At present, persons who are indirectly affected economically may not, for that reason alone, collaterally attack an agency decision. If they are permitted to do so, administrative decisions will remain in prolonged controversy between the persons directly affected and those indirectly affected. The true parties in interest would face a long period in which they would be uncertain whether they could rely on the agency decision since it might be attacked in court by any business competitor, supplier, customer, or even taxpayer who might show that some adverse effect had been caused him by that decision.

CONCLUSION

For the reasons which I have outlined and for the further reasons expressed in our reports on this bill and its predecessor the Department must urge this subcommittee to reject S. 1336.

Mr. RAINS. First let me say that there have been a number of notable improvements in the proposed legislation as compared with earlier versions. We think that the committee has heeded a good many of our comments and that the drafts which are now before it reflect great improvements over prior bills.

We feel, however, that there is a great deal that remains to be done. Despite what has been done, our general adverse conclusions with

respect to S. 1336 persist. We believe that the proposed legislation would unnecessarily expose the private affairs of individuals to public scrutiny and that it would hinder efficient criminal law enforcement and the execution of other vital laws. We believe it would lead to premature and unwise disclosure of pending agency operations and we believe that it would be detrimental to the private citizen who deals with administrative agencies in that it would open to collateral attack administrative determinations favorable to those persons.

Let me first turn to section 3 which, of course, is the same as S. 1160. There is no difference in principle between the views, as I understand them, of those who sponsor this legislation and of the Treasury Department. I would like very much to emphasize this point. All of us share the same objectives. We all desire to keep interested members of the public as fully informed as possible with respect to the operations of the agencies. We all recognize, however, that there is certain information contained in agency files which should not be made public. This is recognized in the pending legislation by the exemptions from disclosure which are set forth in section 3(e). The Treasury Department, however, has concluded, reluctantly, that these exemptions are inadequate, and that in some cases they are unclear.

The first exemption relates to matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." I shall not repeat here what we have already said about this exemption being too narrow in using the term "national defense" instead of "national security." But I must stress that we persist in this view.

I shall turn instead to the requirement that the exemption be pursuant to an "Executive order." This requirement transfers a serious burden to the shoulders of the President. Every President works harder than any man should be called upon to do. The burdens of the office seem always to increase, never to diminish. Requiring the Chief Executive to focus on whether particular information or particular classes of information may be released constitutes a needless addition to the burdens of that office. Clearly, there have been delegated to such people as the Secretaries of Defense, State, and Treasury far more serious responsibilities than that of determining whether particular information may be released. Moreover, the use of the Executive order seems to contemplate that the President's advisers are so prescient that they can foretell what all the questions are which will arise, so that they may postulate the right answers long in advance of the questions arising. We do not believe that this is possible.

The second exemption protects matter "related solely to the internal personnel rules and practices of any agency." This is good so far as it goes. But, we don't believe that it goes far enough. There are many other internal agency documents which should not be released. The investigative manuals of the Secret Service and the Bureau of Narcotics, for example, contain information the release of which would only be of assistance to criminals in telling them how to plot their crimes so as best to escape detection. Surely such information should be protected.

Further and more important, agency heads rely and have to rely on the advice of their subordinates. The frank expression of the views

of subordinates is vital to informed judgments of superiors and such frank expression cannot be expected to flourish if subordinates believe that they are speaking on the public record where any chance expression may be misinterpreted by those who do not have full background in the matters involved. It is to be feared that if a proper exemption is not included to cover the advice of subordinates, such advice will take the form of oral statements which may be forgotten or misinterpreted, rather than written ones. The restricted scope of this exemption will not lead to more disclosure of the advice of subordinates; it is more likely to lead to the subordinates supplying worse advice. As I shall point out later, the fifth exemption does not offer a solution to this problem.

The third exemption protects matters "specifically exempted from disclosure by statute." Mr. Belin in earlier testimony described the problems which this exemption creates and I shall not dwell on them. Suffice it to say that this language casts doubt on the continuing validity of 18 U.S.C. 1905, the principal statute which heretofore has been regarded as prohibiting certain classes of disclosure.

The fourth exemption protects from disclosure "trade secrets and commercial or financial information obtained from the public and privileged or confidential." We see two inadequacies in this exemption. First, it does not go far enough and, second, it is unclear.

In the first place, it should be noted that this exemption protects information only if it is obtained from the public. The release of certain classes of information in the Treasury Department's files would, in our opinion, constitute an invasion of privacy, but the information contained in those files was not obtained from the public. Let me give you an example: the Treasury Department sells savings bonds. By the act of selling the bonds, it knows to whom they are sold and, ultimately, who owns all of the registered savings bonds in the country. But this information was not obtained from the public; it was generated by the sales. Presumably, the Treasury Department could not rely on this exemption to refuse to comply with any request for the names and addresses of the owners of savings bonds and information as to what each of them owns.

The lack of clarity in this exemption stems from the use of the words "privileged or confidential." It should be noted that the term "privileged" in normal legal usage arises out of a relationship between the parties, it does not arise out of the nature of the information itself. Information passed between husband and wife, or between client and attorney, is privileged, not because of the nature of the information but because of the nature of the relationship of the parties.

There are, of course, other classes of privilege, as, for example, the informer's privilege, but this, of course, would not be relevant to "trade secrets and commercial or financial information." Accordingly, we are left in grave doubt as to what is "privileged" in the sense of this exemption.

A similar difficulty attaches to the word "confidential." Presumably, all "trade secrets and commercial or financial information obtained from the public" are not confidential or the words "or confidential" would not have been added to complete the description of what is exempt from disclosure. And, if all trade secrets and com-

mercial information obtained from the public are not "confidential," we are left without any touchstone for determining which of them are "confidential."

The fifth exemption protects matters that are "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy."

We can think of nothing which would be protected by this exemption, since we have never, at least in my experience, written a memorandum or a letter which was not based on and did not disclose some facts or some factual circumstance. The operation of agencies are based upon factual foundations and agency memorandums and letters reflect this. By way of an example, we believe this exemption would not protect correspondence between the Department of Justice and the Treasury Department with respect to the question of settlement of an automobile accident case involving a Treasury vehicle and the vehicle of someone else. Any discussion with respect to settlement would undoubtedly have to deal with the nature of the evidence, the availability and reliability of witnesses and similar factual considerations. We doubt that the intention of the proposed legislation is really to compel the Government to disclose its presettlement discussions between attorney and client. Certainly I think that most attorneys in private practice would be horrified if anyone were to attempt to make them disclose letters and memorandums exchanged between themselves and their clients relating to any such subject.

The sixth exemption relates to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We would much prefer to see the word "clearly" stricken from this exemption. It is our belief that if the disclosure is unwarranted, it should be prohibited. That should be the test. Further, it is our belief that unwarranted invasions of personal privacy should be prohibited regardless of the nature of the file in which the relevant information is contained. We can see no basis for allowing the possibility of an invasion of personal privacy to depend upon the filing system of an agency.

Senator LONG. Can you make that statement to apply to all the acts of the employees and agents of the Department of the Treasury?

Mr. RAINS. Mr. Chairman, I know very well you have a very keen, deep interest in the question of invasion of privacy. And I want to assure you that I feel much as you do. I am not personally familiar with a good many of the things with which you have concerned yourself of late, and I am not really in a position to comment on them.

Having said all this about these exemptions, and having been rather critical of them, let me at this point, say a couple of nice things about two of them. The Treasury Department certainly wishes to commend those who have transformed exemption 7 from its earlier form and added exemption 8. We believe that both of these changes are very useful and desirable. I think we still would want to change a few words with regard to exemption 7, but on the whole, we believe that this exemption is on the right track.

Mr. FENSTERWALD. Could I interrupt long enough to suggest that if there are certain drafting changes that we think would be helpful that you would be available at any time to talk with members of our

staff? I know that there are certain fundamental differences that we would be unable to resolve, but if there are drafting problems, we would welcome your help.

Mr. RAINS. Mr. Fensterwald, you only have to call on us; we are always at your disposition.

Mr. FENSTERWALD. Thank you.

Mr. RAINS. Turning from the exemptions to another facet of section 3, the Treasury Department wishes to call attention as forcefully as possible to the unfortunate effects which the indexing requirements of section 3(b) would impose.

And here I want to say that I am dealing now with an area which, I am certain, is not intended to be covered in this way by the proponents of the legislation. I am sure that what we have here is one of those fortuitous side effects that stems from the fact that the operations of the agencies are so manifold and so complex that nobody can ever hope to see all the consequences which enactment of this type of legislation would produce.

And again, I would like to stress that the Treasury Department fully shares the objectives of the proponents of this legislation in this regard. We firmly believe that it is desirable for members of the public to have ready access to the precedents of an agency. Moreover, we are convinced that the agency's self-interest is served when the public is as well informed as possible about the agency's substantive and procedural rules, decisions, and interpretations.

The problem from the Treasury's point of view is that S. 1336 and S. 1160 in seeking to achieve this desirable purpose would require the agencies, at great expense to the taxpayer, to engage in a vast amount of unessential work which would be of no use to anyone and which would interfere with effective agency operations.

The proposed requirement would adversely affect the activities of many agencies, among which the Bureau of Customs is a notable example. Under the proposed legislation all final orders would have to be indexed. The Bureau of Customs appraises all imported merchandise, classifies it, and assesses duty on it (or passes it free of duty). During calendar year 1964, it processed "consumption entries" the most common type of formal customs entry, in connection with more than 1½ million importations of merchandise. With respect to each such entry, there were at least two "orders"—one an "appraisement," the other a "liquidation." In addition to these 1½ million entries, the Bureau of Customs processed more than 4 million other entries of various kinds for final action. And in connection with each one there is probably at least one final order," within the meaning of the proposed legislation.

To visualize what numbers of this size really mean, let me use the Washington metropolitan area telephone book as a basis of comparison. The phone book, printed on thin paper, with four columns to the page, giving but a name, address and telephone number for each listing, contains around 735,000 names and occupies more than 1,700 pages. If each customs order could be indexed in a single, short column line, we would have 10 telephone books of index, yearly. But, of course, to be meaningful, the index would have to provide some kind of description of what the importation was, and what the questions decided were.

In short, with respect to an appraisement matter, the index would have to show that merchandise had been imported from certain places, had been declared as being worth a certain amount of money, and that the appraiser had either found that this valuation was correct or incorrect. With respect to a classification matter it would have to provide an adequate description of the merchandise imported, set forth what the importer felt was the proper classification, and state the decision which was made by the collector of customs. In the simplest kind of importation, this could probably be done in a relatively few lines, 4 or 5, perhaps. In a more complicated importation where the importer was bringing into the country a number of things in different categories, such as, rugs, furniture, vases, and so on, the description would have to be quite lengthy. If the bill is enacted, it would provide for the accumulation of an index which would yearly grow by perhaps the equivalent of 50 Washington telephone books.

Obviously, this would be a burden; but like all burdens, it is one that could be bearable if it were justified, but it is not justified. Most importations relate to merchandise with respect to which there is little controversy and no problem. For example, and we have used this example before in a submission to your committee several years ago, fresh bananas are free of duty under the tariff schedules. Thousands of shipments of fresh bananas into the United States occur each year. To have 10,000 or 12,000 or 15,000 indexed items a year each saying that bananas were imported, were declared to be free of duty and were found to be free of duty, certainly would add nothing which is to anyone's advantage.

Moreover, no one should think that putting a useless load of work on an agency such as the Bureau of Customs is disadvantageous only to the agency. The taxpayer bears the burden of supporting the agency's work. However, there is another way in which the public would suffer from the imposition of such a task on the Bureau of Customs. The job of determining the answer to difficult classification questions is a very important one. Today, this task is undertaken in Bureau headquarters by a group of less than 15 people. Last year, they turned out more than 1,900 precedential rulings which were of importance to the American importing and consuming public and which were published and indexed.

To throw the burden of useless indices onto the Bureau of Customs would lead to the slowing down of the important task of classification which they are doing. And here I must again stress that there is no desire to avoid indexing of the things that should be indexed. I have brought with me a couple of recent copies of the weekly "Treasury Decisions" which contain a large number of classification rulings which are of precedential value and which are annually indexed. I will leave copies of them with the committee for its perusal. Indexing of this kind is valuable and the Treasury Department already does it. But indexing for the sake of indexing, with respect to material which no one wants and which can serve no useful purpose, is a waste of time and should not be tolerated, let alone encouraged.

In connection with my discussion of indexing, I should perhaps turn at this point to section 5(b) of S. 1336 and comment on its relevance to the kind of customs adjudication to which I have been

making reference. As I said earlier, these adjudications are numbered in millions and their rate of increase in recent years has been steady. Section 5(b) would require the agencies to provide procedures which, in the context of the customs operation, are unnecessary and would serve no purpose for either the importer or the Government. It should be remembered that each of these adjudications is subject to full judicial review de novo in the Customs Court, with appeal lying thereafter to the Court of Customs and Patent Appeals and by certiorari to the Supreme Court. Surely this type of judicial review is protection enough, and provides the most formal sort of adjudication for anyone who needs or desires it. And the present system provides for simplicity of operation in the vast bulk of cases which are routine and which present no problems at all.

I might add that section 5(b) also would appear to require an agency to provide some kind of adjudicatory proceeding whenever the calculating machines of the Internal Revenue Service click along and discover that someone has made a mathematical error in adding or subtracting on his income tax return and the Service so notifies the taxpayer, either sending a refund or asking for more money. We doubt that this really is the intention of the proponents of this legislation and we urge that due consideration be given to these side effects which so far as we know are unwanted by everyone.

I should like to turn now to section 4 and comment at this time only on the provisions of section 4(d) relating to emergency rules. As we have indicated to you previously, we are at a loss to know why an agency which gives full notice and complies with all of the procedures of section 4 should be stopped from promulgating a permanent rule solely by reason of the fact that the agency earlier adopted a similar rule as an emergency measure—and did so in full accordance with law. We doubt that the proponents of this legislation really desire that agencies refrain from taking necessary emergency action in appropriate circumstances; and yet one effect of taking such action is to restrict the agencies' future authority to issue permanent rules. We can think of no justification for this.

Both section 6 of S. 1336 and S. 1758 deal with practice by attorneys before Federal agencies and problems of representation of clients before those agencies. Since S. 1758 closely parallels S. 1466 of the last Congress which was reported favorably by this committee and passed by the Senate, I think that it would be well to devote my attention to that bill rather than to section 6 of S. 1336 although some of my remarks will have application to both bills.

The Treasury Department has informed you that it is opposed to the provisions of legislation of this type. It must be remembered that the function of policing practitioners before the Treasury Department was not self-engendered by the Department. This function stems from a statute, 5 U.S.C. 261, which is well known to you; and Congress not too many years ago through a subcommittee of the Committee on Ways and Means strongly urged effective implementation of the authority which this statute bestows.

In this connection, I should like to direct the attention of the committee to the statement which was made by the Honorable Cecil R. King, of California, on January 30, 1964, when Subcommittee No. 3 of the House Committee on the Judiciary was considering S. 1466.

A perusal of Mr. King's whole statement, which was based on his experience as chairman of the Ways and Means Subcommittee, would be of great value, but in the interest of saving time I will only quote this short excerpt:

I am deeply troubled * * * by the aspects of the proposed bills which apparently would make it difficult, if not impossible, for the Internal Revenue Service to determine accurately whether a person purporting to be a member of a bar in good standing is, in fact, such a member and is authorized to represent his alleged client. The slight benefit which the ethical lawyer might gain by not having to make such a showing would be far more than offset by the disadvantage that would befall the taxpayers and the tax collection system as a result of such a situation.

The files of the Internal Revenue Service contain great stores of information which are supplied willingly by taxpayers, because, under existing circumstances, they are sure that this information will not be improperly revealed. This information is necessary to the effective administration of the internal revenue laws.

Senator LONG. Mr. Rains, let me ask you this. You talk about—I have had the impression all along that income tax files were very confidential.

Mr. RAINS. Yes, sir.

Senator LONG. I am beginning to change my mind. Can you give this committee an outline as to—I have just been handed a memorandum that there are 23 Federal agencies now that have 109 reasons for getting the income tax files. So perhaps they are not as sacred and as confidential as we thought. We are going to discuss that with your Department later. What are your views about that?

Mr. RAINS. There are just a couple of things that I can say, Mr. Chairman. The first is that I cannot pretend to be an expert on income tax matters and the practices of the Internal Revenue Service. I am not. The area of my normal responsibilities in the Treasury Department lie in other directions. I think I can, however, perhaps distinguish between making the files with respect to a taxpayer available to the FBI in connection with an investigation, and making them available to some member of the public who has no governmental interest in them. But this is a matter that I cannot pursue with you.

Senator LONG. I can see that too. But when I run into a situation where there are 50 States that have various reasons for getting the returns, and 23 Federal agencies have 109 reasons for getting them, and you give them to them for those reasons, there is a tendency away from the income tax returns being private—which I think they should be.

Mr. RAINS. Mr. Chairman, my associate, Mrs. Lloyd, points out what I had known but forgotten, and that is that there is a statutory provision which deals with making tax information available under proper circumstances.

Senator LONG. Who determines what is proper under those conditions?

Mr. RAINS. I believe the statute sets the standards which guide disclosure. But again, I must stress that this is not an area in which I am particularly competent.

Senator LONG. That is one of the problems that later on we must take up.

You mentioned a moment ago, when we were discussing the registration of attorneys by your agency, and you handed me a memorandum

in regard to an editorial from the Government Standard of April 23, 1965, which I had placed in the record and made some remarks on the floor about that time. It is an interesting thing, I have had I don't know how many hundred attorneys just from the State of Missouri write me about this. I have only had three attorneys opposed to that particular bill being required to be licensed by the Department. Can you tell me, are you familiar with the requirements of what type of examination your Department makes of an attorney who files an application with you to be admitted to the practice before your agency?

Mr. RAINS. It is my understanding, sir, that the attorney has to pay a fee of \$25. He has to demonstrate proof that he is a member in good standing of the bar of some State. And then I believe that there is a more or less routine check which is conducted by the Internal Revenue Service in the investigatory and enforcement files of Internal Revenue and perhaps other government agencies to find out whether this man is under indictment, whether he has been convicted of some offense, whether he has been shown to have evaded any of his personal income tax obligations, and the like. This procedure normally leads to the issuance of a card which will be good for 5 years.

Senator LONG. Did you know or do you know that an attorney from your Department testified before this committee a year or so ago that the only requirement that he had was to determine whether or not he had made his income tax himself, and that same witness also advised the committee that they did not check to see whether he had committed murder or rape or any other heinous crime?

Mr. RAINS. Mr. Chairman, I would have to refresh myself on his testimony.

Senator LONG. I do not want to embarrass you, Mr. Rains, if this is not in your particular field, your particular responsibility in the Department.

Mr. RAINS. I was present during the testimony which you speak about, and I am not sure that the person to whom you refer may not have misstated himself in certain respects. The record is as the record is, I must agree to that, Mr. Chairman.

Senator LONG. Let me ask you some more about this man who is charged with bribing a number of your employees, Mr. Albert M. Goldstein, of New York. He was arrested February 9, 1964, under the Federal bribery statute. And he implicated 44 Internal Revenue agents, you tell me here, and 13 of them have resigned, 18 have been removed, 3 have retired, and 3 have been continued to be employed. But this man, from what we have charged in this editorial—which we thought was particularly interesting—carried his Treasury card up until it expired, they tell me here, on March 18, 1965. In other words, that man, up until that time, even though he committed this offense and caused these agents of yours to be discharged, and so on, he still was permitted to practice before your body for over a year after this occurred. Now, is that the proper supervision of the members of your bar that you permit to practice before you?

What is the point of having them if you do not enforce a situation where a man has committed that offense?

Mr. RAINS. I would like to say this, Mr. Chairman. The editorial which you inserted in the Congressional Record takes us to task for

firing these people, these employees who were derelict in their duty, before a card was taken away from Mr. Goldstein—

Senator LONG. I am not saying that these men should not have been fired, but I am curious as to why this man who was a member of the bar, if that is what you call it, that appears before your agency, was still permitted to continue practicing and had his card, while the employees were fired?

Mr. RAINS. I am sure, Mr. Chairman, that you would agree with me that as soon as we found out the employees misconducted themselves we should have dismissed them. And we did that.

With respect to Mr. Goldstein, our problem is that we have to follow the Administrative Procedure Act. And I do not wish to imply that we are sorry that we have to do this. But under the Administrative Procedure Act before a license can be revoked there has to be a hearing before a hearing examiner, and the agency has to employ the whole panoply of procedures that is required.

Mr. FENSTERWALD. What license are you talking about, Mr. Rains?

Mr. RAINS. The license represented by the Treasury card.

Mr. FENSTERWALD. Do you consider that a license in the sense of the Administrative Procedure Act?

Mr. RAINS. Perhaps license is the wrong word—but the Administrative Procedure Act would prevent us from summarily taking a man's card away from him without affording him an opportunity to defend himself.

Senator LONG. But there was nothing done at all. There was sufficient evidence to discharge these employees. You could have had those hearings, but there was nothing done about it.

Mr. RAINS. We certainly could have. But the Department of Justice took the position—and it is a position which I think is reasonable—that where there is pending criminal action and we would have to disclose in the Administrative Procedure Act hearing all of the evidence which would be relevant not only with respect to a particular defendant but with respect to other defendants, the greater interest of prosecuting successfully all of the people who are involved has to take priority. Of course, we were cognizant of the fact that the card would soon expire. Indeed, it had expired before this editorial was printed. Actually, as of the time the editorial was printed, Mr. Goldstein no longer had a card.

Senator LONG. But the point I am trying to make is that your Department had sufficient evidence from a confessed briber, you had sufficient evidence to discharge quite a number of your employees but you did not do a thing about enforcing whatever rights you had against this confessed briber, you still permitted him as far as the card is concerned to appear before the agency and practice.

Mr. RAINS. I would like to be able to inform you, if I may, later on, sir, whether in fact this is only apparent rather than real. In other words, I am by no means certain that Mr. Goldstein was in any position during this period to practice before the Internal Revenue Service whether he had a card in his pocket or not.

Senator LONG. He had a card. You still permitted him to have a card the same as any other attorney would have that made the application. Now, it just seems to me like there was a—what is sauce for the

goose is sauce for the gander, and here was a man who confessed to this crime, and apparently you took his testimony seriously enough, and it was of sufficient weight to discharge and suspend other employees of your agency, but nothing was done under the remedies you have against that man.

Mr. RAINS. Let me say this, sir. If this bill were to pass, Mr. Goldstein would still be practicing before the Internal Revenue Service.

Senator LONG. That would be just a supposition, because when he is not licensed to practice before the court, and you do not justify your basis on what the courts do or say as to permitting a man to practice before you, when you do not accept the findings of the Supreme Court or the Federal courts and so as to the qualifications of a man to practice, you have other qualifications—that is the point of this bill. And we want you to accept the fact that they have found him qualified and have given him a license to practice before you. But you go further than that. Your Department did not exercise the rights that you claim to have or the benefits that you claim the taxpayers would have by enforcing your rights as to removing this type of man from practice.

Mr. RAINS. May I make this observation?

Senator LONG. Yes.

Mr. RAINS. I do not believe that it is accurate to state that we do not recognize the courts. Certainly, we mean no disrespect to the courts. And the average ethical practitioner—and the average practitioner is ethical—has no problem with us. We do recognize the courts in the sense that we accept a lawyer's bar admission as proof of his competence as a lawyer. However lawyers are often members of more than one State bar. As an example, I was admitted to the bar of the State in which I was born and raised, which is New York, and later on I was admitted to the bar of the District of Columbia. I know people who are members of a number of bars. Under your bill, a man could be disbarred, say, in Oklahoma, and still retain the license that he has say, in Ohio; and as long as he remained a member of the bar of Ohio in good standing he would still be entitled to practice before the Treasury Department.

Senator LONG. Mr. Fensterwald?

Mr. FENSTERWALD. Mr. Rains, I am not sure that we are talking about the same thing. But the two bills that are included the provision that "nothing herein shall be construed to authorize or to limit the discipline, including disbarment, of persons who appear in another representative capacity before any agency." So I do not see why the Treasury Department could not disbar from practice before it an attorney or an accountant or anybody else that it has granted permission to practice. So, I do not see how the bill affects us one way or the other.

Mr. RAINS. Mr. Fensterwald, I believe you are correct with respect to Mr. Goldstein, but I believe that that disciplining provision leaves us with the same considerable dilemma, in this type of case either under the proposed legislation or under existing law. We would still have to go through the Administrative Procedure Act procedures. In other words, we would have to give notice, we would have to serve charges, and there would have to be a hearing examiner, and ultimately we would have to have a hearing which would stand up in court.

Mr. FENSTERWALD. But that is only if there is a license, and you have cast some doubt yourself as to whether this is a license.

Mr. RAINS. I believe that we have had cases. I can think of the one in Philadelphia a couple of years ago, in which the courts indicated pretty clearly that they felt that a man did have guaranteed procedural rights which had to be respected in taking away his card. Now, if you want to tell us, and if you want this bill to make it clear that we can yank somebody's card without going through those procedures, we would have to consider that very seriously.

But if this bill were passed, as far as the attorneys were concerned, there would still be a problem. Mr. Fensterwald, you have just told me we could discipline people whether a man has a card or does not. And I do not think we are in disagreement here—we both want to stop dishonesty, and prevent unethical lawyers from representing taxpayers. The only question is, How?

Now, whether a lawyer has a card, or whether we just say to him, "You may not practice before us any more," we are taking away from a lawyer a right which I think all would agree is of considerable importance. This is so particularly if the man is a tax practitioner and tax law is his specialty.

I think that the courts would hold—whatever you call this thing, whether it is a license or privilege or right—that the administrative agency just cannot say, "You cannot have this any more," whatever the "this" is. I think we are bound to go through the charge, and hearing route. And if we are bound to go through it, then I think we are up against the same problem that the Department of Justice pointed out to us. That is, can we make available for "disbarment" purposes the evidence which may be of more importance and use to the Government in a criminal matter, particularly one in which the Government wants to convict a number of people because they have committed serious felonies.

Now, the other problem that I see in connection with your statement about the bill allowing us to discipline attorneys is that it is not really clear. I think it is clear enough that if anyone appears before the Internal Revenue Service and lies or engages in fraud, as Goldstein apparently did, we would have the right to discipline such a person under the proposed legislation. But I am not at all sure whether, if the man conspired, let's say, to avoid the tax laws of the State of Missouri in a proceeding which was not before the Federal Government in any sense, that such a conspiracy would be a basis for disciplining him under the proposed legislation. And yet, I think that a St. Louis or Kansas City lawyer who was unethical enough to conspire to evade the tax laws of Missouri would be exactly the kind of a person that we would feel should not be allowed to practice before the Federal Government either.

Senator LONG. But don't you think, Mr. Rains, that the State and Federal courts would disbar a man of that kind, and you and your agency could safely depend on the action of the court as well as all the people of Missouri that that man might come before them, or any other agencies that do not have this system?

Mr. RAINS. Sir, the problem is that if this man is also a member of the bar of Kansas, he may remain a member of that bar. And we

could not refuse to recognize him while he is still a member of the bar of Kansas. Moreover, we are not at all sure that under the bill we could charge him with anything for which we could discipline him, because he would have done nothing which would be an offense insofar as the Federal Government is concerned.

Senator LONG. Can you tell me how many men you have disbarred or have disciplined over the years?

Mr. RAINS. I can supply that information for the record, I do not have it now.

Senator LONG. Is it a very common practice?

Mr. RAINS. I would have to say no, I do not think it is a common practice. I think it is much more common to admonish, to reprimand, or to deny enrollment in the first instance.

Mr. FENSTERWALD. Mr. Rains, I still do not understand what the problem is you have got. You say that you would have to go through the Administrative Procedure Act before you could take the card away.

Mr. RAINS. I believe so.

Mr. FENSTERWALD. But at the same time today, if a lawyer comes in without a card, without any hearing, any notice or anything else, you just say "You cannot represent your client."

Mr. RAINS. No, sir; we do not. We have—and I think that the record of earlier hearings will bear this out—made it abundantly clear—that any attorney who does not happen to have a card and who has a client walk into his office with a tax case can always get a card right at that time, as a sort of an emergency measure. In other words, we take the view that there is such a great likelihood that an individual lawyer is ethical rather than unethical that a temporary card or license, if you want to call it that, will be issued.

We do not think that our procedures deter a lawyer from tax practice. For example, if Mr. Kennedy, who, I understand, is leaving your committee's staff and is going to practice law, wants to practice before the Treasury Department before he has an opportunity to get a 5-year card, I assure you that he will be able to do so.

Mr. FENSTERWALD. Suppose he comes back after a month and does not have his card, you do not have the problem of cutting him off then, do you?

Mr. RAINS. No. We try to be reasonable. We may not always succeed, and we may not be as good as our intentions are, but we try. And we are not sticky about extending a temporary card. And we do try to deal decently with the people who come in.

I cannot think of anyone who has ever had a complaint about a temporary card not being extended. Of course, I think that if somebody tried to use a temporary card for 6 months, 8 months, a year, or a couple of years without filing an application, that would be a different matter.

Mr. FENSTERWALD. In effect, you can discipline him without any Administrative Procedure Act proceeding simply by saying that "You have had a temporary card for 6 months, and you have not put in an application, and therefore, we are going to cut you off."

Mr. RAINS. Mr. Fensterwald, I think you are right. But I would like to distinguish between two things. One is giving a card and the

other is taking away a card. I would agree without any debate that we can refuse a card to a man without a hearing. But I do not—

Mr. FENSTERWALD. I do not see why you cannot take it away the same way.

Mr. RAINS. I just have to say that I think the courts would not agree with you, and I think I can cite you cases.

Mr. FENSTERWALD. Of course, it is the position of the Senators who introduced the bill and the American Bar Association that since no examination as to competence is given, and since there are other means of discipline, and since the bill itself provides that the Treasury Department can discipline him, that there is really not much point in this \$300,000 a year. I think that really is the basic disagreement here.

Mr. RAINS. I think there is a basic disagreement, and I know the attorneys, or at least some of them—and I think they are more the general practitioners than the tax practitioners, although I cannot say this with assurance—feel that way. But I am not sure that this compels me to agreement. Indeed I do not agree.

If I may continue with what I was saying, I would like to point out some of the problems that this bill does create for us, apart from this question of discipline.

Senator LONG. Let me ask you this one question. If you did not have this, and just any member could practice before the State of his residence, what effect do you think that would have on your collection of taxes?

Mr. RAINS. I cannot say that, sir.

Senator LONG. That is the main purpose of your Department?

Mr. RAINS. It is one of the purposes of our Department. We feel, as I think you feel, as I know your published statements indicate, that in addition to the overall objectives of the Federal Government there are the rights of persons. And they are very important rights. And we would feel that if somebody could come in and pass himself off as a lawyer and get information with respect to your tax returns and mine, or Mr. Fensterwald's, or anyone else's that this would be a bad thing even though it might not have a serious effect on the overall tax collections of the country. And I do not think there is of any disagreement with that.

Senator LONG. The regulation of the practice of law has generally been held to be vested in the superior courts of the State and the Nation. And rather than say it is necessary for the protection of the public to license practitioners to determine who is qualified to practice before your agency, that we should try to determine what effect it would have on the main function of the Internal Revenue Service.

Mr. RAINS. Let me refer to *Sperry v. Florida* which was decided in the Supreme Court a year or two ago in which the American Bar Association filed a brief amicus supporting the view of the State of Florida that it could control practice before the Patent Office. The Supreme Court unanimously indicated that they thought that this was a Federal concern. The man in question was not a lawyer. Florida said he was acting as a lawyer because he was practicing patent work, whether he called it law or not, within the State of Florida. The Supreme Court unanimously decided against the view of Florida and the American Bar Association. And I think that this decision is as

applicable to the Internal Revenue Service as much as it is to the Patent Office.

Senator LONG. You do not think a man who represents himself to be a lawyer—in other words, you do not think that representing a client in a tax matter before your Department is the practice of law?

Mr. RAINS. Of course it may involve the practice of law, sir. But it does not involve the practice of State law, it involves the practice of Federal law.

But I would like to make this point. Under this bill if X walks in the door and says, "I am a lawyer and I represent Mr. Fensterwald," as I read the bill, we have to take this man's representation as being true and valid in all respects.

Now, I would like to call your attention to the recent case of Daniel Jackson Oliver Wendell Holmes Morgan, if I remember the name correctly, who practiced law in the District courts of the District of Columbia for some 14 months under the name of Lawrence Archie Harris, who was a District of Columbia attorney, but was temporarily, or perhaps permanently, out of the District. Daniel Jackson Oliver Wendell Holmes Morgan before he went to jail successfully practiced in the District courts. And I say successfully, because he got some clients off.

Now, I think that the taxpayer should be protected against this. If Mr. Morgan had come in to see us he might not have been able to practice his deception successfully.

Senator LONG. I do not want to be facetious, but it reminds me of that employee in your Department that worked for you in tax departments for 7 years, and then went over to the State Department a few months ago and they found out that he had not paid taxes for 5 years.

Mr. RAINS. He was not working for Internal Revenue.

Senator LONG. He was in the Treasury Department, was he not?

Mr. FENSTERWALD. He was in the Treasury Department. And when we asked for his tax returns we were told that the committees of Congress have to have a special resolution and stand on their heads and a few other things, which we took pretty quietly at the time. But in view of the fact that almost any Federal, State, and local agency outside of the Congress can get tax returns, it seems prejudicial that we cannot get them except under very stringent circumstances.

Mr. RAINS. Mr. Fensterwald, you know as well as I do that neither I nor my Department makes these statutes. And they are subject to change. And I do not believe the statutes say anything about standing on your heads.

Senator LONG. You may proceed with your statement, Mr. Rains.

Mr. RAINS. Thank you, sir.

I was in the middle of the quotation from the views of Hon. Cecil King, stating:

This information is necessary to the effective administration of the internal revenue laws. If taxpayers should come to feel that this information which relates to their business secrets and their sources of income, and the like, would be revealed to those who could take private advantage of it, I am sure that the effect would be to impair the ability of the Government to get the information which now flows to it.

And as I pointed out in my colloquy with you, sir, it is not unknown for people who are not lawyers to represent themselves to be lawyers.

In our opinion, the deficiencies of S. 1758 fall into a number of categories. One of these is mentioned in the quotation from Mr. King which I have just read. Another I have already mentioned and will not dwell on. It is that disbarment in one jurisdiction would not exclude a person from practice before the Department if the person continues to be a member of another State bar.

I have also already mentioned our uncertainty as to what rights of discipline would be allowed under the bill and that we cannot be sure that we could discipline for an act which did not occur before the Department.

We are, as we have advised this committee previously, disturbed very greatly by the limitation which the proposed legislation would place upon the right of the Internal Revenue Service to ask for powers of attorney. The Treasury Department does not delude itself into thinking that its methods of operation are beyond improvement. An attempt to improve its operations is always a current aspect of the activities of the Department. In this connection, I can report to the committee, with satisfaction, that the Internal Revenue Service, on September 19, 1963, and March 14, 1964, published regulations progressively liberalizing the power of attorney requirements for persons practicing before the Service. These amendments resulted from a study made in cooperation with interested tax practitioners and their professional associations.

I think that it would be accurate to say that as of today the power-of-attorney requirements of the Internal Revenue Service are not unduly burdensome; and I think that experience has demonstrated that the Internal Revenue Service is willing to consider changes and further changes if any necessity for them is shown.

In short, it is not our desire to have the power of attorney requirements impose onerous burdens.

The Treasury Department has pointed out elsewhere many of the problems which would arise from the abolition of the power-of-attorney requirements. These problems can be of a number of types. The taxpayer may choose to have one representative appear for him in connection with an estate tax matter and another in connection with an income tax matter. He may have different representatives handling his affairs which relate to different time periods. Commercial companies may have different representatives handling alcohol and tobacco tax matters and corporate tax matters. The use of powers of attorney avoids confusion and is, we submit, no real hardship on anyone.

Senator LONG. Mr. Rains, it is difficult for me to understand why the Supreme Court of the United States, the Federal courts, the district courts, have no trouble in handling problems of that kind, and why the agencies of the Federal Government, one single agency would have that difficulty and the courts would not.

Mr. RAINS. Perhaps I can make this distinction, sir.

If I purport to represent somebody in court and try a case for that person, I do not go to the court and get any information from the court about the person whom I purport to represent. The court does not have in its dossiers and its dockets personal and private information with respect to this man's earnings, who his dependents are, and

similar information of this sort which is entitled to privacy. What the attorney brings to the court is what he brings to the court; he gets nothing from the court. When you go before the Internal Revenue Service, if you properly represent a client, you can get access to any of the files relating to anything which you are authorized to see.

Now, I submit, sir, that that is a real distinction. If you are an attorney and you go to a court, you do not need a power of attorney. But if you go to a bank and you say, "I represent Mr. Jones, I would like to see his records," the bank is not going to give you any of those records without the consent of Mr. Jones. It may be in the form of a power of attorney, and it may be on just a telephone call to Mr. Jones. But I think, sir, that there is a real distinction.

We have also pointed out that where a power of attorney has not been filed, the taxpayer may later wrongfully assert that the act which he authorized the attorney to do on his behalf was an unauthorized act by the attorney. The filing of a power protects both the attorney and the Government against such fraud by the client.

In other words, I am thinking of the situation in which an attorney is authorized to effect a tax settlement by a client, and he does so. And later on, after the statute of limitations has run, and witnesses have disappeared, the client says, "I never authorized that attorney to appear on my behalf and effect this settlement. Sure, I authorized him to come in and discuss this and that with you, but I never authorized him to make a settlement." Then we have a real problem.

Senator LONG. But there are serious criminal penalties against an individual who would do that?

Mr. RAINS. Of course, there are.

Senator LONG. And does not an attorney have the right to go into court as a common practice and contest judgment and file a pleading or what amounts to a pleading that would greatly affect substantial sums that that individual or his supposed client might have that would be involved? And still this is not required there.

Mr. RAINS. I concede that there is that. But there are also, as I say, these other problems to which I have referred. And I think that this is really an important thing, and a disturbing thing. And the thing that is important to us, sir, is that we are not talking about something that is very much of a burden insofar as powers of attorney are concerned.

In short, if you and I were in private practice, and a client came in and said: "Will you please represent me before the Internal Revenue Service?" and I were to say to him: "Sure, I will be glad to, just sign a form saying that I am authorized to represent you," that is not really what anyone can call a terrible burden. I think in determining whether the power-of-attorney requirements should be abolished some consideration has to be given to just what is the nature of this burden upon either the practitioner or the client. And since today practitioners do this anyhow, and since we have attempted—and I think successfully—to liberalize the power-of-attorney requirements to get away from needless formalities, such as seals and so on, to the greatest extent possible, I really do not think that this presents a terribly significant problem from the point of view of the practicing practitioner.

Senator LONG. I think, as far as the burden is concerned, the time and effort is not too serious. But I think that most attorneys feel

that it is a very definite affront to their professional integrity and character, which is recognized from the Supreme Court on down, by the men who are admitted to those bars to practice, is it not? I think they respect it as a protection.

Mr. RAINS. They may, sir. But I would like to point out, as perhaps I have done earlier, that a great deal of practice by lawyers is not before the courts these days. It involves business contracts, financial matters, helping float bond issues, and all sorts of things. And it is commonplace for attorneys to get authorization in writing from their clients to appear in all sorts of matters on their client's behalf. And this is not an affront, it is just a matter of keeping the records straight.

I would like to continue by pointing to the submission which our former General Counsel, Mr. Belin, made and which appears on page 402 of the July 1964 hearings of this subcommittee on S. 1663 during the 88th Congress. I would underscore in this connection the point concerning notices which Mr. Belin made with respect to what is now contained in section 102 of S. 1758. Mr. Belin pointed out that this provision, in effect, requires all of the millions and millions of routine notices, tax forms, and so forth, which are sent out to taxpayers to be sent to taxpayers' counsel instead. He pointed out that this would not be a service to the taxpayer and, indeed, would be a source of confusion, particularly in this age, which increasingly relies on the computer and automatic data processing, to issue many routine documents.

I, by no means, wish to suggest that the Treasury Department objects to communicating with taxpayers' counsel rather than directly with the taxpayers. In appropriate proceedings, this should always be done. Quite possibly, members of this committee may know of isolated episodes in which there have been failures to do this; by some inadvertence or other a notice which should have been given to an attorney was given directly to a client. We regret this sort of thing and we try to prevent it, but we doubt that any statute would make all of our employees immune to the occasional mistakes which I am afraid that all of us make from time to time.

I may say that one aspect of section 102 of S. 1758 appears to be unconstitutional. This is the requirement that when a participant in a matter before an agency is represented by an attorney at law or some other qualified representative, only that representative may communicate with the agency. It would seem quite clear that it is a deprivation of due process of law to say that a citizen, as the price of employing an attorney, must give up his right to communicate with a Federal agency, either directly or through some other representative of his choice.

I should like to deal with only one further section of S. 1336, section 10, before concluding my statement. In this connection, I would like to express concern at the proposal that standing to sue shall be accorded to any person who is adversely affected in fact by any reviewable agency action. I shall be brief on this point.

Our concern is that it would open, to collateral attack, decisions which are made by any agency with full observation of all of the requirements of the Administrative Procedure Act and full participation by all of the parties truly interested in the proceedings. I can illustrate my case best, perhaps, by a hypothetical example. The

Coast Guard licenses radio operators on American-flag vessels. Suppose a radio operator is charged with malfeasance on duty, perhaps drunkenness, which is said to have occurred on April 3, 1965. These charges will be heard by a hearing examiner. Perhaps the hearing examiner, after hearing all of the witnesses, will conclude that there was no malfeasance by the radio operator, and that he should not be suspended, and his license to be a radio operator shall not be revoked.

Under our present procedures, there is a situation which is akin to that in a criminal action when there is an acquittal. If the Government loses a criminal case, it has no appeal. That is the end. And we think that this is the way it should be.

Now, as I read section 10, it would allow someone else, say, a steward, or some other crewmember on this vessel could come along and say: "I am a person adversely affected by this decision. This radio operator is a drunk. He will imperil the vessel if he is allowed to continue as a radio operator. I demand a judicial review of the decision which has already been made on the record by the hearing examiner." Under section 10 he would have a right to a judicial review which would open up the hearing examiner's decision.

And perhaps another crewmember later on would do the same thing.

This, to me, is opening to collateral attack something that should not be so opened.

Let me give you another example, and then I will conclude.

Let us suppose that the Coast Guard, after all proper consideration, agrees that proposed plans for building a vessel are satisfactory and will lead to the construction of a seaworthy vessel. The shipping line interested in the construction enters into contracts for the building of the vessel and at this stage another firm, which may be adversely affected in the sense that it will have to face added competition, brings suit. Today, such a competitor has no standing. The issue of seaworthiness of the vessel does not affect him directly and he has suffered no legal wrong.

What he is seeking is to restrain his competition, and effect on competition is not one of the considerations which the Coast Guard must consider in determining whether a proposed vessel will be seaworthy. Although the competitor may not succeed in his effort to overturn the Coast Guard determination, the ability to bring the litigation and get it docketed on the often-crowded calendars of our district courts in itself bestows a measure of success on the competitor; for he can delay the construction until the litigation is finally concluded.

I thank you for listening to me so long. I have only dealt with some of the matters that concern us. And I hope that the committee will look at the prior submissions that have been made to it on behalf of the Treasury Department, and give consideration to the points that were made therein, because many of them continue to be relevant and germane despite certain differences between these bills and earlier versions of them.

I think it is perhaps redundant, in the light of everything I have said this morning, for me to say at this point that the Treasury Department is opposed to the bills which are before you; but lest there be any mistake, let me say it now for the record.

Senator LONG. Mr. Rains, I would say that you are consistent in your position on the bill.

The Chair will note that Senator Javits is now present.

Senator, do you have any question or comment?

Senator JAVITS. No; I will get the position of the Treasury from the transcript.

Senator LONG. Mr. Fensterwald?

Mr. FENSTERWALD. Mr. Chairman, I would like to take up Mr. Rains' kind offer to meet with him and discuss some of these points in some detail, because there are a number of interesting points raised in the testimony.

Mr. Kennedy was going to raise one question, and I think I might raise it for him. I am not sure you have the answer, but you might be able to supply it for us.

Two years ago when Mr. Hauser and Mr. Reilly were here, there was considerable consideration of dossiers that the Treasury Department kept on lawyers and I believe on others in the Treasury who were interested. And it was determined that he had some type of clipping service, and he also got information from the FBI. I wonder if you could supply me information on this?

Mr. RAINS. I would be glad to do so, Mr. Fensterwald. We will endeavor to get whatever you want on this. And as I said earlier, I will be glad to meet with you any time you call upon us and do what we can—anything you want.

Mr. FENSTERWALD. In particular, I would like to know on whom you keep these files, what you put in them, and to whom you make them available, if we can have that.

Mr. RAINS. Certainly, Mr. Fensterwald.

(The information referred to will be furnished at a later date.)

Mr. FENSTERWALD. That is the only question I have.

Senator LONG. Thank you, Mr. Rains, and Mrs. Lloyd.

Senator JAVITS. Mr. Chairman, may I ask Mr. Rains one thing?

Do I understand the Treasury favors the position taken by the accountants in their organizations, or do they favor the position taken by the Treasury that it should continue the present practice of issuing these cards—I think when he was actively practicing, I had one—permit the practice especially before the Treasury Department which would include the tax, Internal Revenue, and so forth, rather than just admitting generically lawyers to practice; is that correct?

Mr. RAINS. You are correct.

Senator JAVITS. What about the position that the accountants take that they want to continue the practice of filing powers of attorney? Does the Treasury support that? Does the Treasury support that?

Mr. RAINS. We certainly do, sir.

Senator JAVITS. Mr. Chairman, may I have permission to insert at this point in the record, or if the chairman feels there is some other point that may be more pertinent, a letter addressed to me by the New York State Society of Certified Public Accountants which seeks to sustain this position?

Senator LONG. Without objection, it may be printed in the record at this point.

(The letter referred to is as follows:)

TREASURY DEPARTMENT,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., May 25, 1965.

BERNARD FENSTERWALD, Jr., Esq.,
Chief Counsel, Subcommittee on Administrative Practice and Procedure, Senate
Judiciary Committee, Washington, D.C.

DEAR MR. FENSTERWALD: I am returning herewith the corrected copy of my testimony of Wednesday, May 12, 1965, before the Subcommittee on Administrative Practice and Procedure.

My testimony elicited several requests for further information which I have now obtained.

At the bottom of page 25 and at the top of page 26 of the transcript the question arose whether Mr. Goldstein continued to practice before the Treasury Department after his wrongdoing had been ascertained. I am now informed by the Internal Revenue Service that its agents went to Goldstein's office immediately after his arrest and closed out two cases which had been at the point of settlement just prior to his arrest. I am informed that the Internal Revenue Service agents exercised particular care in closing out these cases because of the knowledge which, by that time, they had obtained relating to Goldstein's activities. Thereafter, no other cases were handled by Goldstein before the Internal Revenue Service.

At the bottom of page 30 of the transcript, Senator Long asked me how many enrolled persons had been disbarred or disciplined by the Director of Practice's Office. I stated that I would supply this information for the record, and accordingly I am attaching hereto table I which supplies the requested information for the past 3 years.

At page 46 of the transcript you asked me to supply information with respect to the kind of information which is contained in the Director of Practice files with respect to persons who apply for Treasury cards. In this connection, to the kind of information which is contained in the Director of Practice's files which contains information prepared by the Director of Practice. I am also attaching copies of forms 23, 23A, and 2426 which are referred to therein.

Sincerely yours,

EDWIN F. RAINS,
Assistant General Counsel.

TABLE I.—Disciplinary and related actions by the Office of the Director of Practice

Attorneys and agents	Fiscal year 1963	Fiscal year 1964	Fiscal year 1965 ¹
Applicants:			
Applications withdrawn or abandoned.....	6	22	32
Applications denied.....	4	8	4
Enrollees:			
Resignations accepted.....	3	9	19
Suspensions.....	4	4	11
Reprimands.....	12	31	24
Disbarments.....			2
Total.....	29	74	92

¹ Through May 19, 1965.

NOTE.—During the fiscal year ended June 30, 1963, the number of derogatory information cases evaluated and closed totaled 223; for the fiscal year ended June 30, 1964, it totaled 388, and for the current fiscal year, through May 19, 1965, it totaled 296.

ENROLLMENT PROCEDURES AND FILES

More than 85,000 persons are enrolled to practice before the Internal Revenue Service, and of those enrolled, slightly more than 50 percent are attorneys.

An applicant for enrollment normally either writes or calls the Office of the Director of Practice, or any of the 58 district director's offices, and secures an Application for Admission To Practice Before the Internal Revenue Service, Form 23. Each applicant fills in the application form in duplicate, attaches

the enrollment application fee of \$25, and proof of his competence, and submits these to the district director's office in which he files his tax returns. In the case of an attorney, certification that he is in good standing as a member of the bar of the highest court of his State is accepted as proof of competence.

In some instances, the application itself will elicit that the applicant has been disciplined by his licensing authority, has been a defendant in a criminal proceeding other than a minor traffic violation, or that he has failed to file required tax returns. In these cases which, percentagewise, are few, he is requested to attach a statement in explanation thereof.

The district director's office, upon receipt of an application (form 23), circulates within its audit division, including field offices, an inquiry (form 2426), in order to ascertain whether or not there is any derogatory information on file concerning the applicant. At the same time, inquiry is made of its intelligence division, for purposes of determining whether or not there is any derogatory information in the files of that division. In addition, the district director's office also circulates form 2426 to its accounting branch to ascertain whether there are any delinquent accounts outstanding. Occasionally a district director's office will write to the applicant, to clarify whether or not, in fact, a required return was filed.

After the application has been filed, and the form 2426 circulated through the several divisions of the district director's office, the application, together with the completed portions of form 2426, copies of correspondence with the applicant, and derogatory information, if any, is forwarded to the Office of the Director of Practice. In some instances, unsolicited derogatory information concerning the application may be received from another Federal agency, by a communication from a private citizen, by a notice of an action taken or proposed by a State licensing authority, or from a newspaper item. In most instances, the applicant's form 23, and the circularization by the district director's office of form 2426, will disclose nothing of a derogatory nature, however, and the applicant is promptly enrolled.

In those instances wherein derogatory information is disclosed on the application itself, on form 2426, or from other sources, the particular application is forwarded to the Inspection Service of IRS for a report. In a relatively few cases, wherein there has been an FBI investigation, the Inspection Service attaches for our use a copy of the FBI report on a loan basis. It is ultimately returned. Upon receipt of the inspection report, its contents are evaluated by the Office of the Director of Practice. Where the derogatory information is unsubstantiated, the applicant is enrolled.

In those cases wherein the derogatory information warrants further consideration, the applicant is advised of such information, and given the opportunity to reply. He may either admit, deny or explain such information, and he is afforded the opportunity of a conference with the Director of Practice, if he so desires.

An enrollment card is valid for 5 years, and must be renewed, or the enrollment terminates 1 year thereafter. In order to renew his enrollment card, the enrollee files form 23A: Application for Renewal of Enrollment Card, in which he is requested to submit similar information, on a current basis, to that requested on form 23. This would include disclosure as to disciplinary action, if any, taken against him by his licensing authority since the issuance of his latest enrollment card; whether he has been the defendant in a criminal proceeding, excluding minor traffic violations; and his tax filing record for the prior 3 years, including the declaration of estimated tax for the current year.

With respect to all applicants for enrollment and those enrolled to practice, the file in the Office of the Director of Practice of each individual, whether attorney or agent, generally consists of the following:

1. Request for application. form 23.
2. Completed application for enrollment.
3. Certification of competence.
4. Form 2426, showing circularization within the District Director's office,
5. Renewal application, form 23A (if any).
6. Derogatory information (if any), and evaluation thereof.
7. Inspection report on derogatory information (if any), and evaluation thereof.
8. Correspondence with applicant or enrollee.
9. Indication of final action.

Form Approved
Bureau Budget No. 48-R422

FORM 23 (REV. JUL. 1964)	U. S. TREASURY DEPARTMENT - OFFICE OF THE DIRECTOR OF PRACTICE APPLICATION FOR ADMISSION TO PRACTICE BEFORE THE INTERNAL REVENUE SERVICE	FOR OFFICIAL USE ONLY ENROLLMENT NUMBER _____ DATE ENROLLED _____
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INSTRUCTIONS: Type or print and file in duplicate with your District Director of Internal Revenue, attention Enrollment Clerk.

1. I have familiarized myself with the contents of Treasury Department Circular No. 230, Revised, and believe I meet all the requirements for admission to practice before the Internal Revenue Service. I submit the following information in support of my application for admission to practice as an Attorney or Agent.

2. NAME (Last, first, middle)	3. HOME ADDRESS (No., street, city, State)	5. DATE OF BIRTH
4. OTHER NAMES USED (Show any other names used, including maiden name and dates used)	5. OFFICE ADDRESS (No., street, city, State)	7. PLACE OF BIRTH
		8. SOCIAL SECURITY NO.

9. ELIGIBILITY INFORMATION	YES	NO
a. Are you a citizen of the United States and over 21 years of age? (If "No," you are INELIGIBLE for enrollment. See T.D. Circular No. 230, Revised, Sec. 10.3(c)).		
b. Are you an employee of any State or subdivision thereof where your duties require you to pass upon, investigate or deal with tax matters where your duties may disclose facts or information applicable to Federal tax matters? (If "Yes," you are INELIGIBLE for enrollment. See T.D. Circular No. 230, Revised, Sec. 10.4(c)).		
c. Are you an officer or employee of the United States or of the District of Columbia? (If "Yes," you are INELIGIBLE for enrollment. See T.D. Circular No. 230, Revised, Sec. 10.4(c)).		

10. PROOF OF TECHNICAL COMPETENCE (Check one)

- a. I am a member of the bar in good standing of the highest court of the _____ (State, possession of the United States, or the District of Columbia). (Attach current certification from said court).
- b. I am duly qualified to practice as a certified public accountant in the _____ (State, possession of the United States, or the District of Columbia) under certificate No. _____. (Attach current certification of good standing from the licensing authority.)
- c. I am a successful Special Enrollment Examination candidate. (Attach a copy of letter issued by the Director of Practice.)
- d. I am an ex-IRS employee seeking enrollment pursuant to Section 10.3(f) of T.D. Circular No. 230, Revised. (Attach a separate statement indicating the period of your IRS employment, the reason for your separation, and a brief description of the position or positions held while so employed.)

11. PROFESSIONAL PRACTICE AND OTHER DATA	YES	NO
a. Has any complaint ever been filed against you by any professional association or charge made against you before any person or tribunal having authority to institute or try proceedings for suspension or disbarment from practice or for the revocation of a license or certificate to practice or for expulsion from membership in a professional society? (If "Yes," attach statement giving particulars, including date, place and before what person or tribunal).		
b. Has any application for admission to practice filed by you with any court, or Government department, agency, or commission been denied or rejected? (If "Yes," attach statement giving particulars, including date, place, and name of tribunal or agency).		
c. Were you ever enrolled to practice before the United States Treasury Department, Internal Revenue Service? (If "Yes," furnish approximate date of such enrollment.)		
d. Since your sixteenth birthday, have you ever been arrested, indicted, cited for contempt of court or summoned into court as a defendant in a criminal proceeding, or convicted, or fined, imprisoned, or placed on probation, or have you ever been ordered to deposit bail or collateral for the violation of any law, police regulation, or ordinance (excluding minor traffic violations for which a fine or forfeiture of \$25 or less was imposed)? (If "Yes," attach statement giving details in each case, including date and nature of offense, or violation, name and location of court and penalty, if any, imposed or other disposition of case).		
e. Have you ever been employed by the United States, or by any corporation wholly owned by the United States or by the District of Columbia? (If "Yes," state agency, nature of employment and date and reason for separation therefrom).		

(Note: You may omit answering question 11.e, if you are filing a statement under 10.d. above.)

12. INCOME TAX INFORMATION:

a. Did you file a Federal income tax return for each of the last 3 years? Yes No

b. Did you file a declaration of estimated tax for the current year and each of last 3 years? Yes No

If answer is "No," to 12a, or b, attach statement giving detailed explanation.

C. INFORMATION CONCERNING YOUR RETURN FILING RECORD FOR THE CURRENT YEAR AND PREVIOUS THREE YEARS:

YEAR	EXACT NAMES AND ADDRESS AS SHOWN ON EACH RETURN (Line A relates to Declaration of Estimated Tax Return; Line B relates to Income Tax Return)	LOCATION OF DISTRICT DIRECTOR'S OFFICE WHERE EACH RETURN WAS FILED	SERIAL NO. OF RETURN (For IRS use)
CURRENT	A.		
19	A.		
	B.		
19	A.		
	B.		
19	A.		
	B.		

d. Do you owe any prior year Federal Tax for which you have been billed? Yes No
(If answer is "Yes," attach statement giving explanation.)

13. FEE PAYMENT

I am attaching check money order in the amount of \$25.00 payable to the Treasurer of the United States. I understand that this constitutes an application fee which shall be retained by the United States whether or not I am granted the privilege of enrollment to practice before the Internal Revenue Service.

14. CHANGE OF ADDRESS

If admitted to practice before the Internal Revenue Service, I agree to give the Director of Practice written notice of any change in my mailing address. I agree further that, in the event any proceedings shall be instituted against me at any time by the Director of Practice, a written notice thereof, together with a statement of the charges against me, sent by registered mail to the last address filed with the Director of Practice, shall constitute due and sufficient notice.

15. ATTENTION: Before signing this application (in duplicate), make sure you have executed it completely so that your eligibility for enrollment can be decided on the basis of all the facts. Your application will be investigated and any admitted information concerning disciplinary proceedings, arrests or the like will be considered together with the favorable information in your record. However, a willfully false statement or material omission in the execution of this application may be grounds for denial of your application or subsequent revocation, disbarment, or suspension of your enrollment to practice before the Internal Revenue Service and is punishable by law.

16. AFFIDAVIT I, _____, do solemnly swear (or affirm) that the statements contained in the foregoing application are true and correct; that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; that, if authorized to represent others before the Internal Revenue Service, I will at all times conduct myself strictly in compliance with the laws, regulations, and rules governing practice before the Internal Revenue Service, as now constituted or as they may hereafter be lawfully modified or amended; and that I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor; so help me God.

17. SIGNATURE OF APPLICANT _____

18. MAILING ADDRESS (Street, number, city State) _____

19. (Impress seal here)

SUBSCRIBED AND SWORN TO BEFORE ME THIS (Specify date) _____

SIGNATURE AND TITLE OF PERSON ADMINISTERING OATH _____

1/ An oath as included herein is required of persons prosecuting claims against the United States (Title 31, section 204 and 205, U. S. Code) and may be taken before any notary public, justice of the peace or other person legally authorized to administer an oath in the State or district where the same may be administered.

APPLICANT'S NAME (Last - first - middle initial) BUSINESS ADDRESS (Number and street)		ENROLLMENT NO.		
CITY AND STATE				
<input type="checkbox"/> ATTOR- NEY	<input type="checkbox"/> C.P.A.	<input type="checkbox"/> WRITTEN EXAM- INATION	<input type="checkbox"/> FORMER IRS EMPLOYEE	
FILE TO INSPECTION SERVICE		TEMPORARY CARD ISSUED		
ENROLLMENT CARD ISSUED	DATES RENEWAL CARD ISSUED			
	(1)	(2)		
	(3)	(4)		

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

FORM 2425 (REV. 2-63)

PART 1 - DIRECTOR OF PRACTICE INDEX

ADMINISTRATIVE PROCEDURE ACT

☆ U. S. GOVERNMENT PRINTING OFFICE 1963 - 695-549

APPLICANT'S NAME (Last - first - middle initial)		ENROLLMENT NO.	
BUSINESS ADDRESS (Number and street)			
CITY AND STATE			
<input type="checkbox"/> ATTOR- NEY <input type="checkbox"/> C.P.A. <input type="checkbox"/> WRITTEN EXAM- INATION <input type="checkbox"/> FORMER IRS EMPLOYEE			
FILE TO INSPECTION SERVICE		TEMPORARY CARD ISSUED	
ENROLLMENT CARD ISSUED	DATES RENEWAL CARD ISSUED		
	(1)	(2)	
	(3)	(4)	

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

FORM 2425 (REV. 2-63)

PART 1 -DIRECTOR OF PRACTICE INDEX

☆ U. S. GOVERNMENT PRINTING OFFICE 1963 - 695-549

APPLICANT'S NAME (Last - first - middle initial) BUSINESS ADDRESS (Number and street)		ENROLLMENT NO.			
CITY AND STATE					
<input type="checkbox"/> ATTORNEY <input type="checkbox"/> C.P.A. <input type="checkbox"/> WRITTEN EXAMINATION <input type="checkbox"/> FORMER IRS EMPLOYEE					
FILE TO INSPECTION SERVICE		TEMPORARY CARD ISSUED			
ENROLLMENT CARD ISSUED	DATES RENEWAL CARD ISSUED				
	(1)	(2)			
	(3)	(4)			

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

FORM 2426 (REV. 2-63)

PART 1 - DIRECTOR OF PRACTICE INDEX

APPLICANT'S NAME (Last - first - middle initial)			
BUSINESS ADDRESS (Number and street)			
CITY AND STATE			
<input type="checkbox"/> ATTOR- NEY	<input type="checkbox"/> C.P.A.	<input type="checkbox"/> WRITTEN EXAM- INATION	<input type="checkbox"/> FORMER IRS EMPLOYEE

To: Chief, Audit Division

(City and State)

Please furnish promptly any information on the applicant bearing on his fitness for enrollment to practice before the Internal Revenue Service. Ascertain from your files and from your key subordinate officers if there is any unfavorable information regarding this applicant.

RETURN TO	ENROLLMENT CLERK, COLLECTION DIVISION (City and State)
	REGIONAL INSPECTOR (City and State)

- There is no unfavorable or questionable information in our files or known to us concerning the applicant.
- Information concerning applicant is set forth on the back of this form or in attached memo(s).

SIGNATURE OF AUDIT DIVISION OFFICIAL	DATE
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FORM 2426 (REV. 2-63)

PART 4-AUDIT DIVISION CIRCULARIZATION

APPLICANT'S NAME (Last - first - middle initial)
 BUSINESS ADDRESS (Number and street)

CITY AND STATE

ATTOR-
NEY C.P.A. WRITTEN
EXAM-
INATION FORMER IRS
EMPLOYEE

To: Chief, Audit Division

(City and State)

Please furnish promptly any information on the applicant bearing on his fitness for enrollment to practice before the Internal Revenue Service. Ascertain from your files and from your key subordinate officers if there is any unfavorable information regarding this applicant.

RETURN TO	ENROLLMENT CLERK, COLLECTION DIVISION (City and State)
	REGIONAL INSPECTOR (City and State)

- There is no unfavorable or questionable information in our files or known to us concerning the applicant.
- Information concerning applicant is set forth on the back of this form or in attached memo(s).

SIGNATURE OF AUDIT DIVISION OFFICIAL	DATE
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Form Approved
Budget Bureau No. 48-R338.1

FORM 23A (REV. JULY 1964)	U.S. TREASURY DEPARTMENT - OFFICE OF THE DIRECTOR OF PRACTICE APPLICATION FOR RENEWAL OF ENROLLMENT CARD	FOR OFFICIAL USE ONLY DATE RENEWAL CARD ISSUED
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INSTRUCTIONS: Type or print and file in duplicate with your District Director of Internal Revenue, attention Enrollment Clerk.

Complete all sections and sign both copies. Attach check or money order for renewal fee in the amount of \$5.00 payable to Treasurer of the United States. Enrollment card last issued must be attached or, if not available, an explanation must be submitted with application.

NAME (Last, first, middle)		DATE OF BIRTH	SOCIAL SECURITY NO.
HOME ADDRESS (Number, street, city and State)	TELEPHONE	OFFICE ADDRESS (Number, street, city and State)	TELEPHONE

Attached is a check money order in amount of \$5.00 payable to Treasurer of the United States. I am enrolled to practice as an Attorney or Agent, and answer the following questions in support of this application:

1. Have you been cited to appear for alleged misconduct before any court or any professional body since the date of issuance of your last enrollment card? (If answer is "Yes," attach statement giving details)	YES	NO
2. Since the date of the issuance of your last enrollment card, have you been a defendant in a criminal proceeding (excluding minor traffic violations to which a fine or forfeiture of \$25.00 or less was imposed) or any proceeding based upon allegations of fraud? (If answer is "Yes," attach statement giving detailed explanation including name and place of tribunal and the final disposition thereof by it)		

3. INCOME TAX INFORMATION:

a. Did you file a Federal income tax return for each of the last 3 years? <input type="checkbox"/> Yes <input type="checkbox"/> No	b. Did you file a declaration of estimated tax for the current year and each of last 3 years? <input type="checkbox"/> Yes <input type="checkbox"/> No	If answer is "No," to 3a. or b, attach statement giving detailed explanation.
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C. INFORMATION CONCERNING YOUR RETURN FILING RECORD FOR THE CURRENT YEAR AND PREVIOUS THREE YEARS:

YEAR	EXACT NAMES AND ADDRESS AS SHOWN ON EACH RETURN (Line A relates to Declaration of Estimated Tax Return; Line B relates to Income Tax Return)	LOCATION OF DISTRICT DIRECTOR'S OFFICE WHERE EACH RETURN WAS FILED	SERIAL NO. OF RETURN (For IRS use)
CURRENT	A.		
19	A.		
	B.		
19	A.		
	B.		
19	A.		
	B.		

DATE OF APPLICATION	SIGNATURE (Must correspond with that shown on enrollment card last issued)
---------------------	--

Dear Sir:

Your application for renewal of card to practice before the Internal Revenue Service has been approved and your new enrollment card is attached.

DATE	DISTRICT DIRECTOR
	BY:

APPLICANT PLEASE NOTE - (Enter your name and address below)

Senator LONG. Thank you, Mr. Rains.

The next witness will be Mr. Donald E. Marlowe, dean of engineering and architecture, Catholic University.

STATEMENT OF DONALD E. MARLOWE, DEAN OF ENGINEERING AND ARCHITECTURE, CATHOLIC UNIVERSITY; ACCOMPANIED BY WILLIAM D. PATTON, LEGISLATIVE COUNSEL, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

Mr. MARLOWE. Mr. Chairman and members of the subcommittee, I greatly appreciate the opportunity to present the views of the National Society of Professional Engineers on the important legislation before you.

My name is Donald E. Marlowe. I am dean of engineering and architecture at Catholic University, a registered professional engineer, and chairman of the Legislative and Government Affairs Committee of the National Society of Professional Engineers.

I have brought with me, Mr. Chairman, Mr. William D. Patton, who is legislative counsel of the National Society of Professional Engineers.

Senator LONG. We are happy to have you here with us.

Mr. MARLOWE. Our society is composed of more than 63,000 members, all of whom are qualified under applicable State engineering registration laws. The society's membership is affiliated through 53 State and territorial societies, and more than 450 local chapters.

We are particularly interested in section 6 of S. 1336, and the identical language in S. 1758, which would amend the Administrative Procedure Act to provide that:

Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency.

The effect of this provision would be to authorize any member of the bar of any State to represent others before any Federal agency, with no need to show any additional qualifications. While this may be appropriate for most agencies, we believe that in at least the case of the U.S. Patent Office it would be contrary to and inconsistent with the public interest.

The Patent Office differs from other agencies in that the major part of the subject matter being presented to it and under consideration by it is of a highly technical nature. In fact, as of any given date the subject matter of existing patents and pending applications for patents will generally reflect quite accurately the state of scientific and engineering know-how in the country.

The subject matter of patents and applications for patents in large measure involves technical delineation of structure and principles of operation of inventions, rather than the application and interpretation of legal principles. In the course of prosecution of an application for patent, the issues most frequently encountered are those of distinguishing a claimed inventive structure over structures appearing in issued patents, and prior scientific and other literature (usually referred to as the "prior art").

The Patent Office employees who examine the patent applications and who seek out the applicable prior art for evaluating an application, all have highly specialized technical training. In recognition of the highly technical nature of this work in the Patent Office, the Civil Service Commission requires that patent attorneys and patent interference examiners employed by the Patent Office have training equivalent to that represented by graduation (with a degree in one of the scientific or engineering disciplines) from an accredited college or university.

Since such high degree of technical ability has been found necessary to insure adequacy of review of an application for patent presented to the Patent Office, it is submitted that such technical ability is even more necessary in the preparation of the application in the first instance to insure adequacy of subject matter. And this need for technical ability as a requirement for patent practice becomes even more compelling when one realizes that a major part of practice before the Patent Office involves such first instance preparation of applications for patents, and where needed, their subsequent amendment to distinguish over prior art cited by the technically trained Patent Office personnel.

The need for a high level of technical ability in patent practice has been recognized by a number of courts, including the U.S. Supreme Court. As recently as May 1963, while dealing with a matter relating to patent practice, the Supreme Court specifically noted the requirement that—

a person may be admitted [to patent practice] under either category [patent attorney and patent agent] only by establishing that he is of good moral character and of good repute and possessed of the legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service * * * (*Sperry v. Florida*, 373 U.S. 379 (1962)).

Patent Office records show that as of March 1, 1965, a total of 8,235 persons were admitted to practice before that Office. Of these, 6,036, or approximately 73 percent had technical degrees. All of them had some technical or scientific background or qualification. Of the 8,235 total 6,352 were patent attorneys. Of these, again, approximately 73 percent had technical degrees. The records show, too, that these percentages have been climbing steadily in recent years. In fact, of the total increase of 943 patent attorneys registered with the Patent Office since 1961 (that is, during the past 4 years), 924, or 98 percent, had technical degrees. These figures demonstrate that among those admitted to patent practice technical degrees have now become the rule rather than the exception, and technical competence has become a publicly recognized integral aspect of patent practice.

Under these circumstances, we believe that it would be undesirable and contrary to the public interest for Congress to adopt a law which would eliminate the authority for the Patent Office to require a demonstration of technical competence. If attorneys without demonstrated technical competence were authorized to practice before the Patent Office, as S. 1336 and S. 1758 now provide, the public could easily be misled as to the qualifications of the practitioner. It is basic to all professional licensing laws that the primary purpose is to protect the public from unqualified practitioners. As stated in a recent Delaware case involving the State engineering registration law:

It has been recognized since time immemorial that there are some professions and occupations which require special skill, learning, and experience with respect to which the public ordinarily does not have sufficient knowledge to determine the qualifications of the practitioner. The layman should be able to request such services with some degree of assurance that those holding themselves out to perform them are qualified to do so. For the purpose of protecting the health, safety, and welfare of its citizens, it is within the police power of the State to establish reasonable standards to be complied with as a prerequisite to engage in such pursuits. (*Delaware v. Durham*, criminal action No. 485, 486, 487, 1960 term, supreme court, New Castle County, quoting from *Clayton v. Bennett*, 5 Utah 152, 298 P. 2d 531.)

We believe that this fundamental principle should apply equally to Federal agencies. In light of the technological revolution which is now sweeping this country and others, and the explosion of technical knowledge which is taking place and promises to accelerate, there can be no doubt that it is necessary today for a qualified patent practitioner to have technical knowledge and education in the subject matter with which he deals and that the public has come to rely on patent practitioners having such competence.

The argument that patent practice is just another type of law practice and that lawyers can and do practice in various specialized fields of law ignore the basic difference of substance. The substance of contract law, labor law, criminal law, et cetera, is the law itself, composed of statutes and case decisions. But the very heart of patent practice is technology. A person without an extensive background of technical substance, no matter how skilled and devoted, cannot cope adequately with the application of the mathematical and scientific data which underlie patent applications and prosecutions.

The point sometimes is raised, too, that attorneys are not required to pass technical examinations to handle patent cases in the courts. This is true, but it certainly is not inconsistent with our position. A patent case in court turns primarily on the interpretation and application of the patent statutes and case law as related to the particular patent issue; hence, fundamentally the issues involved are legal. They do not require the same detailed technical analysis and explanation of physical facts as does the preparation and prosecution of an application in the Patent Office.

This basic difference between the qualifications necessary for the general practice of law and the technical requirements of patent practice is widely recognized within the legal profession itself. Canon 27 of the American Bar Association's "Canon of Professional Ethics," for example, prohibits advertising by lawyers, but makes the following specific exception for patent and admiralty practitioners:

It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the Patent Office to use the designation "patent attorney" or "patent lawyer" * * *. [Emphasis supplied.]

Patent practice and admiralty practice are the only two specialties in the law so recognized by the American Bar Association. The reason, of course, rests on the unique nature of the subject matter involved and, in the case of patent lawyers, the technical competence required.

A further illustration of the recognition, both within the legal profession and by the public at large, that patent practice is a specialty apart from other fields of law, and requires technical competence, is

the separate listing frequently provided for patent attorneys in directories and similar publications. In the Washington, D.C., classified telephone book, for example, attorneys at law—whether they be general practitioners or specialists in tax law, labor law, antitrust matters, or other particular fields—are listed under the general heading of "Lawyers," but, significantly, patent lawyers—and apparently only patent lawyers—are listed under a separate heading.

In light of this, the confusion and harm which could result if any attorney, without showing additional qualification, were permitted to practice before the Patent Office, seems clear.

The records of the Patent Office show that from 1897 to 1922 agency practice was open to all members of the bar without further qualification, just as S. 1336 and S. 1758 would provide. This was changed, however, because experience showed it was not found to be effective as an assurance of competency for this particularly demanding practice. We submit that in the light of today's vast technological revolution, the evils that arose between 1897 and 1922 from admitting any lawyer into patent practice without proof of technical qualifications would be compounded many times over if we were to return to that earlier, discarded procedure.

Mr. Chairman, one final comment: In the past it has been argued by some persons that eliminating the requirement that patent practitioners have a minimum technical competence would in no way open the door to unqualified practitioners since the ethics of the legal profession require that a lawyer undertake to represent a client only in those matters in which he is competent. But this simply begs the question. The ethics of the legal profession are not involved here. Professional engineers have a similar code of ethics. The basic question presented by the pending bills is whether Congress wishes to change the existing law and procedure relating to the Patent Office and thereby dictate a situation where it would be possible for an unqualified person to represent himself as being capable of adequately handling important and valuable property rights of others. We know that your answer will be controlled by a sense of responsibility to the welfare of the public. Because we believe the ultimate objective in restricting patent practice is to protect the public, we strongly urge you to amend the pending bills to permit the Patent Office to continue its requirement of a showing of competence in the technical subject matter inherent in patent applications.

We appreciate this opportunity to present our views and will be happy to furnish any additional information or comment you may desire.

(The statement follows:)

TESTIMONY OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

Mr. Chairman and members of the subcommittee, I greatly appreciate the opportunity to present the views of the National Society of Professional Engineers on the important legislation before you.

My name is Donald E. Marlowe. I am dean of engineering and architecture at Catholic University, a registered professional engineer, and chairman of the Legislative and Government Affairs Committee of the National Society of Professional Engineers.

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is affiliated through 53 State and territorial societies, and more than 450 local chapters.

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The need for a high level of technical ability in patent practice has been recognized by a number of courts, including the U.S. Supreme Court. As recently as May 1963, while dealing with a matter relating to patent practice, the Supreme Court specifically noted the requirement that "a person may be admitted (to patent practice) under either category (patent attorney and patent agent) only by establishing that he is of good moral character and of good repute and possessed of the legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service. * * *" (*Sperry v. Florida*, 373 U.S. 379 (1962).)

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Under these circumstances, we believe that it would be undesirable and contrary to the public interest for Congress to adopt a law which would eliminate the authority for the Patent Office to require a demonstration of technical competence. If attorneys without demonstrated technical competence were authorized to practice before the Patent Office, as S. 1336 and S. 1758 now provide, the public

could easily be misled as to the qualifications of the practitioner. It is basic to all professional licensing laws that the primary purpose is to protect the public from unqualified practitioners. As stated in a recent Delaware case involving the State engineering registration law:

"It has been recognized since time immemorial that there are some professions and occupations which require special skill, learning, and experience with respect to which the public ordinarily does not have sufficient knowledge to determine the qualifications of the practitioner. The layman should be able to request such services with some degree of assurance that those holding themselves out to perform them are qualified to do so. For the purpose of protecting the health, safety, and welfare of its citizens, it is within the police power of the State to establish reasonable standards to be complied with as a prerequisite to engage in such pursuits." (*Delaware v. Durham*, criminal action No. 485, 486, 487, 1960 term, Superior Court, New Castle County, quoting from *Clayton v. Bennett*, 5 Utah 152, 298 P 2d. 531).

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"It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle *or for a lawyer who has complied with the statutory requirements of admission to practice before the Patent Office to use the designation 'patent attorney' or 'patent lawyer'.* * * *"
[Emphasis supplied.]

Patent practice and admiralty practice are the only two specialties in the law so recognized by the American Bar Association. The reason, of course, rests on the unique nature of the subject matter involved and, in the case of patent lawyers, the technical competence required. A further illustration of the recognition, both within the legal profession and by the public at large, that patent practice is a specialty apart from other fields of law, and requires technical competence, is the separate listing frequently provided for patent attorneys in directories and similar publications. In the Washington, D.C., classified telephone book, for example, attorneys at law—whether they be general practitioners or specialists in tax law, labor law, antitrust matters, or other particular fields—are listed under the general heading of "Lawyers," but, significantly, patent lawyers—and apparently only patent lawyers—are listed under a separate heading.

In light of this, the confusion and harm which could result if any attorney, without showing additional qualification, were permitted to practice before the Patent Office, seems clear.

The records of the Patent Office show that from 1897 to 1922 agency practice was open to all members of the bar without further qualification, just as

S. 1336 and S. 1758 would provide. This was changed, however, because experience showed it was not found to be effective as an assurance of competency for this particularly demanding practice. We submit that in the light of today's vast technological revolution, the evils that arose between 1897 and 1922 from admitting any lawyer into patent practice without proof of technical qualifications would be compounded many times over if we were to return to that earlier, discarded procedure.

Mr. Chairman, one final comment. In the past it has been argued by some persons that eliminating the requirement that patent practitioners have a minimum technical competence would in no way open the door to unqualified practitioners since the ethics of the legal profession require that a lawyer undertake to represent a client only in those matters in which he is competent. But this simply begs the question. The ethics of the legal profession are not involved here. Professional engineers have a similar code of ethics. The basic question presented by the pending bills is whether Congress wishes to change the existing law and procedure relating to the Patent Office and thereby dictate a situation where it would be possible for an unqualified person to represent himself as being capable of adequately handling important and valuable property rights of others. We know that your answer will be controlled by a sense of responsibility to the welfare of the public. Because we believe the ultimate objective in restricting patent practice is to protect the public, we strongly urge you to amend the pending bills to permit the Patent Office to continue its requirement of a showing of competence in the technical subject matter inherent in patent applications.

We appreciate this opportunity to present our views and will be happy to furnish any additional information or comment you may desire.

Senator LONG. Thank you, Dean Marlowe. We appreciate having your very helpful statement. We have heard your testimony along the lines of this bill before this committee before. We appreciate your courtesy in appearing before this committee.

Mr. Patton, we welcome you back home. I recall that several years ago, you were on the staff of the Judiciary Committee, and as Mr. Fensterwald suggested, on the other side of the table.

Mr. PATTON. Thank you, Mr. Chairman. It is a pleasure to be here.

Senator LONG. Thank you, to both of you gentlemen, very much.

The next witness is Mr. John F. Sonnett of the American Institute of Certified Public Accountants. And I understand that he has some other officials with him.

Will you gentlemen please come forward?

Mr. Sonnett, we are glad to have you. And will you give us the names of the gentlemen with you for the record.

**STATEMENT OF JOHN F. SONNETT, AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS; ACCOMPANIED BY THOMAS
D. FLYNN, IRWIN SCHNEIDERMAN, AND THOMAS J. GRAVES**

Mr. SONNETT. Mr. Chairman, we have submitted biographical statements which will shorten the problem of introduction.

Senator LONG. We have those, and they will be included in the record.

(The biographical sketches are as follows:)

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, NEW YORK, N.Y.

BIOGRAPHICAL SKETCH OF JOHN F. SONNETT

Sonnett, John F., lawyer; born, Throggs Neck, N.Y., July 12, 1912; B.S., Fordham University, 1933; LL.B., Fordham University, 1936. Executive and chief assistant to U.S. attorneys for southern district, New York, 1941-43;

special assistant attorney general in charge, New York Office War Frauds, Department of Justice 1943; special counsel, Navy, assigned to Under Secretary of Navy, 1945; assistant U.S. attorney general in charge, Claims Division, Department of Justice, 1945-47, in charge of Antitrust Division 1947-48.

BIOGRAPHICAL SKETCH OF THOMAS D. FLYNN

Flynn, Thomas D., certified public accountant; born Los Angeles, Calif., March 29, 1913; B.A., Princeton University 1935; M.S., Columbia University 1939; staff assistant, U.S. Senate Committee on Interstate Commerce, 1935-38; staff member, Federal Trade Commission 1939-40; joined Arthur Young & Co., 1940; presently partner in New York office; member Phi Beta Kappa and Beta Gamma Sigma; president, American Institute of Certified Public Accountants.

BIOGRAPHICAL SKETCH OF THOMAS J. GRAVES

Graves, Thomas J., certified public accountant; born Tell City, Ind., October 22, 1916; B.S.M.C.L., University of Notre Dame, 1938; joined Haskins & Sells, 1938; partner, Haskins & Sells, 1953-; chairman, committee on Federal taxation, American Institute of Certified Public Accountants 1962-; member, Advisory Group to Commissioner of Internal Revenue 1959-61; member, Committee on Taxation, U.S. Chamber of Commerce.

BIOGRAPHICAL SKETCH OF IRWIN SCHNEIDERMAN

Schneiderman, Irwin, lawyer; born New York City, May 28, 1923; B.A., Brooklyn College, 1943; LL.B.C.L. Harvard, 1948; active duty U.S. Navy, 1943-46, lieutenant (junior grade); Associated Cahill, Gordon, Reindel & Ohl 1948-58; partner Cahill, Gordon, Reindel & Ohl 1959-; director, Seaboard World Airlines, Inc.; director, Continental Telephone Co.; member, American Bar Association, Association of the Bar of the City of New York, Harvard Club of New York City, Wings Club; office, 80 Pine Street, New York City.

Mr. SONNETT. We have Mr. Flynn to my left, who may have some preliminary remarks. He is the president of the American Institute of Certified Public Accountants. And you may find his background of some particular interest, Mr. Chairman, in the light of his governmental as well as private service.

We have on my right Mr. Schneiderman, who is one of my partners, I being a lawyer.

And we have to Mr. Flynn's left, Mr. Thomas J. Graves, who is active on the committee on taxation of the institute.

We have a statement of eight pages, Mr. Chairman, which I would request you include in the record. And we would like your permission to depart from it if we may.

Senator LONG. Very well. Your entire statement will be shown in the record, without objection.

(The statement on behalf of the American Institute of Certified Public Accountants is as follows:)

STATEMENT OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
CONCERNING S. 1758 AND SECTION 6(b) OF S. 1336

The American Institute of Certified Public Accountants is the only national organization of certified public accountants. The present membership of the institute is more than 53,000, with members in every State of the United States and in the District of Columbia.

The objectives of the institute are to maintain and enhance the professional standards of the accounting profession to the end that members of the profession may render an effective service to the public in the accounting field.

I. INSTITUTE'S INTEREST IN THE LEGISLATION

The institute has sought an opportunity to comment on the legislation before this subcommittee with some reluctance. On the surface at least, the bills under consideration appear to involve matters of exclusive concern to the

legal profession. The presentation of the institute's views may be easily misunderstood, therefore, as a gratuitous attempt to hamper the legal profession in the attainment of its legislative goals.

Any such misreading of the institute's purposes in testifying on these legislative proposals would deeply concern us. Lawyers and certified public accountants are constantly collaborating in the service of mutual clients, and the preservation of that harmonious working relationship is of considerable importance to both professions and to the public. Moreover, the American Bar Association and the American Institute have been engaged for years in a persistent effort to encourage cordial relations between attorneys and CPA's and to resolve, in the best interests of all concerned, any differences which might create friction between the two groups.

Because it places such a high value on the maintenance of a friendly spirit of cooperation between the two professions, the institute has hesitated to intervene in this legislative situation. It has done so only because the legislation, which may not be required to meet a genuine need, could adversely affect the rights of its members—rights that are essential to the effective operation of the Nation's tax system.

The interest of the institute in the proposed legislation arises out of the fact that many members of the institute regularly appears before Federal administrative agencies, particularly the Treasury Department and the Internal Revenue Service of that Department.

The field of Federal tax practice has long been an area in which certified public accountants have possessed a special competence to assist taxpayers in their dealing with the Internal Revenue Service. This has resulted in assistance to the Treasury Department itself in the efficient performance of its duties in the collection of the public revenues.

Despite the valuable service rendered by CPA's in aiding the public in its dealing with the Government, a long series of bills has been introduced over many years seeking to impose limitations of varying severity on representation by nonlawyers before Federal agencies. In some of the bills, the limiting factors have been expressed in broad general terms that could later be interpreted to the great disadvantage of the nonlawyer representatives. The institute has been compelled to oppose these provisions through the years—joining with other groups which share our conviction that each individual agency ought to retain the right to determine the extent to which it will permit nonlawyers to practice before it and the rules under which such practice should be conducted.

The Federal agencies have a variety of purposes. They must resolve issues which involve a vast amount of technical and professional information of an accounting, engineering, economic, or scientific nature. As the Court of Appeals for the Second Circuit said: "Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases" (296 F. 2d 918, 922). Because of the complexity and diversity of the issues confronting the agencies, they must be free to decide who should be authorized to appear before them. It is undesirable, in our view, to adopt any general rule limiting the extent to which the agencies may recognize experts of various kinds. The enactment of such a general rule would greatly handicap the agencies in discharging the responsibilities assigned to them by Congress.

II. COMMENTS ON S. 1758 AND SECTION 6(b) OF S. 1336

For convenience, our remarks are directed to S. 1758. However, they apply equally to section 6(b) of S. 1336.

A. Treasury exemption from bill

The institute recommends that the Treasury Department be exempted from the requirements of S. 1758.

It believes that section 101(a) of S. 1758, dealing with the automatic admission of lawyers, is unnecessary as it relates to the Treasury Department. As you no doubt know, the Treasury Department already accepts membership in the bar as a demonstration of sufficient competence to permit lawyers to practice before the Internal Revenue Service by virtue of their professional status alone. This recognition is also accorded to certified public accountants.

All that is required of lawyers and certified public accountants is the filing of an application and the payment of a nominal filing fee. The one other procedure

followed by the Treasury Department is to make an investigation of an applicant's character and reputation, which includes a review of his personal tax returns for years not closed by the statute of limitations. Certified public accountants have not found these enrollment procedures to be burdensome.

If the Treasury Department is not exempted from the legislation, we believe that modifications should be made in its provisions, and we respectfully request your consideration of our suggestions for revision which are set forth below.

B. Recommended modification if section 101(a) is to apply to the Treasury Department

1. *Automatic admission.*—The field of Federal tax practice before the Treasury Department has been the subject of extended consideration and negotiation by and between representatives of the American Bar Association and the institute over a number of years. This has resulted in the adoption of a joint statement of principles relating to practice in the field of Federal income taxation. (This statement appears on pp. 10 to 15 of the attached booklet.)

The joint statement recognizes the special and separate competence of both lawyers and certified public accountants in the field of Federal tax practice and recommends the desirability of cooperation between the two professions. Thus, section 1 of the joint statement entitled "Collaboration of Lawyers and Certified Public Accountants" stated in part:

"Many problems connected with business require the skills of both lawyers and certified public accountants and there is every reason for a close and friendly cooperation between the two professions. Lawyers should encourage their clients to seek the advice of certified public accountants whenever accounting problems arise and certified public accountants should encourage clients to seek the advice of lawyers whenever legal questions are presented."

Section 6 of the joint statement entitled "Representation of Taxpayers Before Treasury Department" states:

"Under Treasury Department regulations lawyers and certified public accountants are authorized, upon a showing of their professional status, and subject to certain limitations as defined in the Treasury rules, to represent taxpayers in proceedings before that Department. If, in the course of such proceedings, questions arise involving the application of legal principles, a lawyer should be retained, and if, in the course of such proceedings accounting questions arise, a certified public accountant should be retained."

In 1956, the Secretary of the Treasury, in an interpretation of Treasury Department Circular 230, commented with favor on the progress toward cooperation in matters of Federal tax practice which had been made by members of the legal and accounting professions. In this interpretation (see pp. 7-9 of the attached booklet), the Secretary stated:

"The Department has properly placed on its enrolled agents and enrolled attorneys the responsibility of determining when the assistance of a member of the other profession is required. This follows from the provisions in section 10.2(z) that enrolled attorneys must observe the canons of ethics of the American Bar Association and enrolled agents must observe the ethical standards of the accounting profession. The Department has been gratified to note the extent to which the two professions over the years have made progress toward mutual understanding of the proper sphere of each, as for example, in the joint statement of principles relating to practice in the field of Federal income taxation."

Since there have been repeated efforts in the past to eliminate or restrict the historical right of certified public accountants to represent taxpayers before the Treasury Department, the institution is naturally concerned with any action which might have the effect, directly or indirectly, of endangering that right. The institute fears that S. 1758 could have just such an effect.

If it is deemed necessary to enact automatic admission legislation, we believe certified public accountants should be accorded treatment similar to attorneys in connection with practice before the Internal Revenue Service and that the right of certified public accountants to represent others before the Internal Revenue Service should be expressly recognized. This would continue the present Treasury Department rules which make no distinction between lawyers and certified public accountants regarding admission to practice.

2. *Elimination of the power of attorney procedure is not in the public interest.*—The institute believes that section 101(b) of S. 1758, which would limit

the Treasury Department's power of attorney procedure, is not in the interest of taxpayers, tax practitioners, or the Treasury Department.

Under current procedures, evidence of authority to represent a client before the Treasury Department and to obtain information from the Treasury Department with respect to the client's affairs must be established by the filing of a power of attorney signed by the client. While this may sometimes be slightly inconvenient, we believe that the requirement ought to be maintained.

The requirement for a power of attorney gives the taxpayer the ability to specify and limit the subject matter which may be discussed by his representative with the Treasury Department. It protects employees of the Treasury Department in disclosing confidential information with respect to a taxpayer's affairs to the taxpayer's representative. It avoids the possibility of confusion as to which representative of a taxpayer has responsibility for and authority with respect to a tax return for a given year or a specific tax matter. For these reasons, the institute believes it is in the public interest to retain the present power of attorney procedure with respect to all practitioners before the Treasury Department.

III. CONCLUSION

We respectfully recommend that the Treasury Department be excluded from the provisions of S. 1758 and section 6(b) of S. 1336. However, if it is deemed desirable to include the Treasury Department, we believe that the modifications already mentioned should be made. The institute would be happy to cooperate with counsel for the subcommittee in preparing such modifications.

We have just recently learned that S. 1879 is also before this subcommittee for consideration. We have not had an opportunity to analyze this bill which would completely supersede the Administrative Procedure Act of 1946. Accordingly, we request an opportunity to submit a supplemental statement addressed to this bill.

Because of its vital importance to our members, we are grateful for the opportunity to comment on the legislation before this subcommittee.

THE PROFESSIONAL RELATIONS OF LAWYERS AND CERTIFIED PUBLIC ACCOUNTANTS

1957: A JOINT REPORT BY COMMITTEES OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN INSTITUTE OF ACCOUNTANTS

JOINT REPORT OF SPECIAL COMMITTEE ON PROFESSIONAL RELATIONS OF AMERICAN BAR ASSOCIATION AND COMMITTEE ON RELATIONS WITH BAR OF AMERICAN INSTITUTE OF ACCOUNTANTS

Because of the interrelationship of financial and legal aspects of the modern economy there sometimes is a basis for dispute as to whether a particular matter properly falls within the field of law or within the field of competence of certified public accountants. The Committee on Professional Relations of the American Bar Association and the Committee on Relations with the Bar of the American Institute of Accountants believe that any such question that may arise between the two professions should be resolved by conference and cooperation. One of the principal fields in which such questions have arisen is Treasury practice.

In 1951 the American Bar Association and American Institute of Accountants adopted a joint statement of principles relating to practice in the field of Federal income taxation, for the guidance of members of each profession.

On January 30, 1956, the Secretary of the Treasury issued a statement interpreting Treasury Department Circular 230 relating to practice before the Department. In this statement the Secretary mentioned the need for uniformity in interpretation and administration of the regulations governing practice before the Department and stated that the Department has properly placed on lawyers and accountants, under the Department's ethical requirements, responsibility for determining when the assistance of a member of the other profession is required. He cited with gratification, "the extent to which the two professions over the years have made progress toward mutual understanding of the

proper sphere of each, as for example in the joint statement of principles relating to practice in the field of Federal income taxation."

In concluding his statement, the Secretary said that relationships of lawyers and accountants in Treasury practice would be kept under surveillance, so that, if necessary, the matter can be reviewed later to determine whether amendment of the regulations governing practice before the Department or other appropriate action is necessary.

Consideration of the public interest and the best interests of both professions seems, therefore, to require expansion of voluntary machinery for self-discipline by both professions and cooperation between them to enable differences between lawyers and certified public accountants as they may arise—whether in tax practice or elsewhere—to be resolved by conference and negotiation, and not by litigation.

To this end, the Special Committee on Professional Relations of the American Bar Association and the Committee on Relations with the Bar of the American Institute of Accountants have agreed that the National Conference of Lawyers and Certified Public Accountants, composed of members of the two committees, should serve as a joint committee to consider differences arising between the two professions and disputes involving questions of what constitutes the practice of law or accounting.

The joint committee recommends the following procedures:

1. That with respect to the field of Federal income taxation, the two professions continue to adhere to the statement of principles, approved by the governing bodies of the American Bar Association and the American Institute of Accountants in 1951. It is recognized that the statement is a guide to cooperation and does not presume to be a definition of the practice of law or the practice of accounting.

2. That State organizations of the two professions consider the establishment in each State of a joint committee similar to the national conference for consideration of differences arising between members of the two professions.

3. That before any State organizations of either profession shall institute or participate in litigation or disputes involving differences between members of the two professions, or involving questions of what constitutes the practice of law or accounting, such differences and questions be referred to joint committees of State organizations of the two professions, where such committees exist, or to the national conference.

4. That, in the interest of uniformity, State committees maintain close coordination with the national conference; and if resolution of differences seems impossible at the local and State level, they be referred to the national conference. Particularly in the early years, it would seem to be in the best interest of all concerned for the national conference to participate actively in the consideration and settlement of disputes which might serve as guides and precedents for other cases.

5. That—again in the interest of uniformity—where joint committees at the State level are appointed to deal with any differences which may arise, they be limited, where possible, to one to a State, and their structure and procedure follow the pattern of the national conference.

It is hoped and believed that resolution of specific cases as suggested above will in time provide a body of precedent which will come to serve as a guide to members of the two professions. Such a body of precedent will, we think, prove of more practical value than attempts to find acceptable definitions of the fields of the two professions.

The efforts of the national conference are not, of course, intended to be punitive in nature. Their objective will be to avoid conflict and to encourage and enable continuing cooperation between lawyers and certified public accountants in accordance with the ethical standards of the two professions.

For the American Bar Association:

WILLIAM J. JAMESON,

Chairman, Special Committee on Professional Relations.

For the American Institute of Accountants:

JOHN W. QUEENAN.

Chairman, Committee on Relations With Bar.

DEPARTMENT OF THE TREASURY

TREASURY DEPARTMENT INTERPRETATION OF SECTION 10.2 OF TREASURY DEPARTMENT CIRCULAR 230 (31 CFR 10.2)

For some months the Treasury Department has had under consideration the revision of Treasury Department Circular 230 relating to practice before the Department.

Congress has given the Treasury Department the responsibility of regulating practice before the Department. It is in the exercise of this responsibility that the Department has issued the rules and regulations set forth in Circular 230, taking into consideration, among other things, the need of taxpayers for tax advice and assistance, the number of tax returns filed each year, the volume and complexity of problems relating thereto, the skills and training required for proper representation of taxpayers' interests and the availability of people who can provide such service.

The Department believes the standards prescribed in Circular 230 have generally operated in a highly satisfactory manner, have made available to taxpayers representatives to assist them in presenting their interests to the Department, and have facilitated fair and orderly administration of the tax laws.

It is the intention of the Department that all persons enrolled to practice before it be permitted to fully represent their clients before the Department, in the manner hereinafter indicated. This is apparent from section 10.2(b), which states that the scope of practice (of agents as well as attorneys) before the Department comprehends "all matters connected with the presentation of a client's interest to the Treasury Department." Enrollees, whether agents or attorneys, have been satisfactorily fully representing clients before the Department for many years. The Department believes this has been beneficial to the taxpayers and to the Government and that there presently appears no reason why the present scope and type of practice should not continue as it has in the past.

The Department's attention has been called to the decisions of certain States courts and to statements which suggest varying interpretations of section 10.2(f) of the circular. This subsection makes it clear that an enrolled agent shall have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney, except that an enrolled agent may not prepare and interpret certain written instruments. The second proviso of the subsection states that nothing in the regulations is to be construed as authorizing persons not members of the bar to practice law. The uniform interpretation and administration of this and other sections of Circular 230 by the Department are essential to the proper discharge of the above responsibility imposed on it by the Congress.

It is not the intention of the Department that this second proviso should be interpreted as an election by the Department not to exercise fully its responsibility to determine the proper scope of practice by enrolled agents and attorneys before the Department. It should be equally clear that the Department does not have the responsibility nor the authority to regulate the professional activities of lawyers and accountants beyond the scope of their practice before the Department as defined in section 10.2(b) and nothing in Circular 230 is so intended.

The Department has properly placed on its enrolled agents and enrolled attorneys the responsibility of determining when the assistance of a member of the other profession is required. This follows from the provisions in section 10.2(z) that enrolled attorneys must observe the canons of ethics of the American Bar Association and enrolled agents must observe the ethical standards of the accounting profession. The Department has been gratified to note the extent to which the two professions over the years have made progress toward mutual understanding of the proper sphere of each, as for example in the joint statement of principles relating to practice in the field of Federal income taxation.

The question of Treasury practice will be kept under surveillance so that if at any time the Department finds that the professional responsibilities of its enrolled agents and enrolled attorneys are not being properly carried out or understood, or that enrolled agents and attorneys are not respecting the appropriate fields of each in accordance with that joint statement, it can review the

matter to determine whether it is necessary to amend these provisions of the circular or take other appropriate action.

(Signed) G. M. HUMPHREY,
Secretary of the Treasury.

Dated : January 30, 1956.

STATEMENT OF PRINCIPLES RELATING TO PRACTICE IN THE FIELD OF
FEDERAL INCOME TAXATION

PROMULGATED BY THE NATIONAL CONFERENCE OF LAWYERS AND CERTIFIED
PUBLIC ACCOUNTANTS

Preamble.—In our present complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. Each of these groups is well qualified to serve the public in its respective field. The primary function of the lawyer is to advise the public with respect to the legal implications involved in such problems, whereas the certified public accountant has to do with the accounting aspects thereof. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled. As a result, there has been some doubt as to where the functions of one profession end and those of the other begin.

For the guidance of members of each profession the National Conference of Lawyers and Certified Public Accountants recommends the following statement of principles relating to practice in the field of Federal income taxation :

1. *Collaboration of lawyers and certified public accountants desirable.*—It is in the best public interest that services and assistance in Federal income tax matters be rendered by lawyers and certified public accountants, who are trained in their fields by education and experience, and for whose admission to professional standing there are requirements as to education, citizenship, and high moral character. They are required to pass written examinations and are subject to rules of professional ethics, such as those of the American Bar Association and American Institute of Accountants, which set a high standard of professional practice and conduct, including prohibition of advertising and solicitation. Many problems connected with business require the skills of both lawyers and certified public accountants and there is every reason for a close and friendly cooperation between the two professions. Lawyers should encourage their clients to seek the advice of certified public accountants whenever accounting problems arise and certified public accountants should encourage clients to seek the advice of lawyers whenever legal questions are presented.

2. *Preparation of Federal income tax returns.*—It is a proper function of a lawyer or a certified public accountant to prepare Federal income tax returns.

When a lawyer prepares a return in which questions of accounting arise he should advise the taxpayer to enlist the assistance of a certified public accountant.

When a certified public accountant prepares a return in which questions of law arise, he should advise the taxpayer to enlist the assistance of a lawyer.

3. *Ascertainment of probable tax effects of transactions.*—In the course of the practice of law and in the course of the practice of accounting, lawyers and certified public accountants are often asked about the probable tax effects of transactions.

The ascertainment of probable tax effects of transactions frequently is within the function of either a certified public accountant or a lawyer. However, in many instances, problems arise which require the attention of a member of one or the other profession, or members of both. When such ascertainment raises uncertainties as to the interpretation of law (both tax law and general law), or uncertainties as to the application of law to the transaction involved, the certified public accountant should advise the taxpayer to enlist the services of a lawyer. When such ascertainment involves difficult questions of classifying and summarizing the transaction in a significant manner and in terms of money, or in-

interpreting the financial results thereof, the lawyer should advise the taxpayer to enlist the services of a certified public accountant.

In many cases, therefore, the public will be best served by utilizing the joint skills of both professions.

4. *Preparation of legal and accounting documents.*—Only a lawyer may prepare legal documents such as agreements, conveyances, trust instruments, wills, or corporate minutes, or give advice as to the legal sufficiency or effect thereof, or take the necessary steps to create, amend, or dissolve a partnership, corporation, trust, or other legal entity.

Only an accountant may properly advise as to the preparation of financial statements included in reports or submitted with tax returns, or as to accounting methods and procedures.

5. *Prohibited self-designations.*—An accountant should not describe himself as a "tax consultant" or "tax expert" or use any similar phrase. Lawyers, similarly, are prohibited by the canons of ethics of the American Bar Association, and the opinions relating thereto, from advertising a special branch of law practice.

6. *Representation of taxpayers before Treasury Department.*—Under Treasury Department regulations lawyers and certified public accountants are authorized, upon a showing of their professional status, and subject to certain limitations as defined in the Treasury rules, to represent taxpayers in proceedings before that Department. If, in the course of such proceedings, questions arise involving the application of legal principles, a lawyer should be retained, and if, in the course of such proceedings accounting questions arise, a certified public accountant should be retained.

7. *Practice before the Tax Court of the United States.*—Under the Tax Court rules nonlawyers may be admitted to practice.

However, since upon issuance of a formal notice of deficiency by the Commissioner of Internal Revenue a choice of legal remedies is afforded the taxpayer under existing law (either before the Tax Court of the United States, a U.S. district court, or the Court of Claims), it is in the best interests of the taxpayer that the advice of a lawyer be sought if further proceedings are contemplated. It is not intended hereby to foreclose the right of nonlawyers to practice before the Tax Court of the United States pursuant to its rules.

Here also, as in proceedings before the Treasury Department, the taxpayer, in many cases, is best served by the combined skills of both lawyers and certified public accountants, and the taxpayers, in such cases, should be advised accordingly.

8. *Claims for refund.*—Claims for refund may be prepared by lawyers or certified public accountants, provided, however, that where a controversial legal issue is involved or where the claim is to be made the basis of litigation, the services of a lawyer should be obtained.

9. *Criminal tax investigations.*—When a certified public accountant learns that his client is being specially investigated for possible criminal violation of the income tax law, he should advise his client to seek the advice of a lawyer as to his legal and constitutional rights.

Conclusion.—The statement of principles should be regarded as tentative and subject to revision and amplification in the light of future experience. The principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public. It is recommended that joint committees representing the local societies of both professions be established. Such committees might well take permanent form as local conferences of lawyers and certified public accountants patterned after this conference, or could take the form of special committees to handle a specific situation.

Senator LONG. We would be happy to have you summarize your statement.

Mr. SONNETT. Yes, Mr. Chairman.

Do you have any preliminary remarks to make, Mr. Flynn?

Mr. FLYNN. No, sir.

Mr. SONNETT. I will proceed, then.

I am in the happy position of being a member of the bar of the District of Columbia, New York, and the State of Florida. And I

hold a Treasury Department card, and I have paid my taxes, so I feel pretty secure.

Senator LONG. It would seem to me that you are set to practice summers in New York and winters in Florida, and stop by Washington on the way back and forth.

Mr. SONNETT. We have, Mr. Chairman, as I am sure you know—"we" speaking in this instance as counsel for the American Institute of Certified Public Accountants, which is the only national organization of certified public accountants, having a membership of more than 53,000 throughout the country—we have over the years put in a great deal of time and effort in working with the American Bar Association in the rather difficult field of practice before the Treasury Department. And I am sure that I am telling you nothing new when I invite your attention to the exhibits annexed to our statement, the first being the point report by the committees of the American Bar Association and the American Institute of Accountants entitled "The Professional Relations of Lawyers and Certified Public Accountants."

We have also annexed to our statement the Treasury Department interpretation of the particularly relevant section of Treasury Department Circular 230.

And we have annexed a statement of principles relating to practice in the field of Federal income taxes which was promulgated jointly by the National Conference of Lawyers and Certified Public Accountants.

For some years now, Mr. Chairman, relations between the certified public accountants of this country and the bar represented by the American Bar Association have been exceedingly harmonious, and they have been characterized by cooperation and by mutual efforts to solve the problems which admittedly are of concern not only to the public, but to the members of both of the professions.

Senator LONG. I understand that relationship has been very cordial.

Mr. SONNETT. They have been.

I am happy to say that I think you will hear when the Bar Association witness testifies that there is substantial agreement in many areas with respect to the present position.

Fundamentally, the position of the accountants with respect to the power-of-attorney provisions which you referred to earlier, I think, is about the same as that of the Bar Association and that of the Treasury. I do not think the certified public accountants nor the bar as a whole, have found the power-of-attorney procedure to be burdensome in any respect. Indeed, it provides a very substantial measure of safety for the public and for the client, and for either the lawyer or the certified public accountant.

Senator LONG. Are you referring to the power of attorney?

Mr. SONNETT. Yes, Mr. Chairman.

I think when we realize that so much of what is done here day in and day out around the country in informal conference, and without a record, it involves money, I think we will agree that it is highly desirable that the limits of authority with respect to particular matters,

particular representatives, be reduced to writing, and in that way, there can be no argument later about who was authorized to do what with respect to a particular matter.

The concern we have with the present bill is only with respect to a portion of it. And that is the portion which provides for automatic admission. We are in agreement with the position of the Treasury that the present procedures are desirable, that they are not burdensome, and we think should be continued. Certified public accountants' have not found that present procedures impose any real handicap. And I might say, although I am not a tax specialist, I have done some tax work, and members of my firm are tax specialists, that we have not found that any of the admission procedures, Treasury cards, and so forth, have created the slightest obstacle to our doing what we hope has been a very satisfactory job for our clients.

Accordingly, we would recommend most respectfully that the provision for automatic admissions do not apply in the case of the Treasury Department. But if it is to remain in the bill, we would suggest that there be changes similar to the ones which were worked out with the House committee last year. And those changes specifically confirm the right of certified public accountants to appear before the Treasury.

That language, we think, is reasonably good as a solution, on the assumption that the Treasury is not to be excluded from that provision of the bill.

Senator LONG. Do you understand that if that could be done, that you and your society would support the bill?

Mr. SONNETT. I think that is a correct statement, sir, with the observations about the power of attorney which I have supplied. There are language problems on that. I think the language in the present bill is too limited. And I think the bar association thinks so also. And I think that you will find that the bar association probably has some language to suggest in this regard.

We would be very happy, Mr. Chairman, to make any suggestions with respect to language that you and counsel for the committee might think would be of some help to you.

Senator LONG. I think they would be of help. And I am sure if you would submit those suggestions in writing to your staff—or perhaps you could meet with Mr. Fensterwald or some member of the staff in an attempt to work out some of the language difficulty.

Mr. SONNETT. We would be very happy to do that.

(The information follows:)

JUNE 9, 1965.

Mr. THOMAS D. FLYNN,
President, American Institute of Certified Public Accountants,
New York, N.Y.

DEAR MR. FLYNN: Thank you most sincerely for your recent letter. I have read it and the enclosure with much interest.

As you requested, the letter and the enclosure shall be made a part of the record of our hearings.

Appreciate your assistance to the subcommittee.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS,
New York, N.Y., May 26, 1965.

HON. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure, Senate
Judiciary Committee, Washington, D.C.*

MY DEAR SENATOR LONG: In accordance with your request at the hearings on May 12 regarding S. 1758 and similar legislation, we are submitting our recommendations for amendment to S. 1758.

For your convenience, our recommendations are embodied in the enclosed draft bill. These recommendations, if adopted, would eliminate the features of S. 1758 which disturbed so many of our members. We have already furnished Mr. Donald C. Beelar with a copy of our recommendations for the information of the American Bar Association.

We appreciate the courtesy which you showed us at the hearings on May 12 and this opportunity to present our further views. We respectfully request that this letter and our draft bill be included in the printed record of the hearings on S. 1758.

We would be pleased to meet with you or your staff to provide any further amplification of our recommendations.

Very truly yours,

THOMAS D. FLYNN, *President.*

S. 1758 INCORPORATING RECOMMENDATIONS OF THE AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS

AN ACT

*Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled,*

PRACTICE BEFORE FEDERAL AGENCIES

SECTION 1. (a) Any person who is (i) a member in good standing of the bar of the highest court of any State, possession, territory, commonwealth, or the District of Columbia, in which he resides or maintains an office, shall be admitted to practice to represent others before any agency; or (ii) duly qualified to practice as a certified public accountant in any State, possession, territory, commonwealth or the District of Columbia shall be admitted to practice to represent others before the Internal Revenue Service of the Treasury Department.

(b) Any person who possesses the qualifications described in section 1(a) of this Act may engage in practice before any agency described therein upon the filing of a statement certifying that he is so qualified. Thereafter, until such statement is withdrawn or modified, such person's appearance before such agency or his signature in any particular matter before it shall constitute a representation to that agency that as of that time he is currently qualified under section 1(a) of this Act and is authorized to represent the particular party in the particular matter in whose behalf he acts before that agency. An agency may provide for the filing of a written notice of appearance in any matter which may incorporate a statement of qualification under section 1(a) of this Act. Any misrepresentation under this Act shall subject the person to the provision of section 1001 of title 18 of the United States Code.

(c) Nothing herein shall be construed (i) either to grant or to deny to any person who is not a lawyer, or who is a lawyer or a certified public accountant but not qualified under section 1(a) of this Act, the right to appear for or represent others before any agency or in any agency proceeding; (ii) to authorize or limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; (iii) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation of an agency; or (iv) to prevent an agency from requiring the filing or a power of attorney as a condition to the settlement of any matter involved the determination of a tax liability or the payment of money.

SERVICE UPON ATTORNEYS OR OTHER QUALIFIED REPRESENTATIVE

SEC. 2. When any participant in any matter before an agency is represented by an attorney at law or other qualified representative under the provisions of this Act and that fact has been made known in writing to the agency, any notice or other written communication required or permitted to be given to such participant in such matter shall be given to such attorney or other qualified representative. Where any other method of service is specifically provided by statute, service shall also be made as so provided. If a participant is represented by more than one attorney or other qualified representative service by or upon any one of such attorneys or other qualified representative (as designated by the participant) shall be sufficient.

GENERAL

SEC. 3. To the extent necessary, each agency shall implement this Act with appropriate rules defining the proceedings to which it applies and the method by which representation is recognized.

DEFINITION OF AGENCY

SEC. 4. As used in this Act, "agency" shall have the same meaning as it does in section 2(a) of the Administrative Procedure Act, as amended (60 Stat. 237, as amended).

MAY 26, 1965.

Mr. SONNETT. In view of the time, may I compress what I have to say and ask my associate to comment?

Fundamentally, the interests of the accountants of the country is in protecting not only the public interest, but their perfectly natural interest in this very important part of their practice. It is an essential part, and it is in the public interest. The accountants, the Treasury and the bar are agreed to that. And I would hope that nothing would be done in this bill which would upset that harmonious relationship. The relationships are working out very well.

This bill insofar as it provides for automatic admission, we think, presents some possible threat to the certified public accountant, needlessly so, we think, but if it is going to be done, we would like to suggest language to include them specifically.

Senator LONG. I am sure the sponsor of this bill would have no desire to upset this harmonious and cordial relationship and understanding that has been existing between the bar and the members of your client's profession. I think you have done a great job in working out these difficulties which have resulted in great protection to the public interest.

Do the other gentlemen with you have some comments?

Mr. FLYNN. I do not.

Mr. GRAVES. No, sir.

Senator LONG. Mr. Sonnett.

Mr. SONNETT. As to S. 1879, which just recently came to our attention, we had time to give it only a very minor examination. There may be some minor problems that we have with it, and we would like to submit some supplemental comments in writing if we may.

Senator LONG. The Committee would be happy to receive them.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. Mr. Sonnett, is it true that both the groups of lawyers and the CPA's in a sense are responsible for the qualification itself of their members and also their ethics, and that that would be the ground for putting them together in these exemptions?

Mr. SONNETT. I think that is a fair statement. As you know, the standards for admission as a certified public accountant are equivalent in a sense to those for admission to the bar. And if the conclusion should be reached that a member of the bar is thereby automatically qualified for practice before the Treasury, if that is your legislative judgment—and I might say I have some problems with that as a practitioner for 30 years—but if that is the judgment, I think by the same reason, clearly, certified public accountants should be included for similar reasons.

Mr. FENSTERWALD. Do you police both the competence and the ethics of your members?

Mr. SONNETT. That is correct.

Mr. FENSTERWALD. Thank you.

Senator LONG. Thank you gentlemen very much. We appreciate your courtesy in summarizing your statement.

Mr. SONNETT. We appreciate your courtesy in having us here.

Senator LONG. Our next witness is Mr. Stuart Frankford, past president of the National Society of Public Accountants.

Mr. Frankford.

STATEMENT OF STUART W. FRANKFORD, PAST PRESIDENT, NATIONAL SOCIETY OF PUBLIC ACCOUNTANTS; ACCOMPANIED BY STANLEY H. STEARMAN, GENERAL COUNSEL, NATIONAL SOCIETY OF PUBLIC ACCOUNTANTS

Mr. FRANKFORD. Mr. Chairman, and gentlemen, I have with me the general counsel for the National Society of Public Accountants, Stanley H. Stearman.

Mr. Chairman, I would like to read this statement; it is not lengthy. And at the conclusion of it, I would like to make a few other observations if you would permit me.

Senator LONG. Might the Chairman suggest to you if it would be possible, and not in any way curtail your presentation, if you would summarize your statement, we could put your statement in the record. We have copies and the staff has gone over it. We are running very short on time. If that can be done, we would be very grateful to you. However, we want to give you what time you need.

Mr. FRANKFORD. Thank you. I think the statement here speaks for itself. And without going into detail or even summarizing it, because I think it does speak for itself, I would like to make some additional observations.

Senator LONG. Let me say, then, at this point your statement in its entirety will be printed in the record.

Mr. FRANKFORD. Thank you very much.

(The statement of Mr. Frankford is as follows:)

TESTIMONY OF NATIONAL SOCIETY OF PUBLIC ACCOUNTANTS ON S. 1758

Gentlemen, my name is Stuart W. Frankford. I am a practicing accountant with offices in Detroit, Mich. I have been in the field of public accounting in Michigan since 1942.

I am appearing here today as the spokesman for the National Society of Public Accountants. I have been associated with the national society for many years and have served the society in various capacities. I am a past president, a past

district governor, and I have chaired several major committees of the society, including our committee on national affairs.

The National Society of Public Accountants is a nonprofit, individual membership organization which was formed in 1945. Our 11,000 members are engaged in the practice of accountancy in all of the States, the District of Columbia, and several U.S. territories. The national society is dedicated to promoting high standards of proficiency and integrity so that members of the accounting profession may render an effective and efficient service to the public.

Our members have primarily small- to medium-sized accounting practices and serve the needs of small- to medium-sized business firms. They offer a complete range of accounting services, including a fairly heavy emphasis on tax services. This tax practice includes not only the preparation of tax returns, but the representation of taxpayers before the Internal Revenue Service.

It is because of the volume of tax practice which our members are engaged in that we have an interest in the pending legislation and have asked to appear before you today. While the bill, of course, applies to practice before all Federal agencies, our primary interest and thus our comments will be directed to practice before the U.S. Treasury Department and, more particularly, the Internal Revenue Service.

Two surveys conducted within the past year by the national society among its members reveal that society members prepare approximately 6 million tax returns a year for their clients. This is a rather substantial amount of tax practice by any standards. In addition to the preparation of returns, our surveys indicate that in 1964 our members provided assistance and advice to their clients in connection with 70,368 office audits conducted by the Internal Revenue Service, plus some 39,582 field audits. Thus, it is apparent that the members of the national society have a considerable interest in any proposal which bears on the matter of tax practice and the representation of taxpayer clients before the Internal Revenue Service.

It is the view of the National Society of Public Accountants that no real and tangible need exists for enactment of S. 1758 as it relates to practice before the Internal Revenue Service. We believe it is in the best interests of the public for all persons who wish to represent clients before IRS to meet specified admission requirements as established by the Treasury Department and administered by the Office of the Director of Practice.

We believe that those professional practitioners who assist the Internal Revenue Service in the administration of the tax laws through their assistance, advice, and services to the taxpaying public occupy a key position of confidence and trust. It is imperative that the business community, as well as individual taxpayers, be able to rely with the utmost dependability on those practitioners who offer to represent their interests in matters before the Internal Revenue Service.

Therefore, it is our belief that it is neither necessary nor desirable to waive admission procedures for any group with respect to practice before the U.S. Treasury Department and the Internal Revenue Service. We feel that all practitioners who come in direct contact with the Service should be accountable to the Office of the Director of Practice, not only for their ethical conduct, but their technical competence as well.

It is our opinion that the direct and personal relationship between the Internal Revenue Service and millions of American taxpayers, both businesses and individuals, requires a close and continuing supervision by the Treasury Department of those who would represent the public in important tax matters.

We endorse a 1956 statement by the Secretary of the Treasury contained in an "Official Interpretation of Departmental Circular 230." We believe that statement, which relates to the Department's responsibility for regulating practice before it, to be particularly germane to the considerations involved in a study of S. 1758.

In that interpretation, the Treasury Secretary said:

"Congress has given the Treasury Department the responsibility of regulating practice before the Department. It is in the exercise of this responsibility that the Department has issued the rules and regulations set forth in Circular 230, taking into consideration, among other things, the need of taxpayers for tax advice and assistance, the number of tax returns filed each year, the volume and complexity of problems relating thereto, the skills and training required for proper representation of taxpayers' interests and the availability of people who can provide such service.

"The Department believes the standards prescribed in Circular 230 have generally operated in a highly satisfactory manner, have made available to taxpayers representatives to assist them in presenting their interests to the Department, and have facilitated fair and orderly administration of the tax laws."

The conditions existing in 1956 which prompted the above statement continue today, but perhaps to an even greater degree. The laws are more complex, the number of tax returns filed has sharply increased and the overall need of the public for competent and ethical tax services has become more pronounced. We do not believe that the needs of the public can be met by anything less than a continuation of the existing procedures regarding admission and practice before the Treasury Department.

In fact, it would probably be advisable in the public's interest to require that all persons who wish to practice before IRS be required to pass a written examination on Federal tax laws, regulations, and procedures. Such a test, we believe, would clearly demonstrate an individual's abilities in the highly technical Federal tax field and thus assure the public of the specialized qualifications he professes to have.

It is, therefore, our suggestion that the Treasury Department be exempted from the provisions of S. 1758 for the many reasons which we have set forth thus far.

We understand, however, that there has been a suggestion advanced that certain members of the public accounting profession be granted the same treatment under this bill with respect to practice before the Internal Revenue Service as would be granted lawyers. We recommend that if such a proposal is given favorable consideration, all independent practicing accountants should be recognized equally.

If some accountants are acknowledged by Congress as having the integrity and ability to represent clients before the Internal Revenue Service, then all accountants who are likewise ethical and competent to represent clients in tax matters should be similarly recognized.

For example, as stated earlier, the members of the National Society of Public Accountants provide the business community and individual members of the public with a considerable amount of income tax service and advice. The volume of work and services in the tax field rendered by members of the national society is such that as a group they assist in the preparation of more tax returns for individual and business taxpayers than any other comparable segment of the entire tax practice profession.

All members of the National Society of Public Accountants have pledged to conduct their practices in accordance with a rigid code of ethics and rules of professional conduct. This serves to assure a high measure of integrity and experience in their relations with the public, the Internal Revenue Service, and their professional colleagues.

We earnestly recommend that if favorable consideration is given to the suggestion that S. 1758 be amended to include some members of the public accounting profession insofar as practice before the Internal Revenue Service is concerned, the bill be further amended in an equitable manner to include other qualified practicing accountants who are engaged in rendering tax services and advice.

The National Society of Public Accountants and its 11,000 members throughout the country are anxious to work harmoniously, and we hope effectively, with the Internal Revenue Service and the Congress in all matters relating to Federal taxation and practice before the Internal Revenue Service. An important objective of our membership is to cooperate in the administration of the Federal tax laws and to serve the needs of the taxpaying public to the best of their ability.

On behalf of the National Society of Public Accountants, may I extend our appreciation for being given this opportunity to appear before you and to express our views on the pending bill. We trust our comments and suggestions will be of assistance in connection with your studies. I would be pleased at this time to answer any specific questions which you may have.

Mr. FRANKFORD. Of course, we are only concerned at the moment with S. 1785, as it affects nonattorneys, should we say. We believe that if special exemption is going to be made for any one group, that it should be all-inclusive for all ethical and competent practitioners.

Over the years, actually from 1957 or 1958, a series of meetings were held with the Treasury Department and the Internal Revenue Service along with other professional associations, including the American Bar Association and the American Institute of Certified Public Accountants, discussing who could and who could not represent clients before the Internal Revenue Service in tax litigation.

In 1958, Circular 230 was amended, whereby the preparers of returns, upon authorization of the client, would be allowed to represent the client through the agent level, and past the agent level into the informal conference, but they would have to pass an examination if they were not an attorney or certified public accountant, an examination as provided by Treasury.

Senator LONG. Excuse me for interrupting you. As I understand, does the Treasury Department give the CPA's an examination before they admit you to practice before the agency?

Mr. FRANKFORD. No; they do not.

Senator LONG. They do not do that for lawyers. So actually, they do not pass on the competency of an attorney or an accountant when they appear before you?

Mr. FRANKFORD. That is correct; they do not.

Senator LONG. What do they pass on so far as your organization is concerned?

Mr. FRANKFORD. The noncertified accountants in our organization take a special examination as provided by the Treasury. And since 1959, it has been held annually in September.

Senator LONG. And for CPA's they do not?

Mr. FRANKFORD. That is correct.

It is a known fact, Mr. Chairman, in printed statistics, that slightly in excess of 97 percent of all tax cases are settled at the agent level, without the requirement of going through the informal conferences or the appellate staff or the tax court.

We believe that because of the technical information and the confidential nature of the information and the need for competence, all practitioners who represent clients above the informal conference should take an examination as provided by Treasury. Since the inception of the examination, I do not have the exact number, but certainly thousands have passed their examination, and now have the right to represent clients at all levels that any enrolled person can.

Now, as a side position, and not a position that our national society has taken as a stand, we wonder about the advisability of nonattorneys being able to practice law. And it is my considered judgment that before the appellate staff, and in the Tax Court of the United States, only attorneys should be able to practice. We question the wisdom of nonattorneys practicing in these courts.

Senator LONG. I have that same feeling, too. I did not quite follow you. Where there is someone who is not an attorney who is practicing law that is a nonattorney? I did not follow you.

Mr. FRANKFORD. I suppose it would fall back on what is considered unauthorized practice of law. But if you are a Treasury cardholder, you can prepare formal briefs, and you can represent the clients at the appellate staff, without an attorney being present.

Senator LONG. Without a legal attorney?

Mr. FRANKFORD. Yes, sir; without legal attorney.

Senator LONG. As a general rule, what group does that?

Mr. FRANKFORD. Any Treasury cardholder, sir.

Senator LONG. Whether it is your group or the CPA's?

Mr. FRANKFORD. Yes.

Senator LONG. Are the attorneys the only group of Treasury cardholders?

Mr. FRANKFORD. Primarily; yes. There are some other Treasury cardholders—past employees of the Internal Revenue Service with 7 years' experience upon application will be given a Treasury card, provided the moral character of the applicant is good and the other investigations by the Service finds nothing wrong.

Mr. FENSTERWALD. Do you have to be an accountant to take this examination?

Mr. FRANKFORD. No; you do not.

Mr. FENSTERWALD. Could anybody take it for a Treasury card?

Mr. FRANKFORD. There are certain qualifications. Basically, they should be in the practice of accounting, but it does not have to be public, it could be a person in private industry. You have to prepare a questionnaire or application, I should say, for taking the examination. And we have found since the instigation of this that the examination has been most reasonable. I believe those passing are someplace between 58 and 60 percent of those sitting the first time.

But as I say, this is not the official position of the National Society of Public Accountants, but one which we have discussed and we are leaning this way, that attorneys and only attorneys should represent clients before the courts of law of the land. And in view of the fact that 97 percent of the cases are settled at the agent level, perhaps the Treasury card should allow the person to represent a client at the informal group conference. And after that, an attorney should take over the case with the factual preparation by the accountant.

I believe, Mr. Chairman, that along with the prepared statement, these remarks, unless there are other questions, pretty much conclude our testimony.

Senator LONG. Do you have any questions, Mr. Fensterwald?

Mr. FENSTERWALD. No, sir; I do not.

Senator LONG. Mr. Frankford, thank you and your associate for a statement. It has been very helpful to us.

Mr. FRANKFORD. Thank you very much.

Senator LONG. Mr. Burnham.

Mr. Burnham, you may proceed. We appreciate your being here.

STATEMENT OF GEORGE B. BURNHAM, PRESIDENT, BURNHAM CHEMICAL CO., WASHINGTON, D.C.

Mr. BURNHAM. My name is George B. Burnham, and I am president of the Burnham Chemical Co. It is my desire in this short statement to bring to the attention of this committee a breach of justice on the part of our Government which shows a real need for the passage of S. 1160.

On February 21, 1913, Searles (Dry) Lake, Calif., was withdrawn from the public domain, because it contained large deposits of pot-

ash, sodium borate, and other minerals. On October 2, 1917, a leasing law was passed to leave the deposits to citizens of our country with royalties payable to the Government. I was one of the lessees.

Two weeks after I was granted a lease, an unlawful patent was granted to my competitor, a foreign-owned corporation. Patents do not require payment of royalties.

Government officials concealed certain facts which would have demonstrated the illegality of the patents. This was done secretly, behind "closed doors," and it was impossible for anyone to know the facts. The foreign-owned company had illegal advantage over us and also the Government was deprived of royalties on the borax and potash production.

The following words appeared on the Government document: "Foreign ownership—For office consideration only," and it was concealed from the public for 33 years. Of course, not having access to the document, I could not test the validity of the patents in court.

In 1950, the Interior Department put that confidential document in the National Archives. In late 1953, I found it. Our attorneys then filed suit in the Court of Claims early in 1955. After the trial, the court dismissed the case because of the statute of limitations. If that document had not been suppressed, we would not now be trying to secure legislation to have the statute of limitations waived and the case adjudicated on its merits.

To sum up in a few words, this lack of freedom of information resulted in the loss of millions of dollars to the Government and untold damage to private enterprise.

I thank you.

Senator LONG. Thank you, Mr. Burnham. We appreciate your coming to present this statement.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I do not think so. I have met with Mr. Burnham before, and I have asked the questions I have.

Senator LONG. Thank you very much, Mr. Burnham.

(The prepared statement and supplemental statement of Mr. Burnham follow:)

FREEDOM OF INFORMATION

Statement of G. B. Burnham, president of Burnham Chemical Co.

My name is George B. Burnham and I am president of the Burnham Chemical Co., 132 Third Street, SE., Washington, D.C. It is my desire in this short statement to bring to the attention of this committee a breach of justice on the part of our Government which shows a real need for the passage of S. 1160.

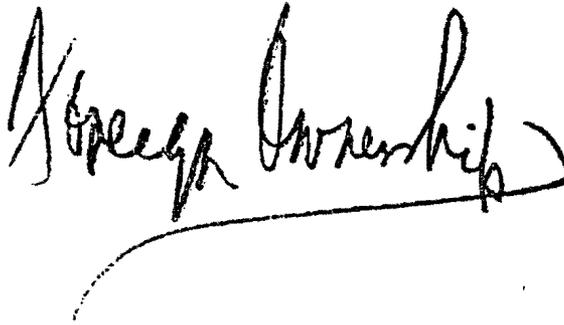
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To sum up in a few words, this lack of freedom of information resulted in the loss of millions of dollars to the Government and untold damage to private enterprise.

WASHINGTON, D.C., May 20, 1965.

Senator EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Senate Office Building, Washington, D.C.
 (Attention of Mr. Bernard Fensterwald, Jr., chief counsel).

DEAR SIR: I believe that a "freedom of information" law in the United States would be of great benefit in helping to solve present world problems, because it would set the example for other nations to go and do the same.

According to the enclosed U.S. postage stamp issued about 1950, we already have four freedoms and "freedom of information" would give us one more freedom. By disclosing that fact to other countries, we would enhance and promote the virtues of the free world and win men to our great crusade.

Furthermore, as mentioned in the enclosed supplemental statement, if we make special efforts to pass a freedom of information law now, in this session of Congress, it would improve the image of the United States at a time when it is so much needed.

Therefore, I would like to submit the enclosed supplemental statement to be printed in the record of the hearings on S. 1160, but only if you feel that it might help.

Sincerely,

G. B. BURNHAM.

FREEDOM OF INFORMATION

Supplemental statement of G. B. Burnham, Washington, D.C.

On May 12, 1965, I submitted a brief statement to the Subcommittee on Administrative Practice and Procedure. Hearings to consider S. 1160, the freedom of information bill, and other bills took place on May 12, 13, and 14.

Now, I would like to present to the subcommittee another vital aspect of this problem, which I do not believe has been discussed. "Freedom of information" will clearly promote better understanding between nations. We should pass the bill at this session of Congress and then suggest that other nations enact a similar law.

William L. Shirer, in his book "The Rise and Fall of the Third Reich," on page xi, says:

"It is quite remarkable how little those of us who were stationed in Germany during the Nazi time, journalists and diplomats, really knew of what was going on behind the facade of the Third Reich. A totalitarian dictatorship, by its very nature, works in great secrecy and knows how to preserve that secrecy from the prying eyes of outsiders."

If the people of Germany and the world of diplomats had known what was going on behind Nazi "closed doors," there might have been no World War II.

If every nation had a "freedom of information" law like the one proposed by S. 1160, all men could get the facts. Minority groups, who oppose their government, and who desire peace, justice and good will, could get the necessary information for them to oppose any wrongdoing of their government officials. It would help promote the two-party system.

If we make special efforts to pass a freedom of information law now, in this session of Congress, and emphasize that fact to all nations, it would improve the image of the United States and thus help to create peace and harmony at a time when it is so much needed.

Therefore, the passage of bill S. 1160 will set a splendid example for men of good will in other nations to insist on their governments enacting a similar law. It will be a big step forward to help establish an enduring world peace.

Senator LONG. This will conclude our hearings for today. We intended to have a short session this afternoon, but we now find that that is impossible. The committee will now stand in recess until 10 o'clock tomorrow morning, and will meet in this room.

(Whereupon, at 12:05 p.m., the committee recessed, to reconvene at 10 a.m., Thursday, May 13, 1965.)

ADMINISTRATIVE PROCEDURE ACT

THURSDAY, MAY 13, 1965

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 1318, New Senate Office Building, Senator Edward V. Long (chairman of the subcommittee) presiding.

Present: Senators Long and Burdick.

Also present: Bernard Fensterwald, Jr., chief counsel and Cornelius B. Kennedy, minority counsel; Kathryn M. Coulter, special assistant; Charles H. Helein, assistant counsel; Gordon H. Homme, assistant counsel.

Senator LONG. The committee will be in order.

At this point, without objection, I desire to place in the record a resolution of the St. Louis Chapter, the Missouri Society of Certified Public Accountants dealing with S. 1758.

(The resolution is as follows:)

RESOLUTION

Be it resolved, That, in view of legislation (S. 1758) now before the Congress, which would impair the right of the Treasury Department to register and regulate those who may practice before it, the Missouri Society of Certified Public Accountants hereby records its belief that such legislation is, as it applies to the Treasury Department, unnecessary and disruptive of procedures which have proved to be neither burdensome nor in contradiction of the public interest; be it further

Resolved, That, since the cited legislation would admit, unconditionally, lawyers (and only lawyers) in good standing to practice before the Treasury Department, S. 1758, is, in its present form, directly discriminatory against an equally large number of certified public accountants, now regulated by their States as qualified professionals, and currently registered to practice before the Treasury Department; be it further

Resolved, That, since S. 1758 would, in the case of the Treasury Department virtually eliminate the power of attorney procedures only for lawyers, and, since it would thus directly interfere with the taxpayer's right to specify and limit the matters which a taxpayer's selected representative may handle; this legislation has an unfair and adverse effect on the taxpayer and on other chosen representatives before Treasury; be it further

Resolved, That great care needs to be exercised lest the power of the Treasury Department to admit nonlawyers be inadvertently impaired by Federal statute, particularly in view of the *Sperry* decision which focused such determination on the Federal Government; be it further

Resolved, That no action should be taken which would, by omitting the Treasury's right to establish a practice register, also have the effect of impairing Treasury's right to discipline, and where necessary, to disbar; be it further

Resolved, That the Missouri Society of Certified Public Accountants feels that no need has been shown for S. 1758 and related legislation in the case of the Treasury Department; be it further

Resolved, That, if the Congress decides such legislation to be in the public interest insofar as it applies to practice before the Treasury Department, the Missouri Society of Certified Public Accountants hereby urges that the legislation be amended to provide for correction of all of the inequities cited above as applicable to certified public accountants.

ST. LOUIS CHAPTER, MISSOURI SOCIETY
OF CERTIFIED PUBLIC ACCOUNTANTS.
KENNETH J. BAUER, *Vice President*.

Dated April 27, 1965.

Senator LONG. Our first witness this morning will be Mr. Robert M. Benjamin, chairman of the Committee on Code of Federal Administrative Procedure, and Mr. Richard H. Keating, chairman of the Administrative Law Section ad hoc committee on the Practice Act, of the American Bar Association.

The other gentlemen at the table will be introduced to the committee for the record.

STATEMENT OF ROBERT M. BENJAMIN, CHAIRMAN, COMMITTEE ON CODE OF FEDERAL ADMINISTRATIVE PROCEDURE; ACCOMPANIED BY CHISMAN HANES, CHAIRMAN, ADMINISTRATIVE LAW SECTION LIAISON COMMITTEE; CHARLES D. ABLARD AND BEN C. FISHER, MEMBERS, COMMITTEE ON CODE OF FEDERAL ADMINISTRATIVE PROCEDURE; AND JOSEPH B. HYMAN

Mr. BENJAMIN. Sitting to my left is Mr. Chisman Hanes, who is chairman of the Administrative Law Section Liaison Committee on the Code of Federal Administrative Procedure. He is working closely with us, and we are working closely in cooperation with the administrative law section. And Mr. Hanes is also our expert on section 3. He has probably studied that more than anybody else.

Senator LONG. We are glad to have you with us, Mr. Hanes.

Mr. BENJAMIN. And at the table behind are two other members of my committee on the code, who will be glad to answer questions.

Senator LONG. If you gentlemen care to have seats at the table we will be glad to have you here.

Mr. BENJAMIN. They are Mr. Charles D. Ablard and Mr. Ben C. Fisher. There is also Mr. Joseph B. Hyman, who I know needs no introduction to you or to your staff.

Mr. Chairman, I know that you have very many witnesses on this act, and since I have appeared a number of times, I think what I will do is primarily to submit a fairly long statement that I have brought with me, and then talk about a few things that seem to me important, and then be ready to answer such questions as the committee may want to ask. I am not going to read this long prepared statement.

Senator LONG. The committee appreciates that. And without objection, your entire statement will be printed in the record at this point.

(The entire statement of Mr. Benjamin is as follows:)

STATEMENT OF ROBERT M. BENJAMIN, CHAIRMAN, AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON CODE OF FEDERAL ADMINISTRATIVE PROCEDURE

Mr. Chairman and members of the subcommittee, I greatly appreciate this opportunity of appearing again before the subcommittee, this time in its hearings on S. 1336, the latest version of the bill to amend the Administrative Procedure Act of 1946 introduced by Senator Dirksen for himself and the chairman.

I had the privilege of testifying last July on S. 1663, 88th Congress, the immediate predecessor of S. 1336. Those hearings dealt also with a draft of S. 1663 as tentatively revised by the staff of the subcommittee and published in Committee Print No. 2 dated April 20, 1964, together with the then version of the American Bar Association's proposed Code of Federal Administrative Procedure (S. 2335, 88th Cong.). Before that, I had had an opportunity to testify in October 1963 on S. 1666, a bill to amend section 3 of the Administrative Procedure Act of 1946, dealing with the subject of "Public Information"; and in earlier years I had testified before the subcommittee, then under the chairmanship of Senator Carroll, on a number of related subjects.

My testimony last July was quite extensive; and it was supplemented by other communications with the subcommittee and its staff, including my part in 3 days of public conferences with the staff in March 1964. What I said on those and earlier occasions still represents the views of the American Bar Association. To avoid undue length in this statement and in my present testimony, I should like respectfully to refer the subcommittee to what I wrote and said last year with respect to the then S. 1663, much of which is still relevant to S. 1336, instead of going into too much repetition here.

I appear here, as I did on the earlier occasions, as chairman of the American Bar Association's Special Committee on Code of Federal Administrative Procedure, which is charged by the association with representing before the Congress its views regarding the association's own proposals for a general revision of the Administrative Procedure Act of 1946 and other related proposals, specifically S. 1336.

As in my earlier appearances, I shall have something to say occasionally about the association's own proposed code. This has recently been reintroduced by Senator Ervin as S. 1879, 89th Congress, incorporating a few changes from S. 2335, 88th Congress, several of which I had forecast in my testimony last July. We believe strongly in the merits of our proposed code, and we are gratified to see that in a good many instances it has been useful to the subcommittee in the drafting of the successive versions of the subcommittee's own bill.

We are gratified also, as will appear in my testimony, to find ourselves in agreement with by far the greater part of the changes made by S. 1336 in last year's S. 1663. We believe that S. 1336 represents encouraging progress toward a satisfactory general revision of the Administrative Procedure Act of 1946, a project which the American Bar Association has urgently advocated.

I turn now to various provisions of S. 1336 as to which present comment seems desirable.

Section 2(c) includes an "exception from a rule" in its definition of "rule," and defines "rulemaking" as "agency process for the formulation, amendment, repeal of, or exception from a rule." We believe that the words "exception from" should be omitted. A general exception from the operation of a rule would be in effect an "amendment," and thus already covered in the definition of rulemaking. The exception of an individual from the operation of a rule, leaving his competitors (for example) subject to the rule, should in our view at least usually be by an adjudicatory procedure, and this would raise questions as to, for example, the grounds on which such an exception might be granted, and those who should be entitled to notice of the proceeding and an opportunity to oppose the application.

The same comment applies to section 4(g) of S. 1336, which provides for petitions "for the issuance, amendment, exception from, or repeal of a rule," where we think the words "exception from" should be omitted. It is, I think, useful to repeat here our comment of last year on section 4(e) of the original S. 1663 (and sec. 4(f) of the revised version of S. 1663), dealing with petitions for exceptions from rulemaking. We said there that it appeared that the proceeding on such a petition would probably, at least in most instances, be adjudicatory, and we added "There is a question, finally, whether such proceedings for exception may not be so peculiar to the special type of rulemaking in question that they should be taken care of in the particular agency statutes rather than in a general procedural statute." In such particular statutes there might, for example, be specific provision for a showing by the applicant for an exception that he had worked out a satisfactory alternative method of accomplishing the purpose of the rule and that there would be unnecessary hardship in requiring compliance with the precise method specified in the rule.

Apart from the references to "exceptions," the definition of "rule and rulemaking" in section 2(c) is in our view good. The definition of "order, opinion,

and adjudication" in section 2(d) raises, however, a number of questions. We do not think that the definition of an adjudicatory proceeding as one "to determine the rights, obligations, and privileges" of named parties is sufficiently inclusive. Reference to section 2(f) (which defines "sanction and relief") will suggest many other words that should be included; but we think that any attempt at an inclusive definition in this manner is too risky.

Since the enactment of the Administrative Procedure Act of 1946, "order" has been defined as the final disposition of an agency "in any matter other than rulemaking * * *". This definition has been used for years without difficulty. The use of the word "matter" makes it clear enough that more is referred to than purely executive or administrative action. We therefore suggest going back to the Administrative Procedure Act definition of "order" as substantially continued in S. 1633.

The reference to "named parties" in S. 1336 is useful. This can, however, be incorporated in the definition of "adjudication," as was done in revised S. 1663 as follows:

"'Adjudication' means agency process for the formulation, amendment or repeal of an order and includes licensing and ratemaking and other agency proceedings in which the parties are named."

This leaves for consideration the definition of "opinion." There was no such definition in the 1946 act; the first definition of "opinion" was in the American Bar Association's proposed code. Having been responsible for this definition in the first place, we are perhaps in the best position to say that, very recently, we have come to the conclusion that no definition of "opinion" should be included in the statute. The word now seems to us sufficiently clear without definition. Moreover, the actual definition in section 2(d) would not be appropriate to the word "opinion" as used elsewhere in the statute (e.g., in sec. 3(b)(A)).

Finally, we note that the specification in section 2(d) of S. 1336 of what an opinion should contain seems to us inappropriate in a definition section. If the definition of "opinion" is dropped as we suggest (and even if it is not), we note our view that this matter should be included in section 8, dealing with decisions; and I shall discuss the matter further at that point.

In the "public information" section of S. 1336, we are gratified to find at the end of section 3(a) a revised and satisfactory provision regarding matter incorporated by reference in the Federal Register, which requires approval of such incorporation by the Director of the Federal Register.

Section 3(a) and section 3(b) each contains a provision designed to protect private parties from the use against them of matter required to be published, or made available for public inspection, and not so published or made available. These two separated provisions seem to us confusing and in some respects incomplete. For example, "no person shall * * * be adversely affected by * * *" in section 3(a) (p. 5, lines 18-20) seems to us less comprehensive than the language of section 3(b), page 6, lines 21-25 (though there is no reason why it should be). We suggest that the two provisions be combined in one separate provision like that of section 1002(e) of the American Bar Association Code. There could be added to that code provision the provision of the two sections of S. 1336 excepting from such protection persons who have had actual and timely notice of the matter in question.

At the end of the first sentence of section 3(c), dealing with agency records, we suggest adding (p. 7, line 7) the words "for inspection and copying."

We are particularly gratified to find that all the exemption provisions of section 3 are now included in one subsection, 3(e) (p. 8). We think also that the grounds of exemption are generally satisfactory, though we have several changes to suggest that appear to us to be important. All but one of these we made recently in hearings in the House on H.R. 5012.

First, we think that the words "national defense or foreign policy" (line 6) should be changed to "national security." The statute deals here with the subject matter of Executive orders. It seems to me that matters of national security, beyond the range of national defense or foreign policy, can properly be taken into account by the President in exercising the Executive privilege.

Second, in item (4), we think that the phrase "obtained from the public" (lines 9-10) should for accuracy be changed to "obtained from a nonagency source."

Third, we think that the exemption (item (5)) for intragency communications dealing with matters of law or policy should be extended to memorandums

from personal assistants to agency members or other deciding officers even though they deal with factual matters besides matters of law and policy.

Finally, we suggest adding at the end of subsection (e) a proviso dealing with records received by one agency from another, and a sentence regarding rights of discovery in judicial or administrative proceedings, as follows:

Provided, That records received from another agency which are exempt in the hands of such other agency under this subsection shall continue to be exempt in the hands of the receiving agency. Nothing contained herein shall be deemed to prevent the discovery of documents in judicial or administrative proceedings in accordance with applicable rules of law."

We are glad to find that section 4(c)(2) includes in its definition of formal rulemaking rules required by the Constitution (as well as those required by statute) to be made on the record after opportunity for an agency hearing.

We are glad also to find the provision for emergency rules put in a separate subsection, section 4(d), and thus made applicable to formal as well as informal rulemaking. We have several suggestions for what we consider improvements in the second sentence of section 4(d). For one thing, we believe that the one extension period should be limited to 6 months instead of 1 year, making the total life of the emergency rule 1 year rather than a year and a half. If this change is accepted, our suggested revision of the second sentence (p. 11, lines 6-11) would be as follows:

"The agency may extend such emergency rule for one additional period not to exceed 6 months only by commencement, prior to the expiration of the original effective period, of a rulemaking proceeding dealing with the same subject matter as did the emergency rule and upon giving the notice and following the procedures provided by subsections (b) and (c) of this section."

Finally, we think that the last sentence of section 4(d) should be omitted. "Emergency rulemaking procedures as provided by other statutes" do not, so far as we know, require regular rulemaking to follow emergency rulemaking if the rule is to be effective for more than 6 months; and that is an essential feature of section 4(d), which should not be vitiated.

We are gratified again to find the exemption provisions regarding rulemaking incorporated in one subsection (4(h)). As to item (1) we repeat our suggestion made with respect to section 3(e) that "national defense or foreign policy" (p. 12, lines 3-4) should be changed to "national security." In item (4) we suggest (in line with our earlier discussion) elimination of the reference to exceptions.

In section 5, "Adjudication," we are gratified again to find in the introductory paragraph of section 5(a) reference to rules required by the Constitution (as well as those required by statute) to be determined on the record after opportunity for an agency hearing.

We are glad also to find that the "modified hearing procedure" provided for by section 5(a)(5) is to be used only by consent of the parties.

It is not entirely clear from section 5(a)(5) whether or not the modified hearing procedure thereunder is intended to be subject to the provisions of section 5(a)(6) regarding separation of functions. Revised S. 1663, section 5(a)(6)(C), provided explicitly that the separation-of-functions provisions did not apply to officers conducting modified hearings. The omission of that provision from S. 1336 makes it appear that the intention is that the separation-of-functions provisions should apply. (The fact that subsec. (5) subjects the modified hearing procedure to the provisions of sec. 8, regarding decisions, tends to support that conclusion.) We think that is a matter of policy separation of functions should be required in the modified hearing procedure. The pressure on parties to consent to the modified procedure will be strong, and we do not think they should be asked to give up too much in doing so. In any case, we suggest that section 5(a)(5) should be explicit as to what is intended, so that if a party consents he will do so with full awareness of what he is consenting to.

Among a few changes made by S. 1336 from S. 1663 which give us the deepest concern are two changes relating to the separation of functions in formal adjudication, section 5(a)(6). These have to do with the application of separation-of-functions requirements to agency members, and provision of assistance to agency members and other deciding officers.

One of the major accomplishments of S. 1663 was to eliminate the exemption of agency members from the separation-of-functions provisions of the 1946 act. That advance has now—for what reason we do not know—been reversed

in S. 1336. This is, we believe, a question of vital importance. To avoid extending this statement unduly, I should like respectfully to refer the subcommittee to my article on the American Bar Association program in 26 Law and Contemporary Problems 203, at pages 229-230 (1961).

It appears to us clear also that agency members and other deciding officers need to have assistance in their adjudicatory functions, especially by permanent assistants, not subject to disqualifying relations within the agency, who can serve with a reasonable degree of permanence and develop a working relationship with the deciding officer. Without undue pride of authorship, we respectfully refer the subcommittee to the separation-of-functions provisions of the ABA code, section 1005 (c), for its treatment of this problem.

We have difficulty with section 5(a)(7) of S. 1336, relating to "emergency action" in matters subject to formal adjudication. Our difficulty relates only to the first sentence, which reads:

"Upon a finding that immediate action is necessary for the preservation of the public health or safety, *or* where otherwise provided by law, an agency may take action without the notice or other procedures required by this subsection." [Italic added.]

Both the original version of S. 1663 (end of sec. 5(a)) and the ABA code (sec. 1004(c)) provided for emergency adjudicatory action where it is authorized by existing law and there is in addition the required showing of the necessity of immediate action. We strongly question the advisability, and indeed the propriety, of the disjunctive "or" italicized in the sentence quoted above.

Since the existing provisions of law may authorize emergency action on grounds other than public health or safety, we think also that that phrase of the sentence quoted above is too narrow.

We suggest in substitution for the above sentence a revised version of the provision of original S. 1663, as follows:

"Where permitted by law and upon a finding that immediate action is necessary for the preservation of the public health, safety, or welfare, an agency may take action without the notice or other procedures required by this subsection."

Section 5(b) of S. 1336, dealing with informal adjudication, is an improvement over the like provision of S. 1663 in eliminating the earlier provision's references to hearings.

On the other hand, the elimination of the requirement of S. 1663 for a statement of "supporting reasons" seems to us a step backward. On this subject we prefer to both versions the provision of the ABA code, section 1004(b), for a statement of reasons if requested. This would give outside parties what they are entitled to, but would relieve the agency of the burden of stating reasons in all cases, even where they are not sought.

We do not understand why section 5(b) of S. 1336 should except adjudication "involving inspections and tests." Unless there is some prescribed hearing procedure in connection with such adjudication, it would be informal adjudication and properly within the operation of section 5(b).

Section 5(c) of S. 1336 follows the like section of S. 1663 in making opportunity to submit settlement proposals available to a private party before hearings begin, but available thereafter only where the agency in its discretion concludes that "time, the nature of the proceeding, and the public interest permit * * *." Our own view, reflected in section 1004(a) of the ABA code, is the reverse; we would make the consideration of offers of settlement by the agency discretionary before hearing and mandatory thereafter. We believe that where the right to make an offer of settlement exists only before hearing, the agency can use this as a bludgeon to induce settlements.

In section 6(a), we suggest that the words "or investigation," at the end of the second sentence, be stricken. The sentence deals with rights of parties with respect to appearance and representation in agency proceedings. Under sections 2(g) and 2(b), defining "agency proceeding" and "party," an investigation is not an "agency proceeding," and there can thus be no "party" to an investigation. The rights to representation of persons involved in investigations seem to us adequately protected by the other provisions of section 6(a).

We think it would be useful for the legislative history to refer, for definition of the right specified in the first sentence to section 6(a) "to be accompanied, represented, and advised by counsel," to recommendation 15 of the recent administrative conference.

I do not comment here on section 6(b) and 6(c) of S. 1336, since these are also in S. 1758, and testimony as to that bill is to be given by a representative of the ABA section of administrative law.

We are gratified to note that section 6(d), dealing with investigations, omits the final clause of the like provision of S. 1663, limiting the right of a person to procure a transcript of his own testimony, to which we were opposed.

We are inclined to think that the first sentence of section 6(e), providing for the issuance of subpoenas upon request of any party to an adjudication, should be limited to formal adjudication under section 5(a) (cf. S. 1879, the recently reintroduced ABA Code, section 1005 (b)).

We are glad to note that section 6(e) has been revised to allow a proceeding for enforcement of a subpoena to be initiated "by any party" as well as by the agency.

We are gratified by the revision of section 6(h), dealing with depositions and discovery, which goes further than S. 1663 to assure the use by agencies to the greatest practicable extent of this valuable procedural device.

If the suggestions we have made elsewhere for changing "national defense or foreign policy" to "national security" are accepted, this phrase in section 6(j) should be changed accordingly. Apart from this, we think that section 1005(f) of the ABA code is a clearer and more useful statement of what is intended here.

We are gratified by the change in section 6(k), dealing with declaratory orders. The mandatory form of the S. 1336 provision is in our view a great improvement over the like S. 1663 provision, which merely carried forward language of the 1946 act that had proved to be ineffective.

While we consider the form of section 7(b) of S. 1336, dealing with the powers of officers presiding at hearings, generally satisfactory and an improvement over S. 1663, we believe that it would be well to specify some additional powers. We suggest for reference section 1006(b) of the ABA code, and suggest specifically consideration of items (6), (7), (8), and (9) (some of which are included, though not as fully, in S. 1336).

We are gratified by the change from S. 1663 effected by section 7(e) of S. 1336, dealing with interlocutory appeals. This is now, we think, an entirely satisfactory provision.

Regarding section 8, dealing with the decision process, I should like to repeat generally what I said last July in strong support of the purpose of this section to relieve agency members of having to devote relatively too much of their energies to the adjudication of individual cases.

In discussing the definition of "opinion" in section 2(d), I noted our view that the specification of what an opinion should contain should be included in section 8, dealing with decisions. The place for this would be in section 8(b). As to what might usefully be included here, we suggest referring to the concluding portion of section 1007(a) of the ABA code.

I repeat also what I said last year, that we do not agree with the provision of section 8(b) leaving to the presiding officer the right to determine in his discretion whether he wants to hear oral argument. It has been suggested that the presiding officer is in the best position to decide when oral argument would help him. We do not agree, since the presiding officer cannot know what the oral argument would be. Apart from these considerations, it seems to us especially important, when the presiding officer may require submission of all or part of the evidence in written form (section 7(c)), that the parties should have a right to oral argument thereon.

Section 8(c)(1) specifies the grounds on which a party may appeal the decision of the presiding officer. Among these (item (B)) is the ground that "the findings or conclusions of material fact were clearly erroneous." In the like section of revised S. 1663 the standard was not "clearly erroneous" but "contrary to the weight of the evidence." We believe that S. 1663 was correct in this (see also the next to the last sentence of section 1007(c) of the ABA code). We do not believe that review within the agency of a hearing officer's decision of questions of evidentiary fact should be as limited as is judicial review of an agency decision of fact.

We think also that a party should have the right to appeal on an added ground, that the agency should reconsider its policy in specified respects. Under section 8(c)(4), the agency can do this on its own motion, but we do not think that this should be left entirely to the agency's initiative.

Among our few major objections to changes made by S. 1336 is an objection to the restoration of the in terrorem clause of section 8(c) (2) which had been included in the like clause of the original S. 1663 (where we had strongly objected to it) and had been eliminated in revised S. 1663. If a party applies for a determination of exceptions by the agency rather than by an appeal board, and the agency denies the application, there is in our view no justification for providing that the agency shall automatically be deemed to have considered and denied each exception and affirmed the decision of the presiding officer. To impose this risk is likely to force a party to accept final adjudication by an appeal board even where he has valid reason for going instead to the agency.

If the in terrorem clause is eliminated, as we think it should be, there will have to be a corresponding change in section 8(c) (3).

There is, on the other hand, a good change earlier in section 8(c) (2). The provision for the establishment of agency appeal boards is not wholly mandatory, as was the like provision of S. 1663.

We agree with the statutory provision that such appeal boards should be made up of agency members or hearing examiners or both. The main idea in using hearing examiners is, in our opinion, to insure their independence. We take presently no position as to whether or not there should be an appellate roster of hearing examiners, as S. 1663 provided (though we do not think that a hearing examiner should during the same period serve as a presiding officer at hearings and as a member of an appeal board). The American Bar Association has assigned to its section of administrative law jurisdiction over the subject of the appointment and administration of the corps of hearing examiners; and that section may want later to be heard on this subject.

We are gratified to find, in section 9(b), the provision first suggested in the ABA code (section 1010(b)) for dealing with prejudicial agency publicity.

With regard to section 10, dealing with judicial review, we repeat the recommendation made last year that the order be changed to follow that of section 1009 of the ABA code rather than the order of the 1946 act. Section 10 is difficult to absorb, to a considerable extent because the order of treatment is confusing. The order of section 1009 of the ABA code is, we believe, logical and easy to follow.

The change effected by S. 1336 in the introductory clause of section 10 with respect to unreviewable agency discretion we find entirely satisfactory.

Section 10(a) (which is entitled "Right of review" and which we would entitle "Standing to seek review") we find unsatisfactory; and we suggest returning to the text of original S. 1663 as follows:

"Any person adversely affected or aggrieved by any reviewable agency action shall have standing to seek judicial review thereof."

The insertion of the words "in fact" in the S. 1336 provision, and the omission therefrom of the word "aggrieved," were both suggested last July by Kenneth Culp Davis. With respect to these suggestions, I wrote to the chairman (in a letter of August 10, 1964 incorporated in the hearing record, hearings, p. 286):

"* * * we can see no advantage in following Mr. Davis' suggestion that the word 'aggrieved' be omitted. It might, on the other hand, be useful to add 'in fact' as Mr. Davis suggests."

We still believe it to be a mistake to omit the word "aggrieved," which has been used frequently in support of "standing," and in our view can do no harm so long as it is not followed by phrases like "within the meaning of any statute." After discussion with my colleagues, we have concluded that the addition of the words "in fact" may do more harm than good, never having been used (so far as we know) by the courts, and being in our view imprecise in meaning.

The clause that we support, quoted above from original S. 1663, has been supported by Dean Robert Kramer as highly desirable (Kramer, "The Place and Function of Judicial Review in the Administrative Process," 28 *Fordham Law Review* 1, 35 (1959)).

Kenneth Culp Davis has also suggested adding at the end of section 10(b) a provision drafted by him regarding sovereign immunity. We approve this in principle, and have no present suggestions for any change in his tentatively suggested language.

S. 1663 as originally introduced included, at the end of section 10(d), regarding interim relief, the words: "whether or not any application therefor shall have been made to the agency."

These words were stricken in revised S. 1663, and are not in S. 1336. We believe that they should be restored. In their absence, we think a reviewing court might well hold that there had not been a proper exhaustion of administrative remedies.

We suggest, as we have before, that a subsection relating to the record on review, similar to section 1009(e) of the American Bar Association Code, should be included at this point in S. 1336.

With regard to section 10(e) of S. 1336, dealing with the scope of review, I shall confine myself here to referring to my letter of August 10, 1964, to the chairman with regard to the inadequacy of the introductory sentence to deal with the problem of *Gray v. Powell*, 314 U.S. 402, and *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (hearings, p. 286) and with regard to the desirability of substituting the clearly erroneous test for the substantial evidence test in the review of agency determinations of fact (hearings pp. 286-287).

Finally, we are disturbed that S. 1336 (following in this respect revised S. 1663) omits from section 12 a brief provision that had been in the original S. 1663 as follows:

"Any agency proceeding or investigation not within the jurisdiction delegated to the agency and authorized by law may be enjoined by any court of competent jurisdiction at any time."

This was in turn a partial summary of a carefully worked out and safeguarded provision of the American Bar Association Code (sec. 1009(g)) to enjoin the conduct of an agency proceeding clearly beyond the constitutional or statutory jurisdiction or authority of the agency. We think that such a provision, preferably in the extended form of the American Bar Association Code, should be re-introduced. As to this, I respectfully refer to my statement of last July (hearings, p. 63).

In conclusion, may I repeat the thanks of the American Bar Association to the subcommittee and your staff for the work that you have been doing, and our congratulations on the progress represented by S. 1336 toward a satisfactory conclusion of that work.

Senator LONG. You may make any comments you want to make.

Mr. BENJAMIN. Mr. Keatinge will be talking later on the Attorneys Practice Act, which is section 6 (b) and (c) of S. 1336, and also S. 1758. So, I will not discuss those sections; I have not discussed them in this statement that I have submitted.

In order to shorten things, since my prepared statement isn't as short as it might be, I would like to refer the subcommittee respectfully to what I testified last July and on an occasion before that on S. 1666, as it then was, and what I said in communications with and in conference with the staff, so as not to have to repeat everything either orally or in writing.

The committee on the code, as your subcommittee knows, is charged by the American Bar Association with representing it in hearings and other activity in the Congress for the general revision of the Administrative Procedure Act of 1946. These hearings, I am glad to see, have been called not only on S. 1336, which is the latest version of the subcommittee's bill, but also on S. 1879, which is the latest version of the American Bar Association proposed Code of Federal Administrative Procedure, and which was referred to in last year's hearings when its 88th Congress number was S. 2335.

And we are gratified to see that over the years a good many of the provisions in our code have been found useful to the subcommittee in the drafting of its successive versions of the subcommittee's own bill.

We are gratified also, as will appear from my written statement, to find ourselves in agreement with by far the greater part of the changes made by S. 1336 from last year's S. 1663. And looking at S. 1336 as

a whole, we believe that it represents very encouraging progress toward what we would consider a completely satisfactory general revision of the 1946 act, which we have advocated for a good many years now.

Now, I will go through some of the provisions that I think are worth oral comment in addition to what I have written. But having said that we thought most of the changes in S. 1336 from S. 1663—having said that we found most of these changes good, it would perhaps be well to start with one change which we are very sorry to find in the present bill, and which we hope very strongly will be reversed.

There are some aspects of the provision of the bill, which is section 5(a)(6), dealing with the separation of functions, which we find a distinct step backward. And I would like to talk a little about that beyond what I have said in my written statement.

I would like for one thing to point out—which is sometimes lost sight of—that what we are aiming at throughout our proposed code is sound administrative procedures in the interest of effective administration, just as much as in the interest of the parties whom the agencies deal with. And, as I have mentioned in the earlier hearings—that is true, for example, of our proposed extension of informal rulemaking procedures to a lot of fields that are not covered by the 1946 act, including procedural and interpretative rules, and also cutting out some of the restrictive clauses of the 1946 act even with regard to substantive rules. And our proposed extension, which S. 1336 accepts and incorporates, of the scope of informal rulemaking procedures is motivated not simply by the interest of the people affected by the rules in having an opportunity to express their opinion in the rulemaking process, but equally by our interest in arriving at the best possible rules, the soundest administrative action, which is furthered by public participation in rulemaking. I do not think anyone could go off in a room and work out the best rule without asking anybody's opinion on it. And that is one aspect in which we have tried to further sound administrative action.

That is true also of our proposals regarding the separation of functions. It is not simply in the interest of the outside party to an adjudication that there be separation of functions; it is in the interest of informed administrative action. And in our view, the sound way to arrive at a decision is to be able to direct evidence and argument to the people who are going to have the decision in their own making, and not to have the decisionmakers take into account matter received from what we would call disqualified agency personnel who have not heard the evidence or argument, and thus arrive at a result which is not the product of informed consideration by the deciding officer, but the product of internal and untraceable influences on the deciding officer.

Another feature of our own proposal is that whatever outside assistance the agency gets from its agency personnel shall be directed not to taking the place of evidence in the record, but be directed simply to helping the deciding officer appraise and value the evidence that is in the record for the purpose of arriving at a decision. That kind of expertness is necessary, and that kind of assistance does not involve the evils that we are arguing against.

I hope very much that for these reasons the subcommittee will change its mind and go back to what S. 1663 provided; namely, that the separation of functions provisions shall be applicable to agency members as well as to other agency deciding personnel.

The final decision is in the hands of agency members. To exempt the members as the Administrative Procedure Act did from the separation of functions provisions is to vitiate the whole objective of informed adjudication in which evidence and argument are brought openly to bear, and instead, to go in the backroom and make decisions not on the basis of evidence, but on the basis of undisclosed influence on agency members by personnel in the agency who may be adversely interested—I do not mean financially interested or anything of the kind, but who may have strong predilections one way or the other which no one has had an opportunity to deal with.

Mr. FENSTERWALD. Could I interrupt you just to be sure I have your position straight. You prefer S. 1663 to the present 1336 provision on separation of functions?

Mr. BENJAMIN. Yes, I do.

Mr. FENSTERWALD. But do you prefer S. 1336 to the present law?

Mr. BENJAMIN. I think the primary objection to the present law—our primary objection is its exclusion of agency members. That is not changed. So it is a little hard to say that I prefer S. 1336 to the present law. I think it is somewhat better drafted than the Administrative Procedure Act.

Mr. FENSTERWALD. It is the thought of members of the staff, and I think the sponsors, that S. 1336 is a position somewhere between the present law and S. 1663 on this point. And I just wondered if that points out your own thought.

Mr. BENJAMIN. I do not think it is very far between. I think it is so much closer to the present law than to S. 1663 that the difference is of minor consequence.

I want to add one general thing, and then give a couple of references back.

One reason why we think it is important to eliminate decisions by agency members based on complete freedom to consult whom they will, to consult their experts, is this: Of course, we recognize that there are experts, and the question is how their expertise is to be used. But I think it must be recognized that an expert may be wrong. And one of the purposes of separation of functions provisions is to submit assumptions by specialists to evidence an argument so that one can expose their error where they are in error. I think one of the great mistakes is to assume that anybody is bright enough to know everything and be able to make as good a decision without argument, without having anyone point out what he is doing and what the other arguments are, as he could make with such argument.

Without extending this too much, I would like to refer to two places in which I have discussed this at greater length. One is in my "Law and Contemporary Problems" article which the staff is familiar with, at pages 229 to 230. And I also said something of the same thing at page 49 of the record of last July's hearings.

The other aspect of the separation of functions provisions that concerns us is that the S. 1336 provision eliminates everything that was

in S. 1663 regarding assistance to agency members and deciding officers.

I may say with respect to our own bill, which is now S. 1879, that it has somewhat expanded provisions regarding assistance to deciding officers other than agency members—

Mr. KENNEDY. If I may interrupt you for a moment, you commented that the separations of functions provision in S. 1336 was so similar to the present law that you could not express much of an opinion on which you prefer. But I do note that this bill drops the language in the present law, that the separation of functions provision shall not apply in determining applications for initial licenses or to proceedings involved the validity or application of rates, facilities, or practices of public utilities or carriers. Now, do you favor dropping that language, or would you prefer to see it retained?

Mr. BENJAMIN. No, I said I think this is better drafted. I will say that I think that there are things in it that are valuable, including that. But I think it would be an illusion to say that because there are those changes it is a very great improvement over the present law.

Mr. KENNEDY. So if we were faced with a question about retaining the present provision or the provisions of this bill as it now stands, you would say that we might as well retain the present provision because this provision isn't a sufficient improvement to warrant argument for it?

Mr. BENJAMIN. Let me put it this way. This is better, and I would not like to argue in favor of retaining the present provision as against this. On the other hand, I want to be completely clear that I do not support this as any real solution of the problem of separation of functions. I think it would be a disaster if this were adopted instead of something like the S. 1663 provision. I think that was one of the major advances that S. 1663 made over the Administrative Procedure Act.

And I do not like by saying that there are some good things about this to give any weight to the argument, well, we have done something, and that is good enough. I think we would just make it harder to change again.

Mr. KENNEDY. Would you tell us the differences between the provision in S. 1336 and in S. 1663?

Mr. BENJAMIN. I did not understand you.

Mr. KENNEDY. I wonder if you would tell us what you preferred specifically in 1663.

Mr. BENJAMIN. I prefer its making the separation of functions applicable to agency members, and its making some provision with regard to personal assistance to those engaged in decision.

Mr. KENNEDY. Let us take up the first point, which is more important. What did 1663 provide with respect to agency members so far as dealing with the issue of law as opposed to issues of fact?

Mr. BENJAMIN. You said dealing first with agency members?

Mr. KENNEDY. Agency members.

Mr. BENJAMIN. Well, 1663 originally did not cover consultations on questions of law. I think revised 1663 did.

Mr. KENNEDY. I do not have before me a copy of it, but I believe that concept is retained in the revision.

Mr. BENJAMIN. Yes; that is true. Revised S. 1663 did not include questions of law either.

Mr. KENNEDY. So that it only applied to agency members with respect to issues of fact.

Mr. BENJAMIN. Yes; I think that is one of the things that I objected to in S. 1663 last year that I did not repeat—I am not trying to repeat all the ways in which I think S. 1663 could be improved, because I took that up in detail last year.

Mr. KENNEDY. I would like to follow this one point further so that the record is clear for these hearings. You do not believe that an agency member, then, should be able to read a law review article unless it was introduced in the record of the hearing, because that would be getting information outside the record on an issue of law?

Mr. BENJAMIN. Oh, no; that is not what I am talking about.

Mr. KENNEDY. Just what are you talking about as far as issues of law are concerned?

Mr. BENJAMIN. On propositions of law, I do not think he ought to consult with people about how he ought to decide a case, except his own personal assistants, his own assistants whom he is authorized to consult with.

Mr. KENNEDY. Could he consult with a man in the room I see back there, Professor Davis, who might have done a good deal of work in a particular field? Now, he could read Professor Davis' article, but you would forbid him from talking to Professor Davis about the article?

Mr. BENJAMIN. You cannot forbid somebody from studying a general question of law which an article is about. But I hope he would not ask Professor Davis how he would decide the case.

Mr. KENNEDY. No; but just discussing the issues of law.

Mr. BENJAMIN. It is rather hard to draw the line. It seems to me that the issues of law can be perfectly adequately argued before the agency by lawyers litigating for the agency, if there is an agency party, and by the outside people. But if he goes to Professor Davis outside and gets a sudden idea that nobody has ever thought of before, there is not any opportunity to point out errors of which even Professor Davis is sometimes guilty.

Mr. FENSTERWALD. How can you suggest that?

May I interrupt and ask whether he could talk with his Chief Counsel about a legal matter involved in the case?

Mr. BENJAMIN. I do not know whether the Chief Counsel here is involved in prosecuting or not.

Our own code gives authority to consult people who are not engaged in prosecutory functions or investigatory functions.

Maybe I should read our bill.

Mr. FENSTERWALD. That is basically what we say for everybody except the agency members themselves.

Mr. BENJAMIN. You do not say it about questions of law. As a matter of fact, as far as your bill goes, the agency can consult one of the outside—talk about the questions of law with one of the outside parties, or with anyone within the agency, no matter what his—

Mr. KENNEDY. Mr. Benjamin, you said the difficulty is in drawing the line between reading a law review article and discussing it with the author, and perhaps gettings over into the particular problems that are in the mind of the agency member with respect to the case at hand.

I am sure a judge has the same kind of problem. You think the easy way to do it is just to prohibit any discussion of issues of law?

Mr. BENJAMIN. Except with the authorized—

Mr. KENNEDY. Except in the course of the hearing itself?

Mr. BENJAMIN. Except with the personnel who are authorized by the bill.

Mr. KENNEDY. The personnel who would be authorized outside the agency would be no one, under your view, is that correct? You would authorize no discussion with anybody outside of those particular employees of the agency that are not engaged in prosecuting or advocating functions?

Mr. BENJAMIN. Let me read our own code provisions, section 1005 (c): "An agency member"—and we go on to say about the same thing about other deciding officers—"may (1) consult with other members of the agency, (2) have the aid and advice of one or more personal assistants, (3) have the assistance of other employees of the agency who have not participated in the proceeding in any manner, who are not engaged for the agency in any investigative functions in the same or any current factually related case and who are not engaged for the agency in any prosecutory functions."

That gives them a wide scope.

Mr. KENNEDY. Isn't it a very wide scope within the agency?

Mr. BENJAMIN. That is right.

Mr. KENNEDY. But he could not go and talk with you about the case, even though you weren't concerned with it in any way, but just the author of a number of articles on administrative law?

Mr. BENJAMIN. I think that is risky. And the risk is—again I would like to go back to what I said in the beginning. We are not trying to play a game here, or to do it just for the protection of the parties. What we are trying to do is set up something that results in informed adjudication, based on the presentation to the deciders of the case by the people who are litigating it. And this consultation outside may lead to perfectly cockeyed suggestions. And the agency or member or whoever is doing the consulting may not realize how cockeyed they are. If he called another hearing and presented this question for argument, that would be all right. But he won't. If he is talking outside he is not going to schedule another hearing. The result is that he adjudicates on the basis of the legal ideas that may be presented to him by somebody he has picked at random, and he may not be very good at picking people to discuss legal questions.

Mr. KENNEDY. Mr. Benjamin, would not he have reached the same result if he had read a law review article which might lead him to the cockeyed results? In other words, I am trying to find out whether you would prohibit him from having any contact with the law outside of that portion of it that had been spoonfed to him in the course of the hearing?

Mr. BENJAMIN. You cannot prevent a man reading a law review article, and you would not want to, you would not want to interfere with his general education. But that is very different from discussing with somebody the question of law for decision in this specific case.

Mr. KENNEDY. Wait a minute, now. Let's say he went down to one of the legal law schools knowing that he had a number of cases in-

volving a principle. And he signed up for a course, postgraduate education. And he took a course that would touch on the problems that he had to decide in his agency work. You would not say that was bad, would you?

Mr. BENJAMIN. No.

Mr. KENNEDY. Would you consider, though, that he could not go up and talk to the professor after the class and ask him a few questions?

Mr. BENJAMIN. About the law course, or about the law generally? Certainly not.

Mr. KENNEDY. Would you consider that he could not talk to any other lawyer about the problems that had been raised in that course?

Mr. BENJAMIN. Certainly, I would not consider that.

Mr. KENNEDY. So as far as we are dealing with legal issues in the abstract, even though they may be pertinent to a case that he might be doing from 9 to 5, you would not prohibit him from improving his education in the field?

Mr. BENJAMIN. Certainly not.

Mr. KENNEDY. Then how are you going to draw this line? Obviously what he learns from the professor is going to influence his decision in some way, at least his thinking in some way in a particular case. Where are you going to draw the line? This is a problem which has puzzled all of us for some years now. How do you manage to say that he can talk to anybody, and yet he cannot use that improved education in deciding the case?

Mr. BENJAMIN. I do not consider talking to somebody about the issues in a given case education.

Mr. KENNEDY. We are talking about issues of law, not the issues of fact. Issues of law are pretty common property.

Mr. BENJAMIN. I distinguish between taking these courses and talking to anybody at lunch or otherwise, or going to somebody and saying, we have got a rough case here, what do you think about it, how would you decide it?

Mr. KENNEDY. He is not asking that question, how would a man decide it, he is asking, what do you think the majority view in the country as a whole is on this issue of law, if A hits B, is he liable?

Mr. BENJAMIN. But he is not restricted from asking the question that I suggested by any language in S. 1663 or 1336. He can go to anybody and say, how would you decide this case on the law? Maybe he would not, maybe he will just say something more general, as you suggest, but he is not prohibited from getting any assistance whatever that he wants in deciding the question of law in this specific case, if you leave out anything about questions of law.

Mr. KENNEDY. And you approve that provision, that he is not prohibited from getting any assistance on issues of law so long as he does not ask somebody how they would decide that particular case?

Mr. BENJAMIN. I do not know. It depends. There are so many lines between, so many graduations between one and the other that I would hate to phrase the distinction just that way.

Mr. KENNEDY. This is the important thing, though, in trying to draft the legislative language. Your proposal would prohibit him from discussing issues of law with anybody outside the agency.

Mr. BENJAMIN. Yes.

Mr. KENNEDY. And with some people inside the agency. Now, how is he going to prove that he was not violating the statutory provision that you oppose, if all he did was talk about general principles? The burden is on him to show that he did not violate the law.

Mr. BENJAMIN. Well, I suppose most of this must be a matter of reliance on an agency member acting in good faith—I do not know how you can ever prove he consulted with wrong personnel on a question of fact either. I am assuming that if there is statutory statement of what he ought to do, most agency members would do it. I think the job of proving it would be extremely difficult, and I would hate to see everybody's time devoted to cross-examining everybody about whom he consulted, and so forth.

Mr. KENNEDY. Do you think these agency members ought to be subject to roughly the same standard in this respect that a judge is?

Mr. BENJAMIN. Yes. I may say that I do not think this issue-of-law thing is nearly as important as are the other things that I have brought up—namely, the exemption of agency members from any separation of functions provisions, and the failure of 1336 to provide any standards for assistance to deciding officers other than agency members.

Mr. KENNEDY. Then if we can deal with that problem of assistance within the agency, do you think we could come up with a fairly workable approach which would not prohibit them from getting postgraduate education that they feel that the case might be in?

Mr. BENJAMIN. I can see a perfectly good argument either way on questions of law. I think we are right about it, but I do not think we are nearly as clearly right about it as we are about subjecting the agency members to the separation-of-functions provisions whatever they are.

I think, as I have said before, that it is very important to put in the statute what we have in our code, which is that they may consult all these people "in analyzing and appraising the record for decision." They are still, if this is an on-the-record proceeding, not supposed to go outside the record by asking a lot of fact questions of the people they are consulting; they are supposed to get their assistance in analyzing and appraising the record for decision.

Mr. KENNEDY. And they would get that from their personal assistants or anybody?

Mr. BENJAMIN. Or as we say here, any other employees of the agency, as I read before.

Mr. KENNEDY. You generally prefer two standards, one with respect to the public generally, they cannot consult anybody outside the agency. On the other hand, they can talk to a lot of people inside the agency about issues of fact and law in a particular case?

Mr. BENJAMIN. Except people having a partisan position.

Mr. KENNEDY. On the other hand, if you merely exempt these who are actually prosecuting or advocating, you are permitting them to talk to a host of people who might have viewpoints on the matter.

Mr. BENJAMIN. Well, "advocating" was the committee's word. But it is not only prosecuting, it is investigating in the same or any currently factually related case. And I may say that one of the reasons we permitted that was to save the expense of trying to set up dupli-

cate expert staffs, operating experts, and other staff experts to advise the deciding agency member or other deciding officer. That was something of a compromise in the interest of administrative economy and efficiency. But we thought that was a safe economy.

I may say that of all the things in S. 1336, this separation-of-functions provision bothers us more than any other. And we are very disappointed in finding what we thought had been a great step forward in 1663 suddenly reversed. And I could not understand why, and I still do not.

Senator BURDICK (presiding). Mr. Benjamin, we have been talking here the last 15 minutes as lawyers. And I believe in the colloquy which has taken place here between you and the staff member, it has been brought out that this matter should be treated much the same as a judge tries a specific case. But do you not see some difficulty in even securing personnel whose duties involve administrative work and quasi-judicial and sometimes judicial, and quasi-legislative, with the voluminous amount of work in different types of cases, to follow this narrow line that you would draw, would not there be a lot of practice difficulty?

Mr. BENJAMIN. I would not think so. Part of the statute, Senator Burdick, is directed in section 8 to relieving the agency members of a lot of unnecessary adjudicatory activity by limiting their personal part in it most severely, by setting up appeal boards, and by making appeals in some respect of the certiorari type; they take the case for review only where there are important questions involved as a matter of policy.

But I do not view this really as limiting in any way as to what agency members could in effect do. I think a good many agencies actually follow these standards and do their work largely with personal assistants with whom they develop a relationship.

I do not think this is a legalistic approach. It is really directed to the fact that if you do not do something like this, you do not get good adjudication, and you do fall into the business of experts being mistaken and nobody being there to correct them.

I made a long study in New York 20-odd years ago. And one of the procedures we found related to well-drilling permits, where hearings were presided over by an expert in water tables and everything else related to well drilling. And it created a very real problem, because nothing could shake that man's conviction that he knew everything that was to be known about this subject. And he would listen to what other people had to say, and then decide upon what he knew anyway. And that seemed to me a very unsatisfactory procedure. And it seemed to me typical of where an expert closes his mind to everything else; if he is not subjected to something from the outside, he gets completely ingrown. I do not think that is desirable for anybody, I do not think it is desirable for the Government any more than for the people dealt with by an agency.

Senator BURDICK. I simply want the record to show, Mr. Benjamin, that these agency members are charged with judicial functions, they have administrative functions, and quasi-legislative functions, and many times they talk with people in their department, and I presume they could get to talking about two or three functions at once. So the

burden that is placed upon an agency member of this type is far greater than is placed upon an individual with judicial functions alone.

Mr. BENJAMIN. I know that is true. But I still do not think it creates a real difficulty. Because I think it is very easy to draw the line between adjudicating particular cases.

Senator BURDICK. You may continue with your statement.

Mr. BENJAMIN. I would like to go briefly through a few other things, and then stop for any questions that you may have.

I mentioned in my statement the problem raised by the definition of section 2(c), "rule" and "rulemaking," including an exception from a rule in its definition of rule, and defining rulemaking as agency process for the formulation, amendment, repeal of, or exception from a rule. I would suggest that the words "exception from" should be omitted on the ground that a general exception would be in effect an amendment, and that a nongeneral exception, an exception of an individual from the operation of a rule, which would leave his competitors, for example, subject to the rule, should at least usually be by an adjudicatory proceeding.

This is quite like the discussion last year. And I refer in my statement this year to my suggestion last year that probably these exception proceedings are so peculiar to the special type of rulemaking in question that they should be left to the individual agency statute rather than attempt to cover them in a general procedural statute.

I give an example here. It is quite familiar in New York and other places, where you have a rule governing safety appliances in mines and machinery, and so on, and then you have a form of proceeding for a variation from the general rule if you can prove, first, that there is hardship in adhering strictly to the rule, and second, that you have worked out an engineering method which will accomplish the purposes of the rule in a different way. That kind of thing cannot be dealt with in a general statute.

Mr. KENNEDY. Let me ask you one question at this point, Mr. Benjamin. You suggest that these individual exceptions should be covered by the section on adjudication. Unless they involve a matter which was required by the Constitution and by statute to be determined on the record after hearing, a section 5 hearing of adjudication would not apply to a proceeding involving that kind of an exception, is that correct?

Mr. BENJAMIN. That is correct. That is why I think there probably ought to be a separate statutory provision giving the right to a hearing. But there still would presumably be under 5(b), which is informal adjudication, a provision by rule for some kind of notice to the competitors, and some standards as to what you have to prove in order to obtain an exception.

Mr. KENNEDY. Let me ask you this question. How can you give this notice to competitors in any practical way except by a rulemaking proceeding which gives notice to the world?

Mr. BENJAMIN. I do not think the rulemaking proceeding, that kind of rulemaking notice is precise enough. And I think there can be more direct notice by publication in the Federal Register.

Mr. KENNEDY. Who is going to determine who the competitors are of the man seeking the exception? Is the man seeking the exception

going to determine who his competitors are or the agency? This is a problem that we have wrestled with. It seems that one of the best ways is to see that everyone got notice would be to make it the same kind of notice which is required for rulemaking, namely, notice sufficient to put the entire country on notice that this man wants an exception.

Now, short of that, how do you propose to meet the very points you have raised in the notice to competitors?

Mr. BENJAMIN. You might have a supplemental notice. For example, in trade associations—and there are other ways of reaching people in a given field besides publications in the Federal Register.

Mr. KENNEDY. Could you suggest some language to deal with that specific problem and submit it later?

Mr. BENJAMIN. I think it would depend on what particular field you are dealing with, and what the exception was. That is why I really think it has to be done by separate statute.

Mr. KENNEDY. Let me adopt your suggestion and delete any reference to exceptions in this act. That would mean that the problem would be left to be handled by the agency as they see fit?

Mr. BENJAMIN. This is just a simple statement that you may apply for an exception from a rule without any standard for notice or for the grounds on which you may apply for the exception. I just think putting that in a statute, in a rulemaking provision or definition provision—and it is in both, it is in 4(g) as well as in 2(c)—just putting it in there is not really solving any problem at all.

Mr. KENNEDY. You prefer to leave it to agency discretion entirely?

Mr. BENJAMIN. I would prefer to cover it by separate statute, not agency discretion. It is a real problem.

Mr. KENNEDY. Let me say, if it is not included here and an agency does not request a special statute on it, I assume, then, that the problem is left to the agency to deal with as it thinks appropriate when the case arises?

Mr. BENJAMIN. Yes; or as the courts may decide, if somebody objects.

Mr. KENNEDY. If there is an abuse by the agency.

Mr. BENJAMIN. Yes.

Mr. KENNEDY. You think the best way to leave the issue of exceptions from a general rule up to the agency?

Mr. BENJAMIN. Yes, that is what we think about it.

Mr. KENNEDY. Thank you.

Mr. BENJAMIN. Then I have something to say about definition of "order," "opinion," and "adjudication." And I might start that with a confession that "opinion" was never defined anywhere until the APA Code started it. And having gone through a number of years, we have now decided that it was a mistake to try to define "opinion," and it is better to leave it out of the definition section than it is to keep it there and keep using it in other senses in the statute.

So far as the definition of "order" and "adjudication" is concerned, we have several suggestions.

S. 1336 adopts in a way Ken Davis' suggestion that we ought to try an affirmative definition of "order" and "adjudication" rather

than make it everything that is a "matter"—a thing of substance—other than rulemaking. And we do not think that works. We do not think the language used is sufficiently inclusive, and we doubt that you can get an inclusive definition of "adjudication."

We do think the reference to "named parties" is useful, but that could come in in the definition of "adjudication." And I have in my prepared statement some specific suggestions. One is to go back to the APA definition and the code definition of "order" as the final disposition in any matter other than rulemaking. I just point out that that definition under the APA has been used for years without any confusion, as I suggested last year when Professor Davis made his suggestion.

Mr. KENNEDY. You are familiar with Professor Davis' problem about the use of the word "matter"?

Mr. BENJAMIN. The use of the word "matter" makes it clear that the definition does not include purely executive or administrative action.

Mr. KENNEDY. How do you answer Professor Davis' contention as I recall it that "matter" includes all kinds of decisions which are made every minute of the day by a host of people in government, and which really are not meant to be covered by the Administrative Procedure Act.

Mr. BENJAMIN. In the first place, I do not think it does on any fair reading. And in the second place, I point out that that difficulty has not arisen in all the years since the Administrative Procedure Act has been in force.

Mr. KENNEDY. So if Professor Davis testifies at these hearings and gives some examples of the reason why he has these problems as to the word "matter," do you want to be heard again?

Mr. BENJAMIN. Yes.

Our suggestion regarding the definition of "adjudication" brings in "named parties" and really comes from revised S. 1663, as quoted at page 6 of my prepared statement:

"Adjudication" means agency process for the formulation, amendment, or repeal of an order and includes licensing and ratemaking and other agency proceedings in which the parties are named.

Now, just to show you how openminded we are, though we do not take all of Professor Davis' ideas, I may say that we will come later to his suggestion regarding sovereign immunity which we think is good.

But at the moment, and going more or less in order through the statute, I was considerably impressed by some of the things that Mr. Rains said yesterday about section 3, some of the exemptions. And I think we would agree with him about some of them.

As to the one that has the greatest effect in bulk, his objection to the indexing provision: I do not think that is really as serious as he makes it out, because the only enforcement provision for that is that if the order isn't indexed, you cannot cite it against anyone. And therefore, if they do not want to use it as a precedent, it does not cause any real harm to the agency if it is not indexed. But I do not like that kind of indirect avoidance of the statute, I do not like saying that we commanded them to index everything, but it would not hurt them

if they do not index some. I would rather change the indexing provision and say that the agency shall index everything of precedential value. And that recognizes what is the actual effect, and if they do not want to use it as a precedent, it does not hurt them not to index it.

Mr. KENNEDY. They might come back to the answer, how do they know that the case they decide may not be of precedential effect 10 years from now?

Mr. BENJAMIN. Then they should index it.

Mr. KENNEDY. Then your suggestion forces them to index everything because they do not know the future need they may have for it.

Mr. BENJAMIN. No. It eliminates the million items, whatever they were, that Mr. Rains was talking about, which could obviously never be of any precedential value.

Mr. KENNEDY. But you make them make that determination today?

Mr. BENJAMIN. Yes. I think his main problem, for example, with customs was that there was an enormous number of specific orders that could not possibly be of any precedential value, and it is just a waste of time to put them in an index. And they might have to err on the side of inclusion, but it would at least give them an opportunity—

Mr. KENNEDY. Suppose they decided today that the case had no precedential value, and 5 years from now they took a look back and decided, well, it would be very useful to cite as a precedent, at that time would you let them index them, or are they barred from ever putting it on the index?

Mr. BENJAMIN. I suggested last year that I was a little concerned about what "current" meant in your suggestion about indexing, because I did not know what a current index is. But I do not know that that is an important word. Certainly if that word were left out, they could solve it by indexing it in time enough to reach anybody against whom they might want to cite it. Or they might want to take other steps.

Mr. KENNEDY. That would mean one more issue that could be argued, would it not, by the parties in the case, had the precedent been indexed in sufficient time, that could be litigated at quite some length, I suppose.

Mr. BENJAMIN. I know, but if you go through this you can find thousands of things that might be litigated. And I think it is so unlikely that that would be litigated that I do not think I would want to pay much attention to that problem. You can litigate practically every word of practically any statute.

Mr. KENNEDY. You would guarantee never to litigate that issue in your practice of law?

Mr. BENJAMIN. Yes; I guarantee that.

Now, as to some of his other, Mr. Rains' other suggestions—

Mr. FENSTERWALD. Are you going to discuss section 3 now?

Mr. BENJAMIN. Yes; this is on section 3.

Mr. FENSTERWALD. Before you get through discussing section 3, I wonder if you would also discuss the position of the Justice Department that your section 1002 and our section 3 are unconstitutional.

Mr. BENJAMIN. You mean on the ground that they are trying to limit the Presidential—the Executive privilege.

Mr. FENSTERWALD. It is a breach of separation of powers, according to the Justice Department.

Mr. BENJAMIN. I cannot see that at all. In the first place, if it were applied in that way, it would be ineffectively applied. But I think it would be a futile undertaking to try in any public information statute to spell out in detail everything that might be asserted under the Executive privilege. I think this statute makes a reasonable attempt to require disclosure only subject to a reasonable application of the Executive privilege. I do not think it is unconstitutional.

Mr. FENSTERWALD. There is no question in your mind about it?

Mr. BENJAMIN. No; I would not have any question.

Mr. FENSTERWALD. Thank you.

Mr. BENJAMIN. This goes for 3(e). We agree with Mr. Rains that item 1 ought to be phrased as "national security" instead of "national defense or foreign policy." And as a matter of fact, though he did not say so, I would think that national security would include foreign policy. So the language could simply be "national security."

We do not agree with Mr. Rains' other objection to requiring an Executive order. And we do think that the President's advisers should be prepared to make recommendations at the time, they do not have to be under pressure, as Mr. Rains suggested. If it is left to department heads, it becomes in time, we think, a mere "public interest" provision which can always be applied—can always be invoked whatever the justification or lack of justification.

I interpolate to say that Mr. Rains very kindly let me have a copy of his remarks as he delivered them yesterday, so that what I am saying relates to those and not simply to his prepared statement.

Regarding item 2, which is "related solely to the internal personnel rules and practices of any agency," Mr. Rains referred to investigative manuals of the Secret Service and the Bureau of Narcotics, that is, investigative procedural manuals, I gather. We do not think that you can arrive at any safe generalization of that subject under the general concept of internal management. And we think that if anywhere beside in specific statutes it should be treated in item 7, which has to do with investigative matters.

As to advice of subordinates, there may be instances in which subordinates should be able to advise at least their immediate superiors freely without risking having everything they say disclosed, the argument being that otherwise they would not advise honestly but would always be looking over their shoulders when they gave the advice. But the place to deal with that seems to us to be again not under internal management, but under item 5 dealing with intra-agency memorandums.

On item 4, trade secrets, we still refer to what we suggested last year on page 59 of the record of the July hearings, an amendment to read "trade secrets and other confidential business information in the nature of a trade secret." Mr. Rains made a point about the word "privilege" being confusing. And he also made a point that "confidential" taken alone is less than entirely clear. I do think that if you look back at our language last year at page 59 of the record, you will find it useful in this regard.

Now, item 5—I suggested in my own statement on this that fact memos addressed to deciding officers by their assistants should be in-

cluded here as matter that need not be disclosed. And as I mentioned just a moment ago, we think that general advice on other matters, at least to direct superiors, might well as exempted even though it deals with factual matters.

Now, our suggestion here is a little complicated. Our suggestion is dual. We have suggested in my prepared statement that you add a sentence to subsection (e) saying that these exemptions do not interfere with whatever one is entitled to get in judicial or administrative discovery proceedings. If there is such a sentence added to the subsection, we think it would be safe to exempt much more than is exempted under this interagency or intra-agency memorandum provision.

Mr. FENSTERWALD. It is our feeling that that should be placed in the report, and it is your feeling that it should be placed in the bill itself?

Mr. BENJAMIN. I should think so.

Also, Mr. Rains had a good point about exempting what the Justice Department advises its client, another agency, about an automobile accident case.

With regard to item 6, we agree with Mr. Rains about omitting the word "clearly."

With regard to item 7, we did not find Mr. Rains' point about material that had not yet been filed substantial, but it would be possible to add after "files" the words "or material." And we would also bring in here the investigative procedural manuals that Mr. Rains referred to elsewhere.

That brings me to the end of 3(e). And this demonstration of our openminded willingness to support other people's suggestions.

Mr. Rains made suggestion about several other provisions with which we do not agree. And I might, since we are talking about his testimony, refer to these here also.

As to section 5(b), dealing with informal hearings, I think what Mr. Rains said was based on a misconception that 5(b) calls for some particular kind of procedure. In fact, under 5(b) the agency can, by rule, provide for any kind of procedure that is appropriate to the particular kind of informal adjudication. And when Mr. Rains talks about the Internal Revenue Service calculating machines, I would doubt whether their determination of initial tax refunds or assessments is an adjudication at all in view of the use of the word "matter" in the definition section. So I doubt that it would come under 5(b) at all. I could not think it is an adjudication. I think that is an initial administrative step.

With respect to 4(d), which deals with emergency rules, Mr. Rains arrived at the same misconception that Mr. Belin had last year; he misread this provision to put some limit on the period during which a rule adopted by the full procedure to supersede an emergency rule could remain in effect. The only limitation of time under 4(d) is on the time during which an emergency rule can itself remain in effect.

I mentioned last year that if this was not clear, Mr. Pellerzi of the trial examiners conference last summer suggested some alternative language to make it clear that that is all that is referred to. We have some language ourselves in this statement of mine with regard to 4(d) which I would not bother to read now.

Mr. Rains' other statement, except for the matter that Mr. Keatinge will take up, attorneys' practice, was as to the provision regarding "standing" in 10(a). Since the standing provision as it now reads, including "in fact," is a product of Mr. Davis' suggestion, perhaps he will answer Mr. Rains on that.

I may say that in my own statement, we disagree with the present change in section 10(a), and suggest at page 23 of my statement returning to the text of the original S. 1663, omitting the words "in fact" and restoring the word "aggrieved." I do not want to take more time by going into that now. I think I will leave it to the written statement. And I will answer any questions that you may want to ask.

But with regard to one of Mr. Rains' examples regarding a Coast Guard vessel which had been bought, and which was thought by somebody else not to be seaworthy, it seems to me that probably you do not get to the question of standing, but that the question of seaworthiness, or determination of seaworthiness, simply by signing a contract, is probably not a reviewable action within the definition of reviewable action in section 10.

Now, we are obviously nowhere near through all the subjects of my statement. I think I will limit myself to one more, and then open myself to any questions you may want to ask. And that is our considerable distress at finding the *in terrorem* clause of 8(c) (2) restored in S. 1336. That was in the original version of S. 1663, and was taken out of S. 1663 when it was revised, and now it comes in again. What it amounts to is that if there has been decision by a hearing officer, and a party wants to go not to an appeal board, but direct to the agency, the party makes an application for direct review by the agency, and if the agency denies that application it is deemed to have affirmed all the findings and the decision of the hearing officer. That seems to us completely unjustifiable. I know it is directed to minimizing applications for direct review by the agency. But I think it minimizes them in an indecent and unsupportable way, because it says to the man, if you apply here, you may find yourself completely out and never get any appellate consideration of the hearing officer's decision at all.

Mr. FENSTERWALD. Mr. Benjamin, is it correct to say that you agree with the objective but not the means?

Mr. BENJAMIN. Yes, I think the objective was accomplished in 1663 as revised without those means.

Mr. FENSTERWALD. I just wanted to be sure that you did agree with the objective.

Mr. BENJAMIN. Of course, the agency can always accomplish the objective anyway by denying the application, and sending the matter back to an appeal board. But 8(c) (2) as it now reads would not allow that.

Mr. FENSTERWALD. We are trying to prevent the delaying of appeals and the length of time by requiring the litigant to make a choice. Your systems would be all right, except that it would be considerably more lengthy. But everybody would make an appeal first to the agency, and then if they were turned down, then they would go back to the appeal board.

Mr. BENJAMIN. I would not think so. And I would not mind even some attempt to limit the grounds on which you can try to go first to

the agency. You are not going to get there if the agency does not want to take it. But this is related to another suggestion that we make which is that the grounds of exception which are specified in 8(c) (1), the grounds on which one may appeal on exceptions to the hearing officer's decision, should be expanded to include the ground that the agency ought to change its policy.

Under 8(c) (4), the agency can take a case when it thinks it ought to change its policy. But it seems to me it ought to be open to the party to ask an agency to change its policy. And that may determine the whole case. That would be a particularly apt case in which to ask the agency to review directly instead of having it go through an appeal board which could not change the agency's policy even if it thought it ought to.

Mr. FENSTERWALD. In other words, you do not like the litigant having to make up his mind which route to take?

Mr. BENJAMIN. Not under that kind of threat.

Mr. FENSTERWALD. I wonder where you got the phrase "in terrorem."

Mr. BENJAMIN. I think that is an old phrase. It comes in wills where the typical case in a will is where it provides that anybody who contests the will loses his legacy under the will. It is very much the same as this.

There is not any real stopping point, but I think I will stop at this point. The rest of it is in the written statement. And I would be glad to answer any questions.

Or maybe you would like Mr. Keatinge to go ahead with his discussion of section 6 (b) and (c), and then we will take up all the questions at once.

Mr. FENSTERWALD. Mr. Benjamin, do I understand that you are going to be here through today and tomorrow?

Mr. BENJAMIN. I am planning to stay through tomorrow.

Mr. FENSTERWALD. I have already, as you know, interposed a number of questions, and I think it might be better if we went ahead with Mr. Keatinge's presentation and those of the other gentlemen, and then withhold any further questions of you possibly until tomorrow.

Mr. BENJAMIN. My only problem is that my associates are here partly to answer questions. And I do not know whether they will be here tomorrow.

But I think it is probably better to do what you suggest and go ahead with Mr. Keatinge's statement now.

Mr. FENSTERWALD. Up to this point, you have answered all the questions that I had in mind. I was thinking about the chairman.

Senator BURDICK. We have the benefit of your testimony last year also.

Mr. BENJAMIN. Thank you.

Senator BURDICK. We will call Mr. Keatinge as a witness.

(Biography of Mr. Keatinge:)

Keatinge, Richard Harte, lawyer; born December 4, 1919, San Francisco, Calif.; ed. A.B. (econ., cum laude), U. of Calif., Berkeley, 1939; M.A. (Econ.), Harvard U. 1941; LL.B., Georgetown U. Law Sch. (Bd. of Editors, Georgetown Law Journ.), 1944; married Betty West, Washington, D.C., 1944; children: Richard West, Daniel Wilson, Anne Elizabeth. Senior Industrial Specialist, War Prodn. Bd. and predecessor agencies, 1941-44; Senior Economist, Foreign Econ. Adm. 1944; admitted to bar, District of Columbia, 1944, State of New York, 1945, Calif., 1947, assoc. atty., law ofcs. of Joseph L. Weiner, New York City, 1944-45, Norman

L. Meyers, Washington, D.C. 1945-47, Hoag & Mack, L.A. 1947-48; asst. to the pres., the Flying Tiger Line, Inc., L.A. 1947-48; est. law practice; Richard H. Keatinge, Keatinge & Arnold, Keatinge, Arnold & Zack, Keatinge & Older, L.A. 1948-62; Keatinge & Sterling 1962-. Dir-gen, counsel, Consolidated Photographic Inds., Inc., L.A. 1948-60; dir. Nuclear Corp. of America, Inc., New York City, 1955-57, pres., 1955; dir. Yuba Consolidated Inds., Inc., San Francisco, 1955-, general counsel, 1956-; secy. Telautograph Corp., L.A., 1956-61; dir. Glassco Instrument Co., Pasadena, Calif., 1960-; dir. Tavart Corp., Paramount, Calif., 1961-; dir. Management Technology, Inc., L.A. 1962-. Mem.: Phi Beta Kappa; Calif. Law Revision Comm. 1961-; vice chmn., 1964-; Special Asst. Attorney General of California, 1964-; subcom. chmn., Gov's. State Fair Citizens Adv. Com., 1960-61; Amer. Bar Assn. (natl. secy., Jr. Bar Conf., 1948-49; chmn., Com. on Sales, Exchs. and Basis, Tax. Sect., 1963-; chmn. Aviation Com., Adm. Law Sect., 1959-61; chmn. Management Comm., Adm. Law Sect., 1962-64; Council of Adm. Law Sect., 1961-64; chmn. Comm. on Agency Adjudication, 1964-, Adm. Law Sect.; chmn. Comm. on Adm. Practice Act, 1965-, Adm. Law Sect.; Bar Activities Sect., chmn. Comm. on Arbitration, 1964-); Inter-American and International Bar Assns.; The State Bar of Calif.; American Judicature Society; Los Angeles County (mem., Taxation Comm., 1958-61; 1964-, vice chmn., 1965-; Coro Foundation, Trustee, 1964-; Natl. Council, Natl. Planning Assn., Washington, D.C., 1956-; Amer. Econ. Assn.; Calif. Alumni Assn.; Georgetown U. Alumni Assn.; Harvard Club of Southern California. Clubs: Balboa Bay Club, Newport Beach, Calif.; L.A. Ath. Club; Racquet Club, Palm Springs, Calif.; Democrat; Episcopal (vestry, Church of St. Clement, Alexandria, Va., 1946-47). Residence, 1160 Virginia Road, San Marino, Calif. Office: 458 South Spring Street, suite 120, Los Angeles, Calif., 90013; 626-5241.

Prepared May 11, 1965.

STATEMENT OF RICHARD H. KEATINGE, AMERICAN BAR ASSOCIATION

Mr. KEATINGE. Senator Burdick and members of the staff, I have submitted a prepared statement on S. 1758 and sections 6(b) and 6(c) of S. 1336, and I would like to ask that this statement be incorporated in the record at this point. I do not propose to read the statement in full.

Senator BURDICK. Without objection.

(The complete statement of Mr. Keatinge is as follows:)

STATEMENT BY RICHARD H. KEATINGE, CHAIRMAN OF THE AMERICAN BAR ASSOCIATION, COMMITTEE ON THE ADMINISTRATIVE PRACTICE ACT (ADMINISTRATIVE LAW SECTION)

I. INTRODUCTORY

My name is Richard H. Keatinge. My appearance here is on behalf of the American Bar Association. The objectives and purposes of S. 1758 (and the identical provisions contained in secs. 6(b) and 6(c) of S. 1336) are endorsed by the American Bar Association.¹ The provisions of S. 1758 and sections 6(b) and 6(c) of S. 1336, we believe provide practical means for implementation of

¹ The principle contained in this legislation has been of interest to the American Bar Association for a number of years. Its most recent action was the adoption on Feb. 20, 1956, of the following resolution by the house of delegates, 81 Rep., ABA, 1956, at 379-380:

"Resolved, That the American Bar Association recommends the enactment of more comprehensive and explicit legislation covering rights of persons or organizations to appear and be represented by others before Federal agencies, giving due regard to appropriate distinction between legal representation and nonlegal representation, such legislation to include the following features—

"(a) That an attorney at law should be entitled to appear for and represent other persons, parties, or organizations, including the United States or any agency thereof, before any agency upon filing a statement with the agency that he is a member of the bar in good standing according to the law of any State, territory, Commonwealth, or possession of the United States or of the District of Columbia, and that he is not disbarred or under suspension by any court; except that an agency may further require the filing of a power of attorney as a condition to the settlement of any controversy involving the payment of money."

those objectives. There are a few amendments which we feel should be made to the bill in its present form; these proposed amendments, six in number, are discussed in this statement, and, in addition, are set forth verbatim in appendix A hereto.

II. PRIOR BILLS HAVING A COMMON PURPOSE WITH S. 1758

There have been a number of bills introduced in the Senate and House of Representatives from time to time which have a common purpose with that of S. 1758. A recent example was S. 1466, passed by the Senate during the 88th Congress; a current example is S. 1523. The Federal Administrative Practice Act, S. 932, in the 85th Congress, introduced by the late Senator Hennings, contained provisions in sections 405, 406, and 407 on the administration and agency recognition of attorneys. The principal difference between those provisions in the Practice Act and S. 1758 is that S. 932 provided for centralized admissions before an office of Federal Administrative Practice.

III. BASIC POSITION OF THE AMERICAN BAR ASSOCIATION

The American Bar Association's position is based upon a fundamental principle; namely, that an attorney who has been found qualified to represent others before the highest court in his jurisdiction, and who is subject to the restraints and disciplines of the legal profession, should by that fact be accepted as qualified to represent others before the various Federal agencies. That is the essence of our position. It has wide support among the rank and file of the members of the bar throughout the country.

I would emphasize one thing at this point. The bill speaks of the right of an attorney to practice before a Federal agency, but the bill is based on a more fundamental principle; namely, that of the right of a person to be represented by counsel of his choice. This right is now recognized by most of the Federal agencies. It should be extended to all agencies and the enactment of S. 1758 is necessary for this purpose.

We see no justification for any agency to impose admission requirements on attorneys or to interpose restraints on a citizen's right to be represented by an attorney of his choice. After all, an attorney has been determined qualified to represent others in his State; he has been found to be of good character and reputation; he is licensed by the State authority to practice in any field of the law and he can handle before the courts or tribunals in his State any matter which can be handled before any Federal agency.

If State action over the admission and control of practice is to be duplicated at the Federal level, which we believe unnecessary, this should not be done through a maze of multiple and conflicting regulations of various agencies.

IV. PRESENT ADMISSION REQUIREMENTS OF FEDERAL AGENCIES

Admission requirements in recent years have been abandoned by most Federal agencies, but they are still imposed by four agencies—the Interstate Commerce Commission, the Patent Office in patent matters, the Veterans' Administration, and the Treasury Department (Internal Revenue Service). The requirements of these four agencies for admission to practice may be summarized as follows:

1. *Interstate Commerce Commission.*—The Interstate Commerce Commission recognizes that attorneys at law are qualified to practice before it, but applications under oath, a certificate of the clerk of the court, or the sponsorship of three practitioners are required—49 Code of Federal Regulations, sections 1.8 and 1.9.

2. *Patent Office in patent matters.*—An attorney can practice before the Patent Office in patent matters, but he first must make application on a prescribed form showing good moral character and good reputation, plus legal, scientific, and technical qualifications sufficient to render clients a valuable service—37 Code of Federal Regulations, section 1.341.

3. *Veterans' Administration.*—An attorney can represent others before the Veterans' Administration if a member of the bar of the jurisdiction where he maintains a law office or resides, but he must complete Veterans' Administration form 2-3186. An attorney is presumed by the Veterans' Administration to have knowledge of the law and regulations to qualify him to render "substantial service," but besides the admission procedure he is required to file a power of attorney in each particular matter—38 Code of Federal Regulations, section 14.629.

4. *Treasury Department (Internal Revenue Service).*—The Treasury Department has a complex admission procedure. It has 59 sections on practice in part 10 of title 31 of the Code of Federal Regulations and an additional 11 sections on conference and practice requirements in subpart E of title 26 of the Code of Federal Regulations. These 70 sections total 21 pages of fine print in the Code of Federal Regulations. Attorneys are eligible to be admitted to practice, but no one can represent others except upon being issued an enrollment card, and this is issued upon a showing of good character and good reputation and the possession of necessary qualifications to "render valuable service to clients." There is an investigation routine and enrollment organization. Enrollment cards are good for a term of 5 years and must be renewed—31 Code of Federal Regulations, section 10.0; 26 Code of Federal Regulations, section 601.501.

V. RESTRICTIONS ON PRACTICE BEFORE AN AGENCY ARE WRONG IN PRINCIPLE

The restriction of practice before an agency is wrong in principle. It has overtones of a closed shop, or guildism, which is unprofessional. It develops ingrown or inbreeding tendencies. The system presumes that it is a proper Federal function for an agency to determine which attorneys may render valuable services to their clients or to serve as a board of specialization. There is not any basis for the presumption. If specialization is to be formalized in the legal profession, we believe it should be done by the legal profession, not by one or more Government agencies. We also believe that a client, not a Government agency, is the one who is best able to determine whether an attorney is able to render him a valuable service.

The money and manpower expended in these admission routines are quite substantial. These admission rules tend to proliferate and their administration is a clear illustration of bureaucracy putting its worst foot forward. The nuisance aspect is extensive with little or no contribution to any public protection or none that cannot be obtained if and when necessary through existing agency or State disciplinary machinery. The Attorney General's Committee on Administrative Procedure (1941) did not go into this subject, but it did observe in its final report that (p. 124) "it appears to the Committee that members of the bar are subjected to unjustifiable annoyance in connection with their admission to practice before the agencies." The admission problem was considered by the second Hoover Commission. Recommendation No. 25 in its Report on Legal Services and Procedure (par. 1955) coincides substantially with the position of the American Bar Association.

So much for the admission problem as such.

VI. SUBSIDIARY PROVISIONS REQUIRED IN LEGISLATION

It is apparent that certain subsidiary provisions are required in any legislation dealing effectively with the admission problem.

A. *Proof of qualification as an attorney.*—Some provision is needed on proof that a person is a qualified attorney under the bill, namely, admitted to the bar of the highest court of his jurisdiction. This bill meets that problem by making the appearance of an attorney in each matter a representation of qualifications. Under section 101(a) of S. 1758, the appearance of an attorney before an agency in a representative capacity constitutes a representation to the agency that he is a member in good standing of the bar of the highest court of a State, possession, territory, commonwealth, or the District of Columbia. The public is adequately protected. Certain agency rules do accept an attorney's own statement, without further proof, that he is a member of the bar in good standing. This represents existing law, but a legislative declaration of this is essential in the field of agency practice.

We do believe, however, that several slight changes in the wording of section 101(a) would be desirable; the changes suggested would conform the wording of section 101(a) of S. 1758 to the wording of section 1(b) of S. 1466 adopted by the Senate in the 88th Congress. In the first place, we believe that the words "in which he resides or maintains an office" should be added after the words "the District of Columbia" at line 6 on page 1 of the bill. The addition of these words would make clear the fact that, to take advantage of the provisions of this section, an attorney must have a business office or his residence in a jurisdiction in which he has been licensed by the

local admitting body; it should assist in preventing an attorney from practicing solely before Federal agencies while maintaining his office or residence in a jurisdiction in which he is not responsive to local bar or disciplinary authorities.

We also believe that the words "that he is both properly qualified and authorized to represent the particular party in whose behalf he acts," appearing after the word "representation" on lines 1 and 2 of page 2 of the bill, should be deleted, and that there should be added after the word "representation" the following words: "to the agency that under the provisions hereof he is authorized to represent the particular party in whose behalf he acts, and that he is currently qualified as provided herein." We believe that the use of the foregoing wording will more clearly separate the concept of an attorney's authorization to act for his client from the requirement that, to practice before an agency, he be currently licensed in the jurisdiction of his residence or business office.

Throughout the Federal and State systems of this country, it has long been axiomatic that an attorney, as an officer of the court, is presumed to be entitled and authorized to act on behalf of any client for whom he appears. This authority and right is inherent in the attorney's license which carries with it the high duties, privileges and disciplines of the legal profession. This concept has been long expressed in both Federal and State decisions; some of the more significant of these decisions are digested in appendix B hereto.

It is clear from the authorities set forth in appendix B that agency rules which refuse to accept an attorney's statement that he is an attorney; which require an attorney to prove that he is an attorney; which require an attorney to prove that he is a member of the bar in good standing; which require an attorney to prove he is of good character and good reputation; which require an attorney to prove to the satisfaction of some agency that he is able to render a client valuable service; or which impose other superfluous requirements on the right to represent others before an agency—it is clear that such practices are contrary to a fundamental concept of the law which has been recognized since the beginning of our Government at both Federal and State levels.

B. Proof of authorization to represent a particular client or to appear on a particular matter.—There is a related obstacle to agency practice; namely, a requirement that an attorney submit proof that he does in fact represent the client on whose behalf he appears or that he is in fact authorized to handle the particular matter on behalf of the client for whom he appears. These requirements are arbitrary and contrary to Federal and State practice. There is a legal presumption that an attorney who appears in a matter has authority to represent that client and in that particular matter. While such presumptions may be challenged by any court or agency for cause, there is no justification for requiring an attorney to submit collateral proof that he does represent the client for whom he appears and that the particular matter is within the scope of his authority. Such obstructions to agency practice are in general wholly unreasonable and at odds with the authorities heretofore referred to; the special problem presented by the Internal Revenue Service's use of powers of attorney will be discussed below.

C. Requirement that agencies deal with counsel and give notice to counsel.—One other provision is needed to implement the objectives of this legislation. It is necessary to provide that the agencies should deal with the attorney chosen by the citizen to represent him. Section 102 meets that requirement. Agencies sometimes refuse or are reluctant to give an attorney information, or to serve him with notices, or to confer with him on client matters, etc. Such practices wittingly or unwittingly abridge a person's right to be represented by his chosen attorney. It is not only an annoyance and inconvenience, it is not an orderly way to conduct a Government function. Section 102 of S. 1758 makes it clear that an agency is expected to deal with the attorney in the matter covered by the representation, and it makes clear that notice to or service upon the attorney constitutes valid notice and service upon the party. This again is merely a restatement of existing law which, however, as a practical matter must be included in this legislation.

In both the Federal and State courts, it is a required practice to serve pleadings, notices, and other papers related to judicial proceedings upon the attorney of record who represents the party in interest. Authorities supporting this position are collected in Appendix C hereto; these authorities show that an

agency has the right and duty to recognize the attorney of record and to deal with him in that matter, and that the agency's failure or refusal to do this can cause great inconvenience and injury.

We believe, nevertheless, that one formal change should be made in the wording of section 102 to make it clear that an agency need serve notices or other written communications on an attorney only in the matter or matters in which he has been retained, and that an agency shall not be required to send communications regarding other or nonrelevant matters to such an attorney. To achieve this objective, on page 2, line 20, after the words "or by such participant," there should be added the words "in such matter."

VII. SUMMARY OF GENERAL PROVISIONS OF 1758

In sum, S. 1758 is an agencywide declaration of the principle that an attorney who is a member of the bar of the highest court of his jurisdiction is by that fact eligible to represent others before a Federal agency. This principle is implemented by the attorney's own certification that he is a duly qualified attorney in his jurisdiction. The party is assured that the attorney chosen to represent him before an agency will be dealt with in that matter by the agency. The enactment of these provisions will insure order and expedition in the handling of matters before Federal agencies.

VIII. MATTERS NOT COVERED BY S. 1758

The foregoing covers the scope of the bill, but to avoid any confusion the bill makes it very clear that it does not cover one way or the other certain other problems; for example, lay representation before agencies, self-representation, conflict of interest, disciplinary procedures, admission pro hac vice, the problem of representation by former employees, etc. This is made clear in section 101(b) of the bill and this intention can be amplified as necessary in the committee report.

IX. THE SPECIAL PROBLEM OF POWERS OF ATTORNEY AND THE TREASURY DEPARTMENT (INTERNAL REVENUE SERVICE)

A. Comparison of power of attorney exception in S. 1758 with original American Bar Association proposal.—S. 1758 presently contains a provision in section 101(b) (p. 2, lines 11-14) that it shall not be construed "to prevent an agency from requiring a power of attorney before the agency transfers funds to the attorney for the party whom he represents."

The original American Bar Association recommendation for legislation providing for recognition of attorneys before administrative agencies without special enrollment procedures contained a similar, but somewhat broader, exception as follows (81 ABA reports 495 (1956)): "except that an agency may further require the filing of a power of attorney as a condition to the settlement of any controversy involving the payment of money."

The American Bar Association exception was inserted to preserve a long established and important practice of filing powers of attorney in representation before the Treasury Department. Practice before the Treasury Department differs from practice before other administrative agencies in several significant respects, and these differences justify the broader power of attorney exception.

This exception does not infringe on the main purpose of the bill to abolish agency admission requirements for attorneys, because if the bill is passed, an attorney will be entitled to represent his client before any agency without being enrolled. The Treasury Department will be required to accept automatically and acknowledge his power of attorney, which serves an entirely different but important function.

B. Differences in two forms of power of attorney exception; examples.—The difference in the two forms of power of attorney exception may be illustrated by three examples in tax practice:

1. A taxpayer after filing his return and paying the tax discovers that he has failed to claim a deduction to which he was properly entitled. He engages an attorney to file a claim for refund and to negotiate with the Internal Revenue Service for allowance of the refund. The attorney must convince the Service that both the facts and the law support the allowance of the refund. Discussion of the facts with the Service will often require that the parties review facts in prior or subsequent tax returns filed by the taxpayer.

It is not common practice under such circumstances for the taxpayer to authorize his attorney to receive the check in payment of the refund, if allowed; the check is normally delivered directly to the taxpayer.

Under existing practice, the attorney would be required to file a power of attorney identifying the matter in which he is representing the taxpayer. This practice could be continued under the American Bar Association exception, but under S. 1758 in its present form the Service could not require the attorney to file a power.

2. After a taxpayer has filed his return, the Internal Revenue Service makes an audit and proposes a deficiency in tax on the ground a deduction taken by the taxpayer was not allowable. The taxpayer engages an attorney to contest the deficiency, and the attorney then proceeds to negotiate with the Service, reviewing the facts and law as in the first example above. If the attorney is successful, the deficiency will simply be expunged in whole or in part; there will be no transfer of funds to the attorney since the proposed deficiency will never have been paid.

Under existing practice and under the American Bar Association exception, the attorney would file a power of attorney as in the first example above; under S. 1758 in its present form, he could not be required to do so.

3. A taxpayer employs an attorney to secure a ruling or closing agreement as to the tax treatment of a particular transaction during his taxable year before his return is filed for that year. Such ruling or closing agreement will govern the treatment of the transaction in the return and thus constitutes "the settlement of a controversy involving the payment of money"—that is, the tax due with the return.

Under existing practice and under the American Bar Association exception, the attorney would file a power of attorney; under S. 1758 in its present form, he could not be required to do so.

In all of these cases, the purpose of providing for a power of attorney is principally to define the scope or limits of the attorney's authority in view of special considerations involved in representation before the Treasury Department. Thus, the power is not the source of the authority—the Treasury Department could not refuse to accept or acknowledge the power. It merely describes the extent of the authority. This is apparent from the existing power-of-attorney regulations issued by the Treasury Department, which merely require that the limits of the attorney's authority be specified.

C. Two principal considerations justifying special requirement for power of attorney in tax matters.—To be more specific, there are two principal considerations justifying a special requirement for a power of attorney in representation in tax matters—the confidential nature of tax returns and associated financial information, and the decentralization of the Internal Revenue Service.

D. Confidential nature of tax returns and associated financial information.—The first consideration is based on the fact that the tax return and the associated financial information are particularly sensitive data, because they disclose all aspects of the taxpayer's net worth, his costs of doing business, and many other equally confidential facts. For this reason, such information receives rigid statutory protection in the so-called nondisclosure statutes in 26 U.S.C. 7213 and 18 U.S.C. 1905. These provide severe criminal penalties, applicable to Government personnel, for unauthorized disclosure of such information. This protection is a keystone of the self-assessment system under which each taxpayer furnishes a full explanation of his financial position each year and computes his own tax, based on the assurance that the information will remain confidential. Such a full disclosure and such candor are essential to the successful functioning of our self-assessment tax system.

One principal function of the power of attorney in representation before the Treasury Department is to serve as the established method whereby the taxpayer authorizes disclosure by the Government to his representative of all facts relevant to the disposition of the matter to which the power relates. This protects not only the Government but also the taxpayer. The Government employees are free to discuss the case fully and openly with the taxpayer's representative, going into prior and subsequent returns and other financial data they may have in their files or which they have developed in their audit. The power also operates to provide the Government personnel with assurance that the information submitted by the attorney may be received with the same degree of authenticity as other data previously supplied by the taxpayer directly, and

also subject to the nondisclosure statutes. Thus the representatives on both sides are free to negotiate on an open and unlimited basis in resolving the matter. The power of attorney also serves as a convenient means in such cases of specifically authorizing the attorney to execute waivers, closing agreements and similar actions on behalf of the taxpayer; without a power of attorney the Service could not accept such documents unless executed by the taxpayer.

As for the taxpayer, he has the assurance of knowing that his confidential information, protected by the nondisclosure statutes, is secure and will be disclosed only to those persons whom he has specifically designated in writing. The need for the power also serves to bring to the taxpayer's attention the nature and scope of what he is being asked to do, that is, the extent of the authority granted in executing the power.

In addition, the filing of a written power provides some further protection to the taxpayer against unauthorized disclosure of his financial affairs by the Service. Otherwise, if no power could be required, an imposter could appear and represent himself to be the taxpayer's attorney to obtain information on behalf of a creditor, a divorced wife or a business competitor. While such a person would be prosecuted if apprehended, and while there is no protection against such a person filing a forged power of attorney, there is less likelihood of such an unauthorized disclosure where a written power, signed by the taxpayer, must first be filed by the taxpayer's representative.

Furthermore, many responsible attorneys prefer to have a power of attorney as protection for themselves. Thus, counsel who become involved with their clients' intimate financial affairs should be protected in obtaining data of this nature by having the limit and scope of their authority clearly and specifically expressed.

While there may be no intention in S. 1758 to affect the operation of the nondisclosure statutes, this is not clear from its literal provisions. Its terms and its purpose can be taken to authorize an attorney to appear for his client, and to be apprised of whatever information the agency possesses relevant to the matter, without the filing of a power (except in the limited area where he is to receive funds for his client). If some authorization to receive confidential information protected by the nondisclosure statutes could still be required by the Treasury Department, it may as well be in the form of the well-known and long-established power of attorney used in tax practice. As indicated, the existing power-of-attorney process has proven to be both a convenient and satisfactory system for providing the necessary authorizations.

E. Decentralization of Internal Revenue Service.—The other special reason why the scope of the attorney's authority needs to be spelled out in a power of attorney in tax practice stems from a combination of factors. The Internal Revenue Service operates on a decentralized basis through 8 regional and 58 district offices, each of which has 1 or more outlying suboffices. There are over 2 million potential controversies each year in the income, estate, and gift tax areas alone, representing the number of returns examined in which adjustments are proposed. If the controversies in excise, alcohol, and tobacco tax, and other tax matters, plus all those arising by refund claims were added, the number would be much greater. Most of these controversies are disposed of at the district office or suboffice level, so the extent of actual decentralization and the number of real controversies resolved far exceeds that of any other administrative agency.

Added to this decentralization factor is the fact that taxpayers in tax matters are represented not only by attorneys but also by certified public accountants, public accountants, and a further large group of agents without professional standing. This group consists of former service employees, tax consultants, bank clerks, schoolteachers, real estate agents, and many others who not only prepare returns but may also be admitted to practice before the Treasury Department and represent taxpayers in controversies that arise. It is frequently common practice for a taxpayer to be represented by both an attorney and an accountant in the same matter or different attorneys or accountants in different matters. Thus, one may handle excise tax matters while another handles income tax matters; one may represent him in the local office, while another represents him in seeking a ruling from the national office in Washington. Even as to income tax matters, each year's taxes is a separate matter, as to which he may have different representatives.

No other administrative agency has a comparable situation combining this volume of controversies, this degree of decentralization, and this diversity of

representation (both in terms of types of representatives and combination of representatives for a particular client).

The power-of-attorney process enables the Service in an orderly way to know which representatives appear for the taxpayer in particular matters. Even this formality may be readily avoided, where the taxpayer has only one representative, by filing a general power of attorney under the existing regulations. The existence of a general power of attorney is unusual, however, and in view of the extraordinary number of controversies which must be processed through many decentralized offices, in which the Service must deal not only with attorneys but with other types of representatives, and frequently with separate representatives for the separate matters for a single taxpayer, the Service needs some convenient way to have a record of each particular representative's scope of authority. Nearly all the controversies are disposed of informally by negotiation with Government employees who are not hearing examiners; there is no written record of the conferences, and the Government representatives who may be involved range from agents doing audit work to formal conferees. Some written authorization from the taxpayer to be placed in the Government files as they proceed through the various administrative levels and review processes has always been regarded as necessary. The conversion to automatic data processing tends to accentuate this need. The existing power-of-attorney process has proven effective in filling the need.

F. Simplicity of existing power-of-attorney process of Internal Revenue Service.—One final observation relates to the simplicity of the existing power-of-attorney process. The execution of a power satisfactory to the Service is no longer a troublesome or anachronistic process; no particular form of language is necessary, practically no formalities are required, and no written power is even necessary when the taxpayer is present. It is only necessary to set out the nature of the agent's authority and any limitations thereon, as well as certain particular authorities such as the right of the agent to execute a closing agreement on behalf of the taxpayer. The Internal Revenue Service has been particularly cooperative in recent years in streamlining the power-of-attorney requirements by accepting suggestions made on behalf of the American Bar Association.

For these reasons, the broader form of power-of-attorney exception endorsed by the American Bar Association, which insures that the Treasury Department may continue to require such powers, should be substituted in section 101(b) of S. 1758.

X. POSSIBLE ADDITIONAL PROVISION REPEALING CONFLICTING LEGISLATION AND REGULATIONS

Perhaps there should be an additional provision in the bill, section 103, for example, providing in effect that any legislation in conflict with this act is hereby repealed and any regulation not in accordance with this act shall be without effect. S. 1758 is partially in conflict with the act of July 7, 1884 (4 U.S.C. 261), as to the Treasury Department, and is partially in conflict with the act of July 8, 1870, as amended February 18, 1922 (35 U.S.C. 31), as to the Commerce Department and Patent Office. Questions may be raised with respect to other provisions of law or regulation. The singleness of purpose of S. 1758 is sufficiently clear that there should be no problem in regard to indirect repeal but an additional provision such as suggested may be preferable.

With the foregoing possible exceptions, S. 1758 is a practical solution of a longstanding problem in agency practice. We urge the enactment of this legislation.

APPENDIX A. AMENDMENTS TO S. 1758 PROPOSED BY THE AMERICAN BAR ASSOCIATION

Amendment No. 1: On page 1, line 6, after the words, "the District of Columbia," add the following: "in which he resides or maintains an office."

Amendment No. 2: On page 2, lines 1 and 2, delete the words "that he is both properly qualified and authorized to represent the particular party in whose behalf he acts," and after the word "representation" add the following: "to the agency that under the provisions hereof he is authorized to represent the particular party in whose behalf he acts, and that he is currently qualified as provided herein."

Amendment No. 3: On page 2, line 11, delete the word "or".

Amendment No. 4: On page 2, line 12, after the words "agency from requiring," add the following: "the filing of".

Amendment No. 5: On page 2, lines 12, 13, and 14, delete the words "before the agency transfers funds to the attorney for the party whom he represents," and after the word, "attorney," in line 12, page 2, add the following: "as a condition to the settlement of any controversy involving the payment of money; or to prevent an agency from requiring the filing of a written notice of appearance."

Amendment No. 6: On page 2, line 20, after the words, "or by such participant," add the following: "in such matter".

APPENDIX B. FEDERAL AND STATE CASES SUPPORTING THE PRESUMPTION THAT AN ATTORNEY IS PRESUMED TO BE ENTITLED AND AUTHORIZED TO ACT ON BEHALF OF ANY CLIENT FOR WHOM HE APPEARS

One of the earliest and clearest statements of this rule was made by Chief Justice John Marshall in the case of *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204 (1824) at page 226:

"Certain gentlemen, first licensed by Government, are admitted by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any State, or of the Union."

Similarly, in *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616 (1875), the Supreme Court of the United States held that "When an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed."

The same rule prevailed at common law in England. Thus, in the *Anonymous* case reported in 1 Salk. 86, 91 Eng. Rep. 81 (1698) it was stated that:

"The course of this court (King's Bench) is, where an attorney takes upon him to appear, the court looks no farther, but proceeds as if the attorney has sufficient authority, and leaves the party to his action against him."

The principle has been repeatedly reaffirmed in numerous decisions of both the Federal and State courts.

Illustrative decisions of the Federal circuit courts are as follows:

In *Bowles v. American Brewery Inc.*, 146 F. 2d 842, 847 (4th Cir. 1945), the court stated, "An appearance by a practicing attorney creates a presumption that he has authority to act and the law casts the burden of proving the contrary upon the one asserting it."

In *Paradise v. Vogtlandische Maschinen-Fabrik*, 99 F. 2d 53, 55 (3d Cir. 1938), it was held that "It has long been settled that parties may appear in legal proceedings by counsel. It is equally well settled that an appearance by a practicing attorney creates a presumption that he has authority to act and the law casts the burden of proving the contrary upon the one asserting it."

In *Feldman Investment Co. v. Connecticut General Life Insurance Co.*, 78 F. 2d 838, 840 (10th Cir. 1935), the court declared: "It is urged, however, that the respective attorneys who filed the application and the stipulation had no authority to act for the defendant in question. An appearance by a practicing attorney creates a presumption that he has authority to act and the law casts the burden of proving the contrary upon the one asserting it."

Typical State court decisions confirming the rule are as follows:

In *People v. Sleezer*, 8 Ill. App. 2d 12, 130 N.E. 2d 302 (1955), the court stated that "The authority of an attorney to appear for a client whom he holds himself out as representing is presumed."

In *State of Minnesota v. Karp*, 84 N.E. 2d 76 (1948), it was held "There is a presumption that a regularly admitted attorney has authority to represent the client for whom he appears."

In *Kerns v. Garrigus*, 162 N.E. 2d 313 (Ind. 1959), the court held that it was presumed that an attorney who appeared in court was duly authorized to represent the parties for whom he appeared.

Similarly, in the case of *In re Estate of Richmond*, 1 Ill. App. 2d 310, 177 N.E. 2d 583 (1953), the court declared that "There is a presumption that an attorney at law as an officer of the court, has authority to act for a client whom he professes to represent."

APPENDIX C. FEDERAL AND STATE CASES SUPPORTING THE REQUIREMENT THAT PLEADINGS, NOTICES, AND OTHER PAPERS RELATED TO JUDICIAL PROCEEDINGS BE SERVED UPON THE ATTORNEY OF RECORD WHO REPRESENTS THE PARTY IN INTEREST

Rule 33(1) of the rules of the Supreme Court of the United States provides as follows:

"Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, *at the office of counsel of record*, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a U.S. post office or mailbox, with a first-class postage prepaid, *addressed to counsel of record* at his post office address." [Emphasis supplied.]

Rule 5(b) of the Federal Rules of Civil Procedure provides as follows:

"Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court."

Federal Rule 5(b) is explained in 1 Barron and Holtzoff, Federal Practice and Procedure section 203 (rules ed. 1960) as follows: "After the action has been commenced and the summons and complaint have been served, service of other papers may be made on counsel. Service on counsel is not only permissible but mandatory unless service on the party himself is ordered by the court or unless the party is not represented by counsel." (See *Kelley's Adm'r v. Abram*, 20 F. Supp. 229, 230 (E.D. Ky. 1937).)

The same practice is universally followed in the State courts. Thus, 7 Am. Jur. 2d section 119 summarizes the rule as follows: "An attorney of record in a pending cause may accept service of papers and notices in the action and may give any notice in the case that the client himself might give."

A statement of the rule in a State court decision is found in *Anderson v. Anderson*, 198 S.C. 412, 18 S.E. 2d 9, 10 (1941), as follows: "* * * after parties have been brought into court and are represented by an attorney or attorneys at law, service upon such attorney or attorneys would be deemed in legal effect service upon the adverse parties. One of the significant features of our whole judicial system is that parties litigant may be, and usually are, represented by attorneys learned 'in the law, and these attorneys by virtue of the very name of their office stand for and in the place of their clients.'"

In *Unity School of Christianity v. F.R.C.*, 64 F. 2d 550 (D.C. Cir. 1933), a Commission action taking away a radio station license was reversed for failure to give due notice. In that case the rival applicant had served exceptions and request for oral argument on the client in Kansas City, Mo., but had not served his Washington attorney. The Commission also failed to give notice of oral argument on the exceptions. The court condemned the practice of serving the client and not his attorney in the case.

MR. KEATINGE. The American Bar Association finds itself in agreement with the objectives of S. 1758 and sections 6(b) and 6(c) of S. 1336. We believe that the provisions thereof provide practical means for implementation of the objectives set forth in S. 1758.

There are a few amendments which we feel should be made to the bill in its present form; these proposed amendments, which are six in number, are discussed in detail in the statement, and in addition, are set forth verbatim in appendix A to the statement.

The statement contains a discussion of the prior bills which have been introduced on this subject, and particularly S. 1466 which was passed by the Senate in the last session.

The position of the American Bar Association is based upon a fundamental principle, namely, that an attorney who has been found

qualified to represent others before the highest court in his jurisdiction, and who is subject to the restraints and disciplines of the legal profession, should by that fact be accepted as qualified to represent others before the various Federal agencies. This is the essence of our position. It has wide support among the rank and file of the members of the bar throughout the country. We have heretofore discussed the reasoning and the justification supporting this position; such material was submitted to this committee at the last session of Congress with respect to S. 1466.

We have discussed in our statement the present admission requirements of the four Federal agencies which have retained admission requirements. These agencies are the Interstate Commerce Commission, the Patent Office in patent matters, the Veterans' Administration, and the Treasury Department, and, more particularly, the Internal Revenue Service.

Only two of these agencies maintain requirements at the present time which we believe are substantial in nature, and these agencies are the only two which, as we understand it, are opposing the elimination of admission requirements at this time, namely, the Patent Office in patent matters, and the Treasury Department with respect to the Internal Revenue Service.

Now, the objections of these two agencies are different in nature.

The Patent Office objects to the elimination of the requirement of special admission for attorneys on the ground that special technical competence should be shown by an attorney to gain admission.

The objection of the Treasury Department, the Internal Revenue Service, is somewhat different. No technical competence is required of an attorney who wishes admission to practice. Rather, the Treasury Department wishes, in effect, to conduct its own investigation as to the character and fitness of an attorney to practice. As Mr. Rains pointed out yesterday in his statement, and as was pointed out by the Treasury during last year's hearings, the Treasury does not have confidence in the local bar disciplinary bodies throughout the country. Mr. Rains made the specific statement yesterday, if I may quote:

Because the enforcement of ethical standards in many States is lax, because even vigilant State bars are unaware of tax fraud or violations by bar members, and because attorneys frequently belong to the bar of more than one State, a simple requirement of bar membership in one State by no means insures that a bar member will be a reliable representative of taxpayers.

We believe that restrictions on practice before an agency are wrong in principle; we have stated our reasons in detail in the foregoing statement. We do not believe that anything which was said by any of the gentlemen yesterday in any way negates or refutes this principle.

We have suggested a few minor amendments with respect to the conditions of admission to practice before an agency.

One particular amendment we have suggested is in section 101(a). It would provide that to take advantage of the provisions of this bill, an attorney must be currently admitted to practice in the jurisdiction or before the bar in which he maintains a business office or in which he resides. We have suggested the addition of this provision, which I might say was in S. 1466, in order to meet at least one of the ob-

jections of the Treasury and others to the fact that an attorney who was admitted at one time, say, in Tennessee, and then moved to California and was not admitted to the California Bar, could otherwise use the provisions of this legislation to practice before a Federal agency.

We have also suggested some clarifying wording with respect to differentiating between admission to practice and an authorization to appear on behalf of a client in a particular case.

The particular change which we wish to suggest which we think is perhaps most significant, and with respect to which our position differs substantially from the position we took with respect thereto during the hearings on S. 1466, is in connection with powers of attorney. Objections have been made by the Internal Revenue Service, the Treasury Department, and many tax practitioners with respect to the fact that they feel that the existing wording of S. 1758, as was the case with the wording of S. 1446, would eliminate the right of the Internal Revenue Service to provide for the use of powers-of-attorney—in income tax and other tax matters. We feel that with respect to this one position, this one point, that the contentions of the Internal Revenue Service and the Treasury are sound, and that the use of powers-of-attorney should be allowed to be continued. To effect this change and to allow the continuance of powers-of-attorney, we have suggested a change in wording which appears at the bottom of page 16 of my statement; it also appears on page 30 thereof. We have set forth the reasons why we believe that the continued use of powers of attorney should be allowed; I will not go into them in detail, as they are set forth in the statement, beginning at page 16.

I think that summarizes briefly the position of the ABA with respect to S. 1758 and the provisions of sections 6(b) and 6(c) of S. 1336. I would be happy to answer any questions that you may have at this time.

Senator BURDICK. Thank you for your fine statement.

One question that comes to me first is, How do you meet the argument that the Patent Office raises that lawyers do not have the mechanical or professional competence?

Mr. KEATINGE. Senator, I think there is some merit in this argument, but not as much, perhaps, as the people at the Patent Office would have you believe. I think, first of all, we have to accept the fact that any nonexpert attorney to whom a patent case is referred is going to consult expert or outside counsel in connection with the actual preparation or the drafting of the patent application itself. I think this, as I understand the testimony which was given yesterday, and the testimony which was given last year by Commissioner Ladd, is the problem that they are primarily concerned with that is, the problem of the improper drafting or the improper preparation of an application for processing through the Patent Office. Now, there is no question but that this does require a degree of technical competence. But I think the same thing can be said with respect to the lawyer who is approached, let us say, with a Customs case, and who practices in Kansas City. The chances are that he has never seen a Customs case before. He is going to consult and obtain expert outside counsel.

Now, the second point I would make is this. Cases go from the Patent Office, if they are appealed, to the courts. To practice before the Customs Court or the Court of Customs and Patent Appeals, of course, an attorney need only be admitted to the highest court in his jurisdiction. He is going to appear before these courts without any particular qualification other than the qualification of having been admitted to practice in the highest court of his jurisdiction.

Then, I would make another point which I am a little reluctant to make, but I think it should be made. That is this—I think Commissioner Ladd adverted to it in his testimony on S. 1466—approximately 60 percent of the patents which are granted by the Patent Office which are thereafter litigated are found invalid by the courts. It occurs to us that perhaps there should be somewhat more emphasis on the legal problems or an attorney's legal training with respect to the processing of patent cases, and not merely on the technical aspects or the technical preparation of applications.

Finally, we do not feel that the situation in the Patent Office is sufficiently different than the situation with respect to, say, the Internal Revenue Service, to justify a separate set of tests and standards to be applied to this agency alone.

Senator BURDICK. Would you liken the situation to a personal injury case where a lawyer has to familiarize himself with medical facts and medical testimony, that you do the same thing in a patent situation?

Mr. KEATINGE. I think that is true. And I think, as the Senator probably knows, most attorneys who will practice in that field spend a great deal of time familiarizing themselves with medical technique, they will take special courses in connection with their preparation for trying those cases. I think you can expect, and I think it is reasonable to expect, that a lawyer participating or practicing in a given field is going to conform to the ethical standards of the profession by either preparing himself properly to represent his client in that field, or by obtaining special help to assist him in connection with a particular case in that field.

Senator BURDICK. How would you deal with the argument that the practitioner before the field of patents practices exclusively in that field, as distinguished from a general practitioner?

Mr. KEATINGE. Perhaps I do not quite understand your point, Senator.

Senator BURDICK. What about the argument that may be advanced that a practitioner in a patent field is exclusively a patent lawyer, and thereby against greater competition?

Mr. KEATINGE. Senator, I think that same argument can be made with respect to almost any field of law. I think that we know many lawyers who are tax lawyers exclusively and practice exclusively in the tax field. I think the argument could, therefore, be made that these lawyers have a greater competence and a greater degree of specialization in the field and therefore should have a greater degree of preference. Now, the Treasury has not seen fit to do this. I think the basic position we get back to, though, is the position of the association that every client is entitled to be represented by the lawyer of his choice. And if an individual has confidence in a particular

lawyer and wishes to have that lawyer represent him before whatever agency it may be, whether it is here in Washington or back in my home State of California, I think the client is entitled to be represented by that lawyer. And I think we have to depend upon the lawyer and his responsibility to his profession, and to his client to prepare himself properly to represent his client before whatever agency it may be.

Senator BURDICK. And if he needs any particular technical, professional or any kind of special information, he can secure it?

Mr. KEATINGE. That is correct, sir.

Senator BURDICK. Now, what have you to say about the objections of the Internal Revenue Service?

Mr. KEATINGE. I think we have met one set of objections of the Internal Revenue Service, as I understand it. In other words, they have two basic objections. One is, they would like to continue their previous admissions procedure, which is now set up under Treasury Circular 230. That is one problem.

The second problem is that they would like to continue the use of powers-of-attorney. We think with respect to powers-of-attorney, particularly since the liberalization of their regulations in 1963 and 1964 with the cooperation of the tax section of the American Bar Association, that this procedure should be recommended and should be continued.

What we do object to is the first position of the Internal Revenue Service, that is, that their special admissions procedure should be continued.

Now, nothing in this bill will prevent the Treasury from disbarring or disciplining or otherwise dealing with an attorney that appears before the agency. But what the bill will do is prevent the Treasury from continuing its special admissions procedure.

In effect, what the Treasury is saying—and I think they have been fairly frank about it this time in their statement—is that they do not have confidence in the admissions procedures or the disciplinary procedures of the various State bar agencies. I think the difference is that the American Bar Association does. We feel that if the Treasury has an objection to the initial admission of a particular attorney that the matter should be referred to the disciplinary authorities of his own State, and that the Treasury should not try to set up separate admissions standards with respect to dealing with particular attorneys which are different from the admission standards in the home State, the residence of the attorney. They are the last agency which in effect, is taking this position. The Patent Office's position, as I stated, is somewhat different; they are interested in technical competence, they are not particularly concerned with the area of ethics.

The Treasury, on the other hand, makes no test of a lawyer for technical competence. It is merely trying, in its admissions procedure, to set up separate standards for character and fitness. They are attempting, we say, to set themselves up as a separate admissions committee in Washington to pass upon the qualifications of attorneys. This, we object to.

Senator BURDICK. Then it is not a question of special competence, it is a question of ethics?

Mr. KEATINGE. That is exactly the question, sir. If you will look at their application form and at Treasury Circular 230, a lawyer is presumed by the fact of being a lawyer to be technically competent. The area into which they inquire is whether or not his ethics are up to the standard which they feel, the Treasury feels, should be met, which standards may be different than the standards prescribed by an applicant's home State bar.

Senator BURDICK. They are saying in effect that the standards set by the bar associations in various State statutes are not adequate?

Mr. KEATINGE. That is precisely what Mr. Rains said yesterday. He feels that because the enforcement of professional standards in many States is lax, this additional procedure is required. With this, we emphatically disagree.

Senator BURDICK. I think I find myself in agreement with you.

Mr. KEATINGE. Thank you, sir.

Senator BURDICK. That is all I have.

Mr. FENSTERWALD. I have no questions.

Mr. Benjamin, if we make—I do not know if other questions will occur—we would like to be able to possibly ask you questions before the conclusion of the hearing if a point arises.

Mr. BENJAMIN. I would be delighted. And may I look over this testimony of mine and see if I should have said something that I did not, may I be permitted to do that?

Mr. FENSTERWALD. Certainly, if time permits.

Senator BURDICK. The next witness will be Mr. Eugene Patterson.

STATEMENT OF EUGENE PATTERSON, EDITOR, ATLANTA CONSTITUTION

Mr. PATTERSON. Mr. Chairman, my name is Eugene Patterson. I am the editor of the Atlanta Constitution in Atlanta, Ga. I am appearing today as chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, for the purpose of supporting and recommending favorable consideration of S. 1160 and section 3 of S. 1336, to amend the Administrative Procedure Act of 1946.

Surely it is time to make a decision on the issue here involved—time to turn around a negative law that encourages withholding of fact, and to make of it an affirmative law that encourages sharing of fact with the people.

Surely it is time to open the doors of Government except for those properly closed, instead of going on with a policy that sweepingly authorizes closing of doors except for the ones pried open.

I do not believe the Congress meant to authorize withholding of information from the people when it passed the Administrative Procedure Act of 1946, but, instead, intended to encourage its availability. The then chairman of the Judiciary Committee, Senator McCarran, said as much when he reported the bill to the Senate. He made the following statement with respect to section 3, entitled "Public Information":

The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a

few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance.

Yet the years have shown that this title to knowledge, which Congress sought to convey to the people, is not a clear title at all, but a deed so flawed that neither the people nor the agencies of Government who serve them can converse with any definiteness or assurance.

Properly or not, agencies are encouraged to withhold information on workings of the Government.

Unarmed with clear law and unable to know what to ask, the public stands barehanded and quite often blind before its Government.

I submit that this is not a very good idea in our democratic society, which depends for its guidance on a free people well informed.

I cannot believe the people of the country, the agencies of their Government, or the Congress that makes their law, are satisfied with this curious misplacement of emphasis in a statute well meant.

Section 3 of the Administrative Procedure Act says, of course, that save as otherwise required by statute "matters of official record shall in accordance with published rule be made available."

But, say the law's exceptions, they need not be made available if they require secrecy "in the public interest * * *" or if they relate solely to the "internal management of an agency * * *" or if someone decides to withhold them "for good cause found." That last one could clap a lid on just about anybody's out-tray.

It was such open ended exceptions and qualifications as these that enabled agencies—in the words of the American Law Section of the Library of Congress—"to assert the power to withhold practically all the information they did not see fit to disclose."

So there it is. A law designed to open up matters of public record to the people became instead a Government authorization and encouragement to withhold them.

Spread across the record of these years are the examples of unjustified secrecy that resulted when agencies, sitting as judges and juries over their own decisions, commenced under the law to search their own inclinations for "good cause" to withhold information, and of course were able to find it.

Those examples from the past need no repetition here; those of the future will be reported. But in a real sense the larger significance of the presently unsatisfactory law lies not in specific incident but in a general state of mind.

Vermont Royster, editor of the Wall Street Journal and current president of the American Society of Newspaper Editors, summed up the thing quite clearly. He said:

Practically nobody in the Government ever rears back and announces to a reporter that he can't have certain information because of the Administrative Procedure Act. When reporters don't get it, there is mostly no reason given at all. The real case against the Administrative Procedure Act * * * comes from the influence of the law on Government officials.

In other words, Mr. Royster continued:

Any Government official talking to a reporter has hanging over his head the risk that if he tells the reporter anything which his superiors later object to, he may be subjected not just to a bawling out but to some sort of reprisal under the law. In short, the official risks becoming a law violator and this is naturally going to make him much more close mouthed than he might otherwise be.

Mr. Royster has there described the state of mind to which I attach principal significance. I am not among those who make a pastime of denigrating all public officials; I rather admire most of them despite the headknockings that any newspaperman must have with them continuously in search of the news, good and bad, and in scrutiny of the officials, good and otherwise. So I am not here imputing a general or deliberate arrogance to them, nor do I lack faith in their dedication to the democratic ideal of a freely informed people. On the contrary, I wish to invite an examination of the uncertain position the present law has put these people in.

Would any member of this committee be encouraged, if he were an agency official, to make all possible matters of public record available to the people if his release of the information stood always liable—under the law—to be subjectively adjudged wrong by a superior who might feel it could have been withheld “for good cause found”? Or would that catchall summons to secrecy instead encourage him to play safe through silence, say as little as possible to the public about what his agency was doing, and put the people’s right to receive knowledge second to his own boundless authority to withhold it?

The latter would be the prudent course for any official, of course. That is why the law does not encourage him to inform, but instead encourages him to withhold. What the people don’t know won’t hurt him. So the people are the losers in this discouraging inner struggle of the silent Government official. They will go on losing—without really knowing how much they are losing because they cannot know how much information is being withheld from them—until the Congress acts to amend this faulty law. And I emphasize my belief that it is nothing less important than a pervasive state of mind, shaping our National Government, that we are dealing with here.

The amendments embodied in the legislation now before the committee would, in my judgement, relieve Government officials of much uncertainty and vulnerability while at the same time serving the people’s growing need for knowledge at a time of multiplying growth in Government and its complexity.

The legislation before you would give Government officials a clear statement of information they are to regard as confidential, while giving the public an enforceable right of access to information they properly should have.

It contains three essentials of sound policy: First, it affirmatively establishes the public’s right to fullest possible knowledge of the workings of their Government; second, it specifies with relative clarity the exceptions that can guide and justify Government officials in the legal withholding of sensitive information, reducing the ambiguity they now labor under, and third, it provides for court action to require compliance in what I would expect to be those relatively rare instances of actionable denial and legal challenge. Under the prospect of judicial review, however, the main burden would pass to the shoulders upon which it should rest—those of Government agencies—to justify their withholding of information, instead of weighing any longer on the American public to prove it has a right to information the agencies alone may choose to withhold.

Surely this benign change of emphasis would slow down the thump of rubber stamps now classifying nonsensitive information in Government. Before the stamp is inked the official would have to think:

"Can I justify this?" Whereas under present law he can ink and thump, ink and thump, knowing he can justify secrecy for one "good cause found" or another. So the law is presently encouraging him to suppress information. The amendment would encourage him to do the opposite, except of course for specific and stated cause under its provisions. And surely, with the Government enlarging, the public should expect a widening latitude for inquiry into what it is doing, instead of leaving to the Government a widening latitude for withholding answers to valid and answerable inquiry.

For many reasons I respectfully urge favorable consideration of the amendments before you. But foremost is my belief that this legislation would effect a fundamental correction and improvement in the state of mind in Government, encouraging officials to inform a needful public as fully as they can, and no longer discouraging them from making that affirmative effort because of the looseness and ambiguity in the present law.

Thank you.

Senator BURDICK. Thank you for your very, very fine statement.

Mr. FENSTERWALD. I wonder if I might ask a question, Mr. Patterson?

Mr. PATTERSON. Yes, sir.

Mr. FENSTERWALD. Mr. Patterson, you have characterized the present law pretty much as a withholding rather than a freedom of information statute. Do you think we would be better off with no section at all than the present law?

Mr. PATTERSON. I haven't given that full thought. It seems to me that it would be a step backward to give up the effort that we are now undertaking to spell out the public's right to access and simply clear the decks because our first effort—I would much prefer and urge the Congress to continue in the direction it started and simply perfect the flaws in the present law.

Mr. FENSTERWALD. Do you understand the intense opposition to this proposal from practically every Government agency?

Mr. PATTERSON. I am aware of that opposition.

Mr. FENSTERWALD. Up to this time the opposition has been successful. And I would in my own mind think that since the present law encourages withholding rather than encourages granting of public information, it might be better just to get rid of it.

But to answer my question, you thought it would be better to go forward than backward. And I certainly can see your argument in that direction.

I also would like to join the chairman in thanking you for the extremely thoughtful and helpful statement you have presented. You have very kindly come here today on behalf of the editors to present your views to us.

(The following was received for the record:)

THE ATLANTA CONSTITUTION,
Atlanta, Ga., May 28, 1965.

Mr. BERNARD FENSTERWALD, Jr.,
City Counsel, Subcommittee on Government Operations, Senate Office Building,
Washington, D.C.

DEAR BUD: Thanks for sending me the attached transcript. It has my approval. I would, however, like to supplement my statement with the following addition:

"During the course of the Senate hearings on amendments to the Administrative Procedure Act, the question was raised if it would be desirable to repeal the so-called public information section, insofar as it is presently a withholding, rather than a freedom of information, statute.

It is my understanding that the House subcommittee looking into this same question has determined that, although section 3 is legally applicable to all agencies and departments in the Federal Government, in fact many agencies feel it is not so applicable. There appears to be considerable confusion as to whether this so-called public information section could be extended to apply to all the executive branch.

"In order to eliminate this confusion, it is our suggestion that any freedom of information or public records bill be incorporated in the housekeeping statute instead (5 U.S.C. 22). Of course, there should be some cross-reference to the housekeeping statute in the Administrative Procedure Act."

Sincerely yours,

EUGENE PATTERSON.

Mr. FENSTERWALD. The next witness is Dr. B. R. Stanerson, deputy executive secretary of the American Chemical Society.

**STATEMENT OF B. R. STANERSON, DEPUTY EXECUTIVE SECRETARY,
AMERICAN CHEMICAL SOCIETY**

Mr. STANERSON. Mr. Senator, my name is B. R. Stanerson. I am deputy executive secretary of the American Chemical Society. I have a statement by Dr. Charles C. Price, president of the American Chemical Society. Dr. Price was in town yesterday to present his views on the pending legislation but couldn't return today. He is head of the Chemistry Department of the University of Pennsylvania and had to be back in Philadelphia.

We are sorry, of course, that he couldn't stay over.

Senator BURDICK. Would you like to have his statement included in the record?

Mr. STANERSON. That is what I was going to suggest. You may want to put it in the record, and I can summarize it, or read it, if you prefer.

Senator BURDICK. We will do both. Without objection, we will include the full text in the record, and you may summarize it.

(The statement referred to is as follows:)

STATEMENT BY THE AMERICAN CHEMICAL SOCIETY

The American Chemical Society is grateful for the opportunity to present its views on these legislative proposals, principally on the first two bills which would permit any person who is a member in good standing of the highest bar of any court of any State, possession, territory, Commonwealth, or the District of Columbia, to represent others before any Federal agency.

Under the provisions of its national charter granted by the 75th Congress in 1937, the society has a responsibility to foster the public welfare and to aid the development of our country's resources. Three of the objects through which it strives to carry out its function are as follows:

To encourage in the broadest and most liberal manner the advancement of chemistry in all its branches;

To promote research in chemical science and industry; and

To increase the diffusion of chemical knowledge.

It is by reason of its interest in the advancement of science and its sense of responsibility for safeguarding the public good that the society wishes to comment upon the bills in question. Specifically, we address ourselves to the implications of this legislation for the patent activities of the U.S. Patent Office.

PRESENT REQUIREMENTS FOR PATENT ATTORNEYS OR AGENTS

Current Patent Office regulations provide that, to practice before the Patent Office, a person must establish that "he is of good moral character and of good repute and possessed of the legal and *scientific and technical qualifications* necessary to enable him to render applicants for patents valuable service and is otherwise competent to advise and assist them in the preparation and prosecution of their applications before the Patent Office." (Emphasis supplied.)

The "scientific and technical qualifications" required for effective Patent Office practice require a different type of academic training and specialization from that characteristic of, or even appropriate to, the majority of lawyers. The present Patent Office registration procedure screens this background, thereby protecting the public by imposing standards of scientific and technical competency that neither the public nor perhaps even an attorney himself may know are desirable. On past occasion, the Patent Commissioner has testified as to how the public interest and inventors themselves suffer when this screening mechanism is suspended, either by legislative action or by administrative policy.

In 1964, nearly 93,000 new U.S. patent applications, including designs, were filed. Further, there is a large backlog of pending applications. This means that a substantial number of persons are constantly in contact, through patent solicitors, with the Patent Office. Under present practice, patent applicants are assured that anyone who is a registered member of the Patent Office bar has met rigorous scientific and technical tests and standards.

THE PROPOSED LEGISLATION

All of the bills under discussion would continue to permit present practitioners before the Patent Office bar to represent inventors in the handling of patent applications and allied matters. S. 1758 and S. 1336, however, would grant authorization to another larger group to do so as well; namely, attorneys who are members of the bar of the highest courts of the land. Importantly, such individuals would not need to demonstrate competency in technological matters; and thus would void the screening process which had been held to be so important to the success of the U.S. patent system. It is this aspect that disturbs us.

THE SOCIETY'S INVOLVEMENT

Nearly two-thirds of the American Chemical Society's 100,000 members are engaged in scientific research, and many of these have been issued U.S. patents. A survey of the 13 members of our board of directors in 1964, for example, revealed that they had been granted 149 patents since 1930. Lending further force to this observation are statistics released by the Patent Office which show that chemical patents have accounted for some 21 or 22 percent of the total of all U.S. patents issued since 1961. To transform chemical inventions into chemical patents requires technically trained patent solicitors. The same is true, we are sure, of inventions in other scientific and engineering fields as well.

Members of the chemical profession have long had an interest in patents as scientific literature. The Chemical Abstracts Service of the American Chemical Society, for example, identifies, abstracts, and indexes virtually all new chemical patents published throughout the world. It is the prime source of such information for the world's scientists. The extent of these activities testifies to the usefulness of patents as records of chemical advance, as teachings of chemical technology, and as publications of scientific value. It is important that the scientific standard of chemical patents as scientific literature be maintained at its present high level.

THE SOCIETY'S POSITION

Our concern is from three separate viewpoints: (1) the interest of inventors seeking representation before the Patent Office in the preparation and prosecution of patent applications; (2) the interest of the scientific public seeking technical and scientific information from the patent literature, and (3) the interest of the general public, which ultimately benefits from the discoveries of inventors.

We believe that for optimum service to inventors, the scientific public, and eventually the general public it is essential that those persons who are in the

direct line of assisting inventors in their dealings with the Patent Office should be required to meet certain standards of technical training and competence in keeping with the technical nature of the subject matter of patents. Such standards are required of the patent examiners employed by the Patent Office and are at present required of patent practitioners retained by inventors. We believe that the public interest would not be served by a change in the present arrangement, as is contemplated in S. 1758 and S. 1336, since conceivably some inventions might not be available for commercial development and public use because of inadequate representation before the Patent Office. We believe also that such a change could work to the eventual detriment of the patent system.

Further, we do not believe that the legal profession would benefit; the scrupulous general attorney would not find his clientele enlarged, but undoubtedly would continue to refer patent cases to specialists.

PROPOSED AMENDMENT TO S. 1758 ET AL.

In urging that the Judiciary Committee reexamine the potential impact of S. 1758 and like legislation, we suggest specifically that an amendment be added to permit the continued imposition of special qualifications for those who practice in patent matters before the Patent Office. This could be accomplished by inserting the words "other than the Patent Office" following the word "agency" in line 7 of S. 1758, for example. This type of wording was included in S. 318, a similar bill introduced in the 88th Congress.

While we can appreciate a reluctance to segregate one Federal agency from comprehensive legislation of the type now under study, we feel the potential impact on our country's science-related activities could be sufficiently serious to urge this exclusion. In addition, we believe there is a historical precedent for such action.

As an alternate, Senator Ervin's bill, S. 1879, does not propose any broadening of present policies regarding agency practice by attorneys or other qualified individuals. This aspect of his bill thus would merit the society's endorsement.

Thank you for the opportunity to present these views.

Dr. CHARLES C. PRICE, *President.*

Mr. STANERSON. The principal bills we are concerned with are S. 1758 and S. 1336. We address ourselves to the implications of this legislation for the present activities of the U.S. Patent Office.

I think, as you know, the current regulations provide that to practice before the Patent Office a person must establish that "he is of good moral character and good repute and possessed of the legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service, and he is otherwise competent to advise and assist in the preparation and prosecution of their applications before the Patent Office."

S. 1758 and 1336, however, would grant authority to another and larger group, namely, the attorneys who are members of the bars of the highest courts of the land to do so. Such individuals would not need to demonstrate competence in technical matters. And this would void the present process which has been held to be so important to the success of the U.S. patent system. It is this aspect that disturbs us.

And we are concerned about this from three points of view: the interest of inventors seeking representation before the Patent Office in the preparation and prosecution of patent applications; the interest of the scientific public seeking technical and scientific information from the patent literature; and the interest of the general public, which ultimately benefits from discoveries of inventors.

Briefly, what it amounts to is that we take a somewhat different stand than Mr. Keatinge, who was up here a little while ago, in that we think this specialization that is required by the Patent Office is important in representing the inventors. Otherwise the patent appli-

cations will be poorly prepared, the Patent Office will become further behind in its work than it is now, and inventors and the general public would eventually suffer. This, of course, could be very easily overcome by simply exempting the Patent Office from the group that are included in this legislation.

In other words, in 1758, for instance, if you just inserted the words "other than the Patent Office" in one place, the modifications in the amendment would be satisfactory to Dr. Price and his colleagues in the American Chemical Society.

Mr. FENSTERWALD. Can you speculate on the reason why the patent bar has never come up and testified in favor of an exemption?

Mr. STANERSON. Well, I don't know for sure; I don't understand why it hasn't been done. I know a number of people at the Patent Office, quite a number, as a matter of fact, personally. And I know that these people agree with the stand. Why they don't testify—it must be a matter of a political nature that I don't understand.

Mr. FENSTERWALD. The only reason I ask is 2 years ago I invited them to testify, because I felt if there was a serious problem with respect to patent law the patent bar would come and testify. To my surprise, they did not, and they did not indicate any position since. And it just seems to me that almost every field in the law is becoming highly technical. Certainly the Internal Revenue Code is highly technical, and the Food and Drug is highly technical. Could you tell us in what respect you think that patent law is any different from any other phase of the law?

Mr. STANERSON. Yes, very definitely. The patents themselves involve science and technology almost without exception. And in order to represent a client in connection with these it seems obvious that one should know something about the science and technology involved. It isn't only law, it is law superimposed on science and technology. And one must understand both of these. This basically is the problem.

Now, it is true that the general attorney who would go to the specialist and obtain assistance as explained by Mr. Keatinge could probably do quite satisfactorily if he did this and followed through, but it seems it would involve an unnecessary intermediary.

Secondly, I have a feeling that some will not do this, and it will only complicate the nature of the applications, they will be poorly prepared. In fact, I saw some place not long ago that the Patent Office has the privilege of waiving this requirement in certain cases if they want to. In so doing there was something like 30 applications presented, and only two of them eventually were processed by these people who were not members of the patent bar. This indicates that a relatively small proportion of them really are processed properly by people who are not adequately prepared.

Another way of looking at it is this. Approximately, as I understand it, a third of those who apply for the special bar at the Patent Office do not pass the first time. These are people that think they know enough to handle the situation, and the Patent Office does not think they do. Now, if it were thrown open to the general practitioners, they would not even have to bone up as much as this third who have already been refused practice, and they would still be able to go ahead.

Senator BURDICK. Mr. Stanerson, as long as you have mentioned percentages, I thought you would like to comment on the statement made by a previous witness this morning, who stated that 60 percent

of the patents granted were ultimately held invalid by the courts. First, is that correct?

And, second, do you have a comment to make?

Mr. STANERSON. I have never seen that figure before, but I have no reason to doubt it. It could well be. But certainly you wouldn't expect it to improve. The chances are it would be greater if——

Senator BURDICK. That is the question before us.

Mr. STANERSON. I think the people who are practicing are by and large attorneys as well as patents agents.

Mr. FENSTERWALD. Has it occurred to you that part of the difficulty might be in the archaic nature of the procedures at the Patent Office, other than the competency of the people who are trying to work there?

Mr. STANERSON. This is a different matter, of course. There are many in our society who believe that there should be a very sizable reorganization of the system in order to eliminate the long delays in processing patents. But this is a completely different area than this pending legislation, as I understand it.

Mr. FENSTERWALD. I wonder if these are not intimately connected. As long as the Patent Office and the practitioners have what amounts to a monopoly, are you not liable to get much pressure for change, whereas if all qualified attorneys were permitted to practice before the Patent Office, wouldn't there be much more likelihood for a change, pressure for a change?

Mr. STANERSON. I don't see that that would help. It seems to me that would complicate the matters. If a greater number of people attempted to process patents, and some of them not as capable as they should be, this would complicate rather than improve matters, I believe, simply on the basis that, as I understand it, the main difficulty in the Patent Office is a matter of manpower. Certainly if you add more input to the Patent Office and have no more personnel to handle what they are receiving, it isn't going to improve the situation.

Mr. FENSTERWALD. You don't think that a breath of fresh air in the form of nonpatent lawyers working in the Patent Office might stir up a little bit of pressure for a change in the system?

Mr. STANERSON. Well, I don't believe that there is that kind of monopoly, frankly. Bear in mind that they are largely attorneys now who are practicing before the Patent Office. There are relatively few nonattorneys. There are a few, of course.

Mr. FENSTERWALD. These attorneys are generally those who specialize almost exclusively in patent laws, are they not?

Mr. STANERSON. That is right.

Mr. FENSTERWALD. Those are all the questions I have.

Senator BURDICK. Thank you.

Mr. STANERSON. Thank you very much.

Senator BURDICK. Prof. Kenneth Culp Davis, professor of law, University of Chicago.

STATEMENT OF KENNETH CULP DAVIS, PROFESSOR OF LAW, UNIVERSITY OF CHICAGO

Mr. DAVIS. Mr. Chairman, I should like to begin with some comments about the statement by the American Bar Association this morning.

The most astounding position that the bar association takes is at page 16 of the mimeographed statement in which there is objection to the right to be represented by counsel in the degree that is provided for in section 6 of S. 1336. The second sentence of section 6 of S. 1336:

Every party shall be accorded the right to appear in person or by or with counsel or duly qualified representative in any agency proceeding or investigation.

The bar association recommends that the words "or investigation" be stricken. That would mean that an administrative agency can interrogate an individual in an investigation and deny him the right to be accompanied by, represented, and advised by counsel.

It seems to me that the position of the bar association is backwards. It seems to me that the provision of section 6(a) is a good one, and ought to be preserved.

The bar association gives no reason for striking these words. It is interesting to point out that the whole temper of the times is one of increasing, not decreasing, the right to be represented by counsel.

The Supreme Court in such cases as the *Escobedo* case and the *Malloy* case protects the right of the person who is investigated by criminal law enforcement officers to be represented by counsel.

It is interesting to me to look at the definitions in this bill and to observe that a Federal police officer of any kind is an administrative agency within the meaning of section 2. The bar association wants to move in the opposite direction from the direction in which the Supreme Court of the United States is moving on this subject.

Now, another position that Mr. Benjamin has taken this morning is in favor of excluding from section 4 an exception to a rule. It seems to me that logically rulemaking includes the creation of rules, the proliferation of rules, adding to the rules, and subtracting from the rules. It seems to me that there is every reason why the present draft ought to be continued. I think he is simply mistaken when he says that the procedure that should be followed for making an exception to a rule should be what he calls "adjudicatory procedure." I don't know what he means by "adjudicatory procedure." I doubt if we have any such thing.

There are two kinds of procedures that are used in courts, aside from conferences in the judge's chambers. One procedure is that of trial. The other procedure is that of argument. It seems to me that the elements about procedure need to be straightened out in these proceedings, as I was inclined to recommend last year.

We have difficulty as a matter of terminology here. Does Mr. Benjamin mean that on the question whether or not an exception should be made to a rule that we ought to have a trial procedure? If he does, I would strongly object. Trial procedure is designed for resolving issues of fact. A trial procedure is no good for any other purpose. The right procedure for dealing with questions of policy or questions of law or questions of how discretion should be exercised is the procedure of argument, either written or oral or both.

If the question is whether a rule should be amended to provide an exception, the proper procedure is argument, unless it happens that some specific issue of fact arises, and then it may be appropriate to designate that issue for a little trial procedure.

I think that the provision in section 4 in its present form is entirely satisfactory, and is based upon understanding. I should regret very much to see it changed.

Now, Mr. Benjamin objects to definitions of "order," "opinion," and "adjudication." These definitions in the present bill are based upon what I said last year. I think these definitions are good definitions, they are entirely satisfactory. He says that the definition of "adjudication"—he misstates it as a definition of "adjudicatory procedure," but there isn't anything of that kind in this bill, that terminology is not used at all; it is a definition of "adjudication." The definition of "adjudication" seems to me to be a great gain, because too much is included in the old definition and a great deal of confusion has developed as a result of that.

He gives no reason for saying it is not sufficiently inclusive. He gives no illustration of something that is excluded.

I know of nothing that is excluded that should be included. It seems to me we ought to continue the definition of "adjudication" as in the present bill.

Now, he also says that the definition of "opinion" ought to come out. It is very interesting to me that he doesn't give any reason for that. I don't see why he asserts his position without any reason. It seems to me that the definition of "opinion" is a good one, although I would make one very slight change in it. The definition in section 2(d) says—

"opinion" means the statement of reasons, findings of fact, and conclusions of law, upon all the material issues of fact, law or discretion presented on the record, issued in explanation or support of an order.

The change I would recommend is deletion of the words "presented on the record." Ninety-nine percent of all orders, and more than ninety-nine percent, are issued without hearings with a determination on the record. We ought to provide for the 99 percent plus, not merely for the 1 percent or fewer.

Now, he does say, apart from deleting it, that the definition is inadequate, and he gives an illustration this time. He says that the definition of "opinion" is not appropriate in section 3(b)(A). If you look at section 3(b)(A) you find this: "Every agency shall, in accordance with published rules, make available for public inspection and copying all final opinions."

It seems that "opinion" as defined in section 2(d) fits perfectly the purpose of section 3(b)(A). This is a good illustration of why the definition of "opinion" is a good definition of "opinion." What we have today is a tremendous number of opinions and adjudications which are not open to public inspection. We have a tremendous amount of secret law throughout the agencies of the Government.

I will come back to that in a moment.

Another position that Mr. Benjamin takes has to do with subpoenas. He said that he would limit section 6(a) to what he calls formal adjudications under section 5(a). Why should it be so limited? He doesn't state any reasons. I am of the opinion that whenever the party is in an adjudication of any kind and he needs to compel the production of evidence, and the agency has authority to compel the production of evidence, the party ought to be allowed to ask the agency to issue a

subpena. I see no reason to limit the use of subpoenas to cases in which the hearings are required by law to be determined on the record after opportunity for agency hearing. The subpoena power extends to all adjudications, in fact it extends beyond adjudications. The parties should be allowed to use it as in the present bill.

Mr. Benjamin advocates changing the provision on standing in section 10(a). I think that the provision of section 10(a) is perhaps the greatest gain that is made in this entire bill. The provision is a very simple one. Any person adversely affected in fact shall have standing, it says. This is as it should be.

Now, he is making the egregious statement that the courts do not use the language "in fact," at least he says so far as the American Bar Association knows. I wish he would look at the opinions of the courts. He will find in a very large portion of all judicial opinions dealing with standing the language, "in fact," which stems, of course, from the Senate and House committee reports in 1946 at the time the Administrative Procedure Act was adopted.

If he would like an example for the use of the terminology "in fact," I would cite the latest Supreme Court decision of any significance on the subject of standing, *Bantam Books v. Sullivan* (370 U.S., 58, 1963), in which the Court held that the plaintiffs had standing because, in the words of the Court, "they have in fact suffered a palpable injury."

That is the language of the Supreme Court of the United States in the latest case on the subject of standing. It is good language; it is a good decision. This bill is completely in accord with that decision. I recommend that the bill be left as it is on the subject of standing.

Senator BURDICK. Professor Davis, I would like to ask you a question at this point.

Mr. DAVIS. Yes.

Senator BURDICK. Would an issue be raised in the case where an administrative officer had discretion? Let's take, for example, an application for a radio license, the party that didn't receive the license; would he have standing in court, where the administrator had discretion?

Mr. DAVIS. Pardon?

Senator BURDICK. Suppose A and B applied for a radio station license in one town, and only one can be granted; A gets it and B doesn't; can B sue under this?

Mr. DAVIS. Any applicant who applies for a license that is denied has always had standing under the law, and that is quite clear.

Senator BURDICK. In other words, then, a lot of these administrative agencies, whether they be agencies concerned with granting radio licenses, or granting loans, in any of these areas which involve discretion on the part of the administrator there would be a basis for suit by the unsuccessful party?

Mr. DAVIS. Yes, the unsuccessful party who applies for what is technically a license under this act is entitled to go to court and get judicial review. This does not mean that the court will substitute its judgment for that of the agency on the question of whether he should get the license, it means that there will be review in accordance with the scope of the review that is outlined in section 10(e) of the Administrative Procedure Act, which is preserved in this bill.

Senator BURDICK. Of course, with the discretion the losing party would have to prove abuse of discretion, but there would still be standing for suit or appeal?

Mr. DAVIS. Yes. In order to prevail under the abuse of discretion provision he would have to prove, in the words of the statute, that the action is "arbitrary, capricious or an abuse of discretion."

Senator BURDICK. In many of these administrative agencies there are literally hundreds of decisions made based upon discretion.

Mr. DAVIS. There certainly are. In fact, I think you could substitute millions for hundreds.

Senator BURDICK. I will use your word, "millions." And under this language, and under your interpretation of the language, all could be subject to review?

Mr. DAVIS. I am talking about what the law is today, what it has been since 1946, what it was before 1946, and what it will continue to be after this bill is enacted, if it is.

Senator BURDICK. Well, there is a slight difference. I notice in the present law it says "any person suffering legal wrong because of an agency action."

Mr. DAVIS. But there is an "or" following that, "or"—read the rest of the provision.

Senator BURDICK. "Or adversely affected."

Mr. DAVIS. Yes.

Senator BURDICK. You just add another "or" in the present bill.

Mr. DAVIS. Yes. Except that the provision "adversely affected" in the present bill is not cluttered by an ambiguity. The words are "adversely affected or aggrieved within the meaning of any relevant statute." The question is whether the words "within the meaning of any relevant statute" go back and modify "adversely affected." It is because of this ambiguity that I have recommended that we delete the term "aggrieved," because the term "aggrieved" has the same meaning as "adversely affected."

Let's get rid of ambiguity and clarify it and simply say "adversely affected in fact," and stop there. That means that the person who is adversely affected in fact will have standing to get review of administrative action which is otherwise judicially reviewable. This will be substantially what most of the courts are now holding. But some of the courts are confused on the subject. I think that the revision in the present bill will get rid of the confusion, it will clarify, it will be a substantial gain. It will be, I think, an enactment in the statute of what we already have in the legislative history of the Administrative Procedure Act. So that there will be no change in the fundamental—

Senator BURDICK. What would be your opinion of the following language: "Any person suffering legal wrong as a result of any agency action, and adversely affected," leaving out the "or aggrieved"?

Mr. DAVIS. I wouldn't want to put in the word "and," because that would mean that he has to suffer legal wrong, which is the other side of legal right. And the law is and has long been that something short of a legal right may suffice for standing. Always one who has a legal right has standing, or one upon whom a legal wrong is inflicted has standing. That is clear. But in addition, one who has no legal right but may have only a privilege, or be adversely affected in fact, may be

entitled to go to court under the present law and under the law as it would be if this bill were enacted.

Senator BURDICK. Professor, I follow you to a degree, but I don't see how you could go to a court and get redress if you haven't been wronged.

Mr. DAVIS. Well, I will give you an example. I will take the *Sanders* case in the Supreme Court of the United States. This is one of the cornerstones of our standing law. In Dubuque, Iowa, there was one radio station. An applicant sought a second radio station in Dubuque. The Commission granted the application. The first station would thereby be affected by new competition. It thought that the grant of the application was illegal under the Communications Act. It sought to challenge. One question was whether the existing station had any legal right to be free from competition. The clear holding on that was that it has no legal right.

Then the question was, even though it had no legal right, if it is adversely affected in fact, does it have standing to challenge what it alleges to be the illegal action of the Commission?

The answer that the Supreme Court of the United States gave to that question was, "Yes," without a legal right the station had standing because it was illegally affected in fact.

Now, I suppose if I could take the time that I could give you a hundred other such illustrations. The books are full of them.

Senator BURDICK. Would you supply that last citation for the record?

Mr. DAVIS. The *Sanders* case, yes, I could give it to you almost immediately.

Senator BURDICK. The staff tells me it is in your casebook.

Mr. DAVIS. *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S., 470, 1940. It is a cornerstone case of the law on standing; in fact, along with this recent *Bantam Books* case I would say it is the most important case on the subject of standing in the Supreme Court.

Senator BURDICK. You may proceed.

Mr. DAVIS. Now, I should like to come to my section-by-section commentary on this bill.

I am strongly in favor of the purpose behind section 3. I doubt if any need in the whole area of administrative law and procedure is greater than the need for opening up Government information.

However, I would distinguish two things. One is the "law" that affects people. The other is the "records" in the files of agencies.

I think we cannot compromise on the first of these. All law that affects any private person should be open to public inspection. I am talking about law, just law, not records. The fact is today in the U.S. Government that nearly all agencies have, in some degree, systems of secret law. That is a serious evil, and it deserves the attention of the Congress of the United States, in my opinion.

Mr. FENSTERWALD. Mr. Davis, when did you discover this fact?

Mr. DAVIS. Mr. Fensterwald, frankly, I have worked in the field of administrative law as a specialist for between 25 and 30 years. And it is only in the last 2 or 3 years that I have become acutely conscious of this problem. I am a little ashamed of myself that I didn't under-

stand it at an earlier time. I can remember the report of the Franks committee in England which talked about openness. And I coasted right over that without understanding how much significance there is in the need for openness for making administrative decisions. By openness is meant that the nature of the decision ought to be knowable, not merely by those who are affected by the decision, but by others who are potential critics.

During the last year I have been devoting my efforts in administrative law to the problem of discretion, which is exercised without hearing safeguards and without the practical potentiality of judicial review. That we have to have such a phenomenon as discretionary power which is unprotected by hearing safeguards and unprotected by judicial review seems to me unfortunately quite clear. I know no way that we can get the Government's business done unless we have this kind of discretionary power.

But then we have the problem, what can we do to keep it under control? What can we do to protect against human frailties? How do we minimize arbitrary and capricious action if we can't have judicial review and we can't have the safeguards of a hearing?

Well, I have prepared a list of 18 ways—it is too long a list to explain. And I am not going to present that now.

Senator BURDICK. Professor Davis, I have enjoyed this very much. You have talked about capriciousness and harassment, and so forth. And this is a question of academic argument now. Isn't it also possible that out of appeals or review there might be capriciousness too?

Mr. DAVIS. Yes.

My point is, Senator Burdick, that the first of the 18 points is the need for openness, for a statement of what the problem is, what the decision is, what the facts are, and if all this can be open to public inspection, then those who are interested may criticize. If it is open, if the officer knows that at the time he is taking his action that he can be observed by outsiders, or for that matter by insiders, by anyone, this is a natural check upon a natural tendency toward arbitrariness that occurs perhaps in all human beings in some circumstances, and it is what we want to protect against. We need openness.

Now, in the Justice Department, which is supposed to enforce the laws, we have gross, clear, flagrant, and continued violations of section 3(b) of the Administrative Procedure Act. Section 3(b) does have some meaning, and it does do some good, Mr. Fensterwald, in answer to the question you were asking a moment ago of another witness. Section 3(b) requires that all orders and opinions be open to public inspection, except those for good cause held confidential. The Department of Justice has never made any judgment on the question of whether there is good cause to hold confidential all determinations in the Immigration Service, for example.

No orders or opinions are open to public inspection except the 58 in a recent year that were public out of 700,000 decisions. Even when a deportation proceeding is open to the public with representatives of the press present, the transcript of the record of that proceeding is, under the Attorney General's rule, confidential.

Mr. FENSTERWALD. Is there any way that you can contest that ruling?

Mr. DAVIS. Well, I have had dreams about contesting it, but I don't know as a matter of law whether or not that question can be brought to court. Perhaps it may, and perhaps it may not. That in itself is a legal snarl.

Mr. FENSTERWALD. Bit by bit you are just merely confirming my view on the present section 3 and its usefulness.

Mr. DAVIS. That is, it is useless unless the agencies choose to comply with it.

Mr. FENSTERWALD. And they don't.

Mr. DAVIS. The President of the United States has taken an oath to enforce the Constitution and the laws. The Attorney General has taken an oath to enforce the laws. It seems to me that there is a potentiality of appealing to this oath. The law on the subject is quite clear. The legislative history, incidentally, is entirely clear. Both the House committee and the Senate committee spoke of the need for the individual who is affected by what the agency is doing to be allowed to "consult precedents." The purpose was to allow the party to consult precedents. This cannot be done in many fields.

The State Department is violating section 3(b). It has a visa office to which informal appeals are taken from decisions of consular officers in other lands on questions as to whether or not particular visas may be granted. Questions of interpretation of law or policy memorandums are written in the visa office. Several thousand cases a year come to the visa office. Many opinions are written, and there is a large body of law that has accumulated as a result of these opinions. All of them are closed, not one of them is open to public inspection.

I will repeat the words I used about the Justice Department. The State Department in my opinion—and it is a clear opinion—it is an opinion free from doubt in my own mind—the State Department is flagrantly and clearly violating section 3(b) of the Administrative Procedure Act, and it continues to do it even after its violation has been called to the attention of the proper officers of the visa office.

The same thing is true in a greater or less degree in many other agencies of the Government. So I think that there is strong reason in favor of the adoption of something like sections 3(a) and 3(b) of the present bill.

There are questions such as those that were raised by Mr. Rains yesterday about whether the indexing requirement goes too far. And I am inclined to think that Mr. Rains has a valid point. There is not much sense in indexing a million customs officers' decisions. There is sense in requiring that all decisions that may have a value as precedents should be indexed. There has to be some sort of compromise there.

Now, section 3(c) in my opinion is something different from 3(a) and 3(b). I should like to associate myself with all that Mr. Patterson said this morning on the subject matter of 3(c). I agree with what he said. But I am of the opinion that 3(c) in its present form will not accomplish the objective that Mr. Patterson has, and it will not accomplish the objective that the draftsmen of 3(c) have. It overshoots, it goes too far. It needs to be drafted with a great deal more refinement. It seems to me there is no question about what the answer is to Mr. Fensterwald's earlier question about constitutionality of 3(c). Of course, in many applications if it is applied literally it

will be without a doubt unconstitutional. The Department of Justice is clearly right on that.

Let me spell that out a little bit more. This is a complex question. I am not saying that 3(c) is in general unconstitutional. The problem that will be raised is, is it constitutional in this application or that application?

Take, for example, the advice given by General Bradley to President Truman on the question of whether General MacArthur should be discharged. General Bradley before a Senate committee claimed executive privilege. In my judgment he properly claimed executive privilege. In my judgment there is a constitutional doctrine, the limits of which are quite unclear, to the effect that some information in the possession of the executive branch of the Government is within the area of executive privilege and beyond the power of Congress to reach. I do not know where the lines are drawn.

I think the lines have been often drawn by the executive department at the wrong place. I think, for example, in a recent big issue when a report of the Inspector General of the Air Force was withheld from the Comptroller General and a congressional committee, I think in that instance that should have been available to the congressional committees and to the Comptroller General.

We do not have a body of judge-made law on this subject. The only interpretations that we have in the Federal system are interpretations by the executive branch itself.

One of the things that would happen under section 3(c) is that some of these questions for the first time would come to court. Presumably the courts would gradually mark some lines as to what are the limits of the doctrine of executive privilege.

But my objection to section 3(c) does not have to do with executive privilege, it has to do with the manner in which the provision is drafted.

Take, for example, some simple little question. Some irresponsible person wants to get a copy of the speech the President is in the process of drafting. Under the bill that has to be made promptly available. Does it make any sense to do that? Has anybody thought of what the cost will be of complying with section 3(c)? My estimate will be—I don't know how to estimate it, but I am making a wild guess that it will be upward of \$10 billion.

MR. FENSTERWALD. Mr. Davis, are you familiar with section 140 of title V of the United States Code?

MR. DAVIS. That is the housekeeping statute?

MR. FENSTERWALD. That is one which would permit any agency to charge fees to cover the cost of making any records available. And your \$10 billion, I take it, is based primarily on crackpots and others whom you think could cause the Government a great deal of expense. I wonder if, in view of the fact that they could be charged for this, whether this would in fact be true.

MR. DAVIS. Let's take a practical illustration, and let's see whether you accomplish the purpose of section 3(c).

MR. FENSTERWALD. I would like to get to that—first, I would like to stick with this question for a minute.

MR. DAVIS. I am trying to respond to your question.

Mr. FENSTERWALD. Go right ahead.

Mr. DAVIS. Supposing the American Society of Newspaper Editors, represented by Mr. Patterson, decided to be a plaintiff under the new legislation in this bill. And it asked for information that might be useful for any of its members for the purposes of writing newspaper articles, articles in periodicals, or books, or whatever they might want to write. Now, should it be entitled to get at the Government records that it wants? Should it be entitled to be a plaintiff and ask for all records except those within the eight exceptions?

It will take many, many man-hours, up in the billions of man-hours to sort out the information that it may legitimately want. I would recommend, not that the charge be made, but that a time limit be placed on this. The bill in its present form applies to all records, maybe even preceding 1789, all records in the Government files. I would say that searching the records to find out what is in the eight exceptions and what is not within the eight exceptions is a task that nobody ought to perform whether private parties or whether the Government will pay for it.

I would say that the bill should fix a time such as a period of 6 months to a year after the effective date of the act, and as of that time records must be kept segregated, so that those that are under the act and open to public inspection will be in one set of files, and those that are not open to public inspection under the act will be in another set of files. If the records are compiled that way in the first instance, then there will not be this needless expense. I would recommend such a provision.

Mr. FENSTERWALD. Professor Davis, that may be a workable provision; I don't know. But there are numerous statutes which specify for each department and each agency that they keep these records for a short length of time, which is usually anywhere from 4 to 8 years, and then the records which are to be permanently kept are sent to the Archives where they are available anyway. So you don't have this problem of all records back to 1789 in a massive sense, all you have got is the records that are available in the National Archives. And they are available today, as I understand it.

Mr. DAVIS. There is a great deal in the Archives that is not available.

Mr. FENSTERWALD. There may be some areas, defense areas and others, I don't know. But that would not be changed by this bill in any event.

But the problem, I don't believe, is as massive as you think. And I also think that the crackpots would be greatly discouraged if they have to pay for making the records available.

Mr. DAVIS. What would you recommend for a problem like this one? The Immigration Service has four and a half million live files. four and a half million live files in the Immigration Service.

Now, as a student of that subject I want to study, what is this substantive law that is being administered by the Immigration Service. This is secret law, and I want to get at it. The Immigration Service tells me, "Well, we can't sort out four and a half million files, there is classified information in there, and there are reports of the FBI, and sometimes there are reports of the CIA, and there is other confidential

information. And it would be a tremendous job to go through those files and sort them out. And that is why we can't let you see them. You can't study what our law is, because these files are housed in such a way that some secret information, information that is properly secret, is in the files; therefore, we have to close all the files to public inspection."

In fact, I believe, after talking to the Attorney General and the Assistant Attorney General in the Office of Legal Counsel, I think this is in fact the reason that motivates the Department of Justice in closing all of these files which contain the body of what I call secret law on the immigration subject.

Mr. FENSTERWALD. It is a good way of keeping them closed.

Mr. DAVIS. Can't we have a provision that as of such-and-such day all files must be classified so that those which are not within the exceptions will be housed in one place, and those that are within the exceptions will be housed in another place, and the ones that the act requires to be open to public inspection will be clearly open to public inspection, so that a member of the public will have access to them without any restraint?

Mr. KENNEDY. Let me ask you just one question on that point, Professor Davis.

Your proposals have some appeal. But how are you going to know if an agency puts into the classified section a lot of material which is not appropriately classified?

Mr. DAVIS. You know, we have that problem whenever you get into secret information, how do we know that what our intelligence services keep secret ought to be kept secret. We don't have an answer to that. That is intrinsic to this subject, Mr. Kennedy.

Mr. KENNEDY. Are you going to provide any method of reviewing their determination of which piece of paper goes into the A file and which goes into the B file?

Mr. DAVIS. No. I like the provision of this bill to the effect that there might be judicial enforcement. I have not been able to think up a better method, although I have one to suggest that I think could be useful. I would say that a Senate committee—

Mr. KENNEDY. Before you go to that, let me ask this. It is your contemplation that the division of materials into a file that is open to the public and a file not open to the public will be subject to that provision of the bill providing for a contest in court, a judicial review of that determination?

Mr. DAVIS. The bill doesn't answer the question. The draftsmen haven't been able to answer your question, apparently, Mr. Kennedy. I think there is no satisfactory answer to that question.

Mr. KENNEDY. Do you propose that there be any review of their determination?

Mr. DAVIS. Yes; I think there ought to be a judicial review of the determination.

Mr. KENNEDY. Thank you.

Senator BURDICK. Professor Davis, if you interrupted your statement now, how long do you think it would take you to finish your presentation?

Mr. DAVIS. If I were uninterrupted, perhaps an hour. I want to go over the bill section by section.

Senator BURDICK. Then we will adjourn at this time and come back at 2 o'clock.

(Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 2 p.m. of the same day.)

AFTERNOON SESSION

Senator BURDICK. Come to order, please.
Professor Davis?

STATEMENT OF KENNETH CULP DAVIS—Resumed

Mr. DAVIS. Mr. Chairman, I find that one thought I have about section 2 is still unexpressed, so I shall return to section 2 for one moment.

Last year, I suggested that one of the problems of secret law has to do with staff manuals which often contain many agency interpretations and agency statements of policy, and they are still kept confidential from the people who are affected. Apparently, in response to that, the present bill contains a provision that staff manuals that affect the public must be open to the public unless such materials are promptly published and copies offered for sale.

I think that the idea that the staff manual must be open to the public if it affects the public is going too far and needs to be cut back. I think it is perfectly appropriate for an agency to tell its staff confidentially what investigative techniques should be used. I believe it is quite essential to effective law enforcement that in some instances, in some circumstances, investigative techniques be kept confidential. Therefore, I think that the present bill should be changed, and I suggest something along the following lines: "staff manuals"—this is what should be open to public inspection—"staff manuals and instructions to staff to the extent that they embody interpretations of law."

If we would make that change, we would accomplish a great deal, especially if that would be respected by the agencies.

At the present juncture, what I would do with section 3 would be to go ahead with some slight revisions with section 3(a) and 3(b). I think they can accomplish a very great deal. Then I think that 6 months to a year of staff work is necessary before something adequate can be prepared on the subject matter of section 3(c). I would have the staff secure from each agency a statement in detail of what information is now public and in the agency's view should be made public, what information is now confidential and in the agency's view should be confidential, and what are the problem cases. If this were fully reported and systematically studied, the committee, of course, would not agree with many of the judgments that would be provided by the agencies. But the staff would then have the basis for doing the detailed draftsmanship that is necessary in order to have a good bill on the subject of section 3(c). As it is, in my opinion, any responsible President will have to veto the entire bill in order to protect the Government against 3(c) as modified by 3(e) in its present form. I think this whole push for administrative law reform may fail unless section 3(c) is deleted at this stage, or unless it is worked over sufficiently so that it will be a more responsible piece of draftsmanship.

Now, that leads me to section 4, which I think in general is now in pretty good shape. Many changes have been made since last year, and I think the changes are all to the good. But there is one problem about section 4 which I should like to call to the committee's attention. I shall not necessarily take a position about this problem, but it seems to me there is a problem that needs to be considered. Perhaps the biggest change that is made by this bill from the present section 4 of the Administrative Procedure Act is the deletion of the exception in the present section 4 to cover interpretative rules and statements of general policy. The present law is that the agency may issue interpretative rules and general statements of policy without following the procedure of section 4. If the bill is enacted, an agency will be required to follow the procedure of section 4 for interpretative rules and general statements of policy.

If the only question were the one that is readily discernable on the face of this bill—namely, whether or not party participation is desirable in the issuance of interpretative rules and general statements of policy—I would strongly favor party participation. That seems to me to be an easy question. But that is not the only question that is involved here. There is a much deeper question involved here, and that is the question of the extent to which the public will be entitled to know the agency's interpretative rules and general statements of policy.

Nothing in this bill or any bill that can be drafted can compel an agency to make known to the public its ideas about policy in its area if the agency chooses not to tell the public about its ideas of policy in its area. The problem is whether or not this bill, by adding machinery which is awkward and inconvenient from an agency's standpoint, will reduce the extent to which an agency makes known its interpretative rules and its general statements of policy. I fear that the enactment of the bill in the present form will have the effect of discouraging agencies from announcing their general policies and from announcing the interpretative rules which they use. I think on balance, it may be—and I am not sure—that the present act is preferable to what is provided in the proposed section 4.

I consider this is a very important question. I think there can be a great deal of damage done, but I know of no way to measure to see whether the one kind of gain will offset or more than offset the other kind of loss. It seems to me this is your real problem.

Mr. FENSTERWALD. Are you going to make any comments on the problem of area ratemaking with respect to section 4?

Mr. DAVIS. I am pleased with the result of the amendment of section 2, which means that what was heretofore rulemaking will become adjudication to the extent that parties are named and rights or obligations or privileges are determined. The effect will be to make a very large portion of what has been rulemaking into adjudication, and the ratemaking will become adjudication where it has been rulemaking.

Now, I think that a good bill would contain provisions that would be designed to deal with various kinds of ratemaking, price fixing, or wage fixing. This bill does not attempt that. It leaves it alone. There is a great deal that can be done on that subject and that should be done on that subject. It would take a long time to go into that. I would recommend that the materials of the administrative con-

ference—several monographs were written on the subject of ratemaking which provide excellent ammunition for drafting a good bill that will deal with ratemaking.

The bill is deficient in failing to do something that might be done, but I see no infirmity in the present bill with respect to ratemaking. To the extent that this bill affects that problem, what it does, in my opinion, is all to the good. It might do a good deal more than it does do.

Now, section 4(h) exempts from the requirements of section 4 advisory interpretations and rulings of particular applicability. I see no more reason to exempt "advisory" interpretations than authoritative interpretations that have the force of law. I think this is simply an ineptitude or an inadvertance. There is no reason to put the word, "advisory," before the word, "interpretations." Interpretations of particular applicability are not rules, never have been rules, and ought not to be made into rules. I would provide that there should be an exemption from section 4 which will cover "action of particular applicability such as orders, interpretations, and rulings."

Now, we come to section 5. I think the provision of section 5(a)(5) that "every agency shall by rule provide for abridged procedures which shall be on the record" goes too far. This is one of many examples of a provision which is perfectly satisfactory for the agencies that the draftsmen may have had in mind when they drafted this provision, but it is not satisfactory for other agencies. I shall give just one example, the Social Security Administration's handling of old-age, survivors, and disability of insurance cases. The procedures that are regular procedures are as abridged as they can reasonably be. What would the Social Security Administration be forced to do if it begins with its present regular procedure and it is told every agency shall by rule provide for an abridged procedure in these cases? There is no way to abridge the present procedure. I think the "every agency shall" is much too strong. I would change that to every agency "may." I think it is necessary to permit the agencies to use their judgment about whether or not it is desirable to have an abridged procedure. For some agencies, it is, for some agencies, it is not. I could give many examples of other agencies for which it is not desirable.

Mr. FENSTERWALD. You realize that even where it is required that they set up these abridged procedures, the use of them is within agency discretion?

Mr. DAVIS. I understand that is so, but you still have the direction from Congress, "every agency shall," and I think that cannot be complied with. That is bad draftsmanship.

Mr. FENSTERWALD. There is also the reverse problem that if we do not require them to do it, and many of them do not need it, then they will not do so.

Mr. DAVIS. Then you should study which agencies need it and you should specify them in the bill.

Mr. FENSTERWALD. Once we start doing that, we shall have a decade's problem on our hands.

Mr. DAVIS. You cannot legislate for every agency unless you know what the problems will be for each agency. Some of the agencies are a complete misfit for this provision.

Mr. FENSTERWALD. Even though they do not have to use it except if they please?

Mr. DAVIS. What would you do if you were operating as an administrator in the Social Security Administration? How would you draft a rule: "Every agency shall—"? What would you do?

Mr. FENSTERWALD. You could draft up a very short set if you were required to do it, and if you had no occasion to use it—

Mr. DAVIS. You would draft a rule and say, "Nobody can use this"?

Mr. FENSTERWALD. No, sir.

Mr. DAVIS. How will you comply?

Mr. FENSTERWALD. All you have to do is draft it. It does not say you have to use it.

I was wondering if you were aware that we do have a "may" before you get to the actual use of it.

Mr. DAVIS. I did not think the push toward an abridged procedure is nearly as important as the push toward getting away from the use of trial procedure on issues of economic imponderables. This is the abuse where abridged procedure is needed. This provision will not reach that, because the multiple parties in such cases may be 400 parties—if one of them refuses to go along with an abridged procedure, the other 399 have to use the long procedure. This is why the abridged procedure fails in most agencies, because it is deemed to require consent. The way to get around that is to provide by legislation that on questions of economic imponderables, the trial procedures shall not be used. No party shall have a right to cross-examine. Cross-examination will be permitted in the discretion of the agency or the presiding officer. You will get close to some constitutional problems by that, but if this is reasonably administered, the good judges will go along with it. We need some experimentation in that direction. This is the big problem.

There is no need for legislation which will require abridged procedure. Some of the agencies have been using abridged procedure for 30 or 40 years, notably the Interstate Commerce Commission, and using it very successfully.

The provision of section 5(a)(7) that in an emergency "an agency may take action without the notice or other procedures required by this subsection" fails to do what it attempts to do. Nothing in this bill requires a hearing. The only requirement of a hearing comes from other legislation or from the Constitution as interpreted by the courts. What you are relieving against here or trying to relieve against is the other legislation or the constitutional requirement. But the other legislation and the Constitution are already interpreted by the Case law to take care of emergency needs. This provision is useless and it seems to me to be harmful because it is based on misunderstanding. I would delete it entirely. It does not do any good. I cannot think of a hypothetical case or a real case in which it would serve any useful purpose.

Now, section 5(b) applies to all other cases of adjudication except those involving inspections and tests. The "other" must refer back to subsection (a) of section 5, involving hearings required by statute or by the Constitution to be determined on the record. By "other adjudication" are included at least 99 percent of all adjudications in all the agencies.

Now, the provision of section 5(b) is that without delay, after the conclusion of this proceeding, the officer who has conducted it shall make his decision. That is a complete misfit for the 99 percent of adjudication.

Now, I do not know what that word "proceeding" means as it is used in this bill. I know that section 2(g) purports to define the term "proceeding," but it does so only by reference to the definitions of adjudication, rulemaking, and licensing. Is a written application for something which is immediately granted in writing a proceeding? If you look at the definition in section 2(g), the answer is that it is licensing; it is a request for an agency permission for something, and, therefore, it is licensing; therefore, it is a proceeding. If that is true, then the 3 million applications for social security benefits that are granted each year without hearing are all proceedings.

What happens is that the written materials come before an officer known as an adjudicator. His work is checked by another officer known as a reviewer. Then the claim is paid. There is not anything that in the ordinary meaning of the term "proceeding" could be called a proceeding or anything that fits the usual meaning of the term. This language, "without delay after the conclusion of the proceeding, the officer who has conducted it shall make his decision," seems to me to be a misfit. It wrongly assumes that there is something in the nature of a proceeding.

A proceeding to me means some kind of an oral process, usually where there is an issue to resolve. If that is the meaning of "proceeding," and that is the usual meaning of "proceeding," then usually there is not any proceeding.

For example, the Communications Commission grants 735,000 licenses in 1 year. In 1 year, the Communications Commission holds 226 hearings. One adjudication out of more than three thousand is subject to hearing.

I can give other illustrations of similar statistics. I would estimate that perhaps one adjudication in a thousand throughout the Government is after hearing of any kind, and only a small portion of those will be after the hearing with a determination on the record.

Now, my point is that the language of section 5(b), the only operative language in section 5(b) which has any effect, is a misfit for 99 percent of the cases to which it applies. There is no proceeding "conducted" by an officer in 99 percent of the adjudications.

Now, I come to section 6(a), which I touched upon this morning in connection with the surprising American Bar Association position about right to counsel. I would move section 6(a) in the opposite direction from the way the American Bar Association wants to go. I think the right to be accompanied, represented, and advised by counsel should not be limited to proceedings and investigations. It should be accorded for proceedings and investigations, but it should go further. It seems to me that a private party should always be entitled in any dealing of any kind with a Government agency to be accompanied, represented, and advised by counsel. I would not have any limiting words on that provision. A private party may have many kinds of dealings. If he wants to ask for an advisory opinion and do so in person, he should be entitled to be accompanied by counsel and advised by counsel. There is no reason for saying otherwise.

Mr. FENSTERWALD. How do you feel about employees of agencies who are under investigation by the agency?

Mr. DAVIS. I would say that one who is under investigation by an agency, whether or not he is an employee, should be entitled to be accompanied, advised, and represented by counsel.

Mr. FENSTERWALD. Do you know that that would make a radical change?

Mr. DAVIS. I would say that that is not a very radical change, no; because I think, without any legislation, this is very likely to be required by the courts. The courts are moving in that direction. It may be the law under some of the case law already. It is in the problem area from a standpoint of judicial determinations.

I would not say that it is radical to follow some judicial decisions that have already been rendered.

Mr. FENSTERWALD. It would run contrary to the rules of many major agencies.

Mr. DAVIS. Yes, it would require a change in a good many of the rules of the agencies, and that change would be desirable, in my judgment.

Mr. FENSTERWALD. Thank you.

Mr. DAVIS. Section 6(e) provides:

Unless otherwise provided by statute, every agency shall by rule provide for the issuance of subpoenas—

and so forth. Does that provision mean that every agency has the subpoena power? If every agency shall provide by rule for the issuance of subpoenas, is that a grant of power by Congress to the agency to issue subpoenas?

Mr. FENSTERWALD. Yes, sir.

Mr. DAVIS. If it is, it ought to say so, because it does not say so.

Mr. FENSTERWALD. There is the intent.

Mr. DAVIS. The Civil Service Commission, for example, in the kind of case you just referred to, has no subpoena power. This has recently come out in the judicial determination on whether or not it is unfair to make a determination against an individual who could prove his case if he could compel evidence in his favor. If the purpose is to grant power to all agencies of the Government to issue subpoenas, then it seems to me clearly desirable to say each agency is hereby authorized to issue subpoenas.

Now, you have to bear in mind what is an agency as defined here. Every representative of the FBI is an agency as the act defines the term "agency." For example, do you want the FBI to have the subpoena power? I would rather be a little more discriminating. I would rather determine agency by agency, as Congress has always done in the past, what agency should and what agency should not have the subpoena power. Perhaps it ought to be limited to those who have the power of adjudication.

The second sentence of section 6(e) says that the presiding officer or the agency may quash a subpoena for reasons of relevance or scope. It seems to me that this is a deficient provision because other reasons may suffice for quashing a subpoena. For example, the subpoena may reach privileged materials. If privilege is properly claimed, then the subpoena should be quashed. There is no more reason for quashing

the subpoena on account of reasons of relevance or scope than for privilege.

Or let us say for self-incrimination. Or for many other reasons, such as excess of jurisdiction. I think the provision can be rewritten to read as follows: "when objection is made to the subpoena, the presiding officer or the agency may quash or modify it." That will take care of all of the reasons why subpoenas should be quashed.

Now, section 6(f) provides—

Senator BURDICK. Before you get into 6(f) will you be in favor of the present language on subpoenas? This is in the first sentence in 6(c) of the present act.

Mr. DAVIS. I do not have that before me.

Yes, the first sentence of 6(c):

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought.

I see no objection to that.

Senator BURDICK. The reason I asked the question is you said it should be spelled out agency by agency. Does not that spell it out there?

Mr. DAVIS. No; that does not confer subpoena power upon any agency, as I read it.

Senator BURDICK. It says "agency subpoenas authorized by law."

Mr. DAVIS. Yes; those that have been authorized by law otherwise, that means. The present bill, as Mr. Fensterwald interprets it, confers power to issue subpoenas on all agencies without knowing what they are. I think this is undesirable.

Senator BURDICK. Then you approve the present provision of the law as far as that is concerned?

Mr. DAVIS. I would like to see Congress authorize some agencies that now lack subpoena power to issue subpoenas. It seems to me that has to be done agency by agency. This has been the system of Congress for a century and a half, and I think it is a successful system.

Section 6(f) has in it a problem from my standpoint. I cannot understand what it means. It says—

prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding.

What I cannot understand is the meaning of those last words, "made in connection with any agency proceeding."

Why should those words be there? Do they do any good? Because I do not know the meaning of the term, "proceeding," I am unable to answer that question. But what I am quite clear about is that whenever an agency, whether or not in a proceeding, denies any application, it should be required to give prompt notice of the denial. Therefore, I recommend the deletion of the words, "made in connection with any agency proceeding."

Similarly, the requirement in the second sentence of section 6(f) of a simple statement of reasons, it seems to me, should apply whether or not the application is in connection with a proceeding. Let us simply strike the words, "in connection with a proceeding."

Section 7(c) deals with the problem of evidence, and I think it is fully satisfactory in this bill. The important development is announced in this bill that this committee now reject the extreme position of the American Bar Association. I think that position should be rejected, and I am pleased with the bill in its present form, which is essentially what the Administrative Procedure Act now is.

Now, we come to section 8, which in my judgment contains the most objectionable provisions in the entire bill. My position can be stated in very simple terms: I am of the opinion that the Presidential appointees who are the heads of the agencies should not, through legislation about administrative procedure, have any power withdrawn from them and given to their subordinates and put beyond their power. And that is what section 8 does. Always from the beginning of Federal administrative agencies, the heads of the agencies have had the power that is vested in the agency. This is the first threat that I have known about to take power away from superior officers and give it to the subordinates in such a way that the superiors will lose control. It seems to me that on the most elementary principles of public administration, it is undesirable that subordinates should have power which the superiors cannot control.

Now, let us take some simple case. Suppose the Federal Trade Commission asserts that somebody is guilty of an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act. A hearing is held before an examiner. The examiner decides that the respondent is guilty on the facts. Supposing the case involves no question of policy and no question of law. The only question involved is did the respondent commit the act with which he is charged.

Now, supposing the examiner finds that he did. Let us say that he is a little businessman and he asks his lawyer, "Well, now, after this decision against us, how much will it cost to appeal to the Commission?" The lawyer tells him and he says, "Well, I guess I shall give up at this point. I do not want any more lawyers' fees about this case."

Supposing the five Commissioners are strongly convinced not only that the examiner is wrong on that evidence in making the finding that he made, but that no substantial evidence supports the finding. Under this bill, if it were enacted, the Commission would be powerless to do anything about that case.

Why should not the Commission have the power to reverse the examiner on its own motion? A reviewing court under this bill will have power to set aside the order because it lacks substantial evidence. But the Commission will not have as much power within its own area as the reviewing court has. It seems to me that this is monstrous. This could not be intended.

MR. FENSTERWALD. Professor Davis, do you know of many examples where a hearing examiner has held in favor of a Commission and a Commission on its own hook, under the present law, has overturned that?

MR. DAVIS. Yes; there are many examples in all directions.

MR. FENSTERWALD. Would you give us some examples of that, where no appeal is taken by either party and the Commission, although the hearing examiner found in its direction, of its own volition said, "We

think the hearing examiner is wrong; we'll throw it out." I do not know of any such cases. I imagine of all the hundreds and thousands and millions of cases that exist, there may be one or two around. I do not say that there is not. But it must be a most unusual situation.

Mr. DAVIS. Let us say it is unusual. In the unusual case, the Commission should be permitted to make its decisions in its own areas and should not be limited by the decision of a subordinate.

Mr. FENSTERWALD. Let us leave aside the philosophical aspects for the moment. There are a number of grounds here in which the agency does have the power to take a case.

Mr. DAVIS. On a question of policy, in the case I have put, but the great run of cases are cases where only the facts are at issue.

Mr. FENSTERWALD. Let us get down to the factual case. The only purpose of the legislation as drafted here is to relieve the Commissioners of the drudgery of deciding cases.

Mr. DAVIS. This does not relieve Commissioners. It compels Commissioners. It compels Commissioners to leave this case alone. That is what I am objecting to. If you want to relieve Commissioners, the way to do that is to give the Commissioners a power that some Commissioners now do not have, namely, the power to establish an appeal board and to determine the powers of the appeal board, to designate what classes of cases shall go to the appeal board, what classes of cases shall not go to the appeal board. What is needed in my judgment is legislation like what Congress has already enacted with respect to the Communications Commission.

Congress has a beautiful little statute that authorizes the Commission to set up what is called the review board. Now, the best example in the Government of an operating review board that is successful so far as I can tell in all respects is what is being done in the Communications Commission. This bill will compel the Communications Commission, apparently, to do something different, although I do not know how this bill will fit with the legislation that has already authorized the Communications Commission to do what it has done.

I would say that what is needed is authorization to each agency to create an appeal board, to determine what business should go to the appeal board and what business should not, and this is very likely to be a fluctuating thing.

The Commission ought to be permitted to change its mind from time to time about what business will be handled in this way. This section 8 puts each agency into a straitjacket. It can hardly move around. It has no power to determine whether the facts have been found in the wrong way. It loses powers over factfinding.

There are several provisions which withdraw power over fact finding, and I think that is very unfortunate.

Mr. FENSTERWALD. I do not want to appear to argue with you, but this statute as it is drafted clearly provides that this provision of appeal or review is to be used only when agency or appellate procedures have not been otherwise established or provided by Congress. So if, as in the case of the Federal Communications Commission, they have such a system, fine; leave it alone. But there are many, many agencies that have no such provision or no such appeal board.

Mr. DAVIS. Where is that language?

Mr. FENSTERWALD. That is in 8(c)(2) in the comparative printing at the bottom of page 36. I am not sure that this will change your views on the law, but that provision is in the statute, so it will not undo any procedures that are in effect today or that may be put in effect by Congress. If the Congress were to go around and put a separate procedure act up for each one of the 100-odd agencies, I think we all agree that that would be better, but they are not going to do that.

Mr. DAVIS. I believe the provision of 8(c)(2) does not do what you have just said it does, because Congress has not created an FCC appeal board.

Mr. FENSTERWALD (reading): "* * * agency appellate procedures have been otherwise provided by Congress."

Mr. DAVIS. They are not provided by Congress in this case. The Commission is authorized by Congress to provide them, and that is different.

Mr. FENSTERWALD. If that will alleviate your difficulty, we could add that language.

Mr. DAVIS. It is not Congress that has created the Communications Commission Review Board, it is the Commission that has done so.

Mr. FENSTERWALD. Well, if we change the word, "provided," to "authorized," would that meet your objection?

Mr. DAVIS. No; that will not meet my more fundamental objection. My more fundamental objection is that in my opinion, the right way to deal with this problem is the way that Congress used in the case of the Communications Commission and in the case of the Interstate Commerce Commission. That is a little bit different, but it is the same general idea.

What needs to be done is to authorize an agency to create an appeal board and then to find its own method of using the appeal board. One method will be appropriate in one agency, and another method will be appropriate in another agency; one method will be appropriate in one agency and another method at another time in that same agency. This is the kind of thing that decidedly calls for flexibility and calls for agency discretion.

Mr. HELEIN. Your views on this appellate procedure as well as on subpoenas and one other matter you testified on today seem to indicate that your position is somewhat like the agencies', that Congress should pass individual procedural statutes for each agency and therefore, that the Administrative Procedure Act itself is, I guess, obsolete and perhaps we should not have one at all, and perhaps we should repeal it and have Congress work on each agency. Is that your point?

Mr. DAVIS. I think that the answer to your question is we do not have to choose between all and none. To some extent, we need general legislation which will be applicable to all agencies. On some subjects, we can do that and we do it and we do it successfully. On some other subjects, trying to control all of the diverse agencies by single and simple provisions does not work. This is one circumstance in which that is true.

I think that what we have done in the Administrative Procedure Act is quite different from what this bill attempts. In the Administrative Procedure Act, in general, we have only a bare minimum of procedural protection required. This bill attempts to step that up a great deal.

As it is stepped up, the reason to recognize the needs for diversity becomes stronger. But in this provision, in my opinion, what is needed is authorization to the agencies, not a provision which will put every agency into the same position.

For example, take the Social Security Administration again. Can you have three layers under section 8 as drafted? That is, can you have one adjudicating officer, then a review, then a review of that? Apparently, you cannot, as I read it, although it is very difficult to read it on that subject.

The Social Security Administration does have that, and it is not by reason of a provision of Congress, it is by reason of the planning that has been done by the Social Security Administration about how to handle its business.

Mr. HELEIN. Professor Davis, if Congress simply authorizes all of these actions and the agencies do not see fit to use this authorization, how does Congress compel agencies to effectuate the remedial procedures that we would like to see them effectuate?

Mr. DAVIS. I do not see any problem there. I think that every agency that needs an appeal board, that is authorized to use an appeal board, will do so. There will be no loss of time in this.

Do you know any example to the contrary? I do not.

Mr. HELEIN. We think we do.

Mr. DAVIS. What is it?

Mr. FENSTERWALD. I might as well mention my favorite agency. We suggest that next time, next summer instead of going to the Immigration Department, you go down to the Federal Power Commission to make a study to see the slow way in which their wheels grind.

Mr. DAVIS. I did not find any lack of delegation power within the Immigration Service. On the contrary, I find abundant delegation. The reality is that most decisions by the Immigration Service are made by GS-9 clerks and most decisions are made after thinking about 20 seconds about the problem that vitally affects the human being. There is no lack of delegation, I can assure you. Very, very few cases get as high as the District Director of the Service, perhaps 1 in 500.

Mr. FENSTERWALD. If you will study the Federal Power Commission, you will find that they have as many as 10,000 adjudications a year by the Commission itself, with virtually no delegation.

Mr. DAVIS. These are things that go out in the Commission's name. The reality is that there is delegation, but it is all done in the Commission's name.

Mr. FENSTERWALD. That is true, but there is no appeal board or anything of that type. It is all done behind closed doors by the staff, and the litigants have no chance in actually arguing an appeal. So if it is the type of system we have in mind, this would be one which would be applicable to agencies which do not want to delegate.

Mr. DAVIS. I think it would be unfortunate to create an appeal board in the Commission for all the types of business that the Commission handles. I think the Commission must keep a discretionary power to bring cases from the examiner directly to the Commission whenever the Commission thinks that the nature of the subject matter requires that procedure.

Mr. FENSTERWALD. In any case of law or policy, they would have precisely that power.

Mr. DAVIS. But not on important fact issues.

Mr. FENSTERWALD. No, sir; it is the general feeling, I believe, of the drafters of this bill that if you have competent hearing examiners and competent appeals boards, there is no reason that they cannot decide factual questions.

Mr. DAVIS. This is a gross assumption. It seems to me that there is an attitude that goes into this bill that I ought to talk about here. There is an attitude of distrust for some agencies.

I share that attitude. I have great confidence in some agencies of the Government. I have strong distrust for some other agencies, and the great bulk of them are somewhere in between those two extremes.

But as I look at all of the examiners of all of the agencies, I would make the same remark exactly. I have great confidence in some examiners and I have distrust for some examiners, and the bulk of them are somewhere in between. I know some examiners that are, by any standard, incompetent. The agency knows they are incompetent and they have been demoted behind the scenes without a Civil Service Commission proceeding in order that they can save face, save their position until they reach the age of retirement. We have all kinds of examiners.

Do not make the assumption that all examiners are of the quality of the people representing the hearing examiners association that come over before this committee. These are men of outstanding ability. If they were all of that character, then section 8 would have some good reasoning behind it. I wish they were all of that character. But that is not the facts of life.

Mr. FENSTERWALD. That is why we provide for an appeal board which may be made up of agency members.

Mr. DAVIS. I object to the idea that an appeal board has to be made up either of examiners or members of the agency. What did the Communications Commission do when it had the freedom to create an appeal board in accordance with what it thought desirable? Did it use examiners and agency members? No. And the reason, in my opinion, that the FCC Review Board is so successful is that the Commission did such a good job of choosing the personnel for that board. The members of the bar are satisfied with that board; they prefer the Board to the Commission, for many types of cases. The Commission is satisfied with the Board. I have yet to hear any serious adverse criticism of the FCC Review Board.

This is the outstanding example in the Government so far of a good system to relieve agency heads, and this bill rejects it for no good reason, so far as I can see. I think we ought to build on that experience instead of rejecting that experience.

Mr. FENSTERWALD. If we are to adopt the system, do you think it would be helpful to the hearing examiners and members of the agency if we also add some provision for senior nonhearing examiners to sit on these appeal boards as in the FCC?

Mr. DAVIS. I would trust the agency to choose the personnel of the appeal board. I would not have Congress determine who shall be eligible for the appeal board.

Mr. FENSTERWALD. I think that is a very valuable suggestion.

Mr. DAVIS. The various details of section 8 are frequently unsatisfactory, apart from my overall dissatisfaction with section 8.

Mr. KENNEDY. Professor Davis, on that point, would you think it appropriate if the agency, in selecting personnel for the appeal board, selected members of its Bureau of Rates, shall we say?

Mr. DAVIS. That is what the Communications Commission did, in effect, except it was not the Bureau of Rates. It was the heads of the divisions within the Commission, et cetera.

Mr. KENNEDY. In other words, these are people who are not section 11 hearing examiners, nor are they personnel of the agency who are at the top of the agency? They are just anyone in between that the agency might designate?

Mr. DAVIS. Yes; this is what is done by the Interstate Commerce Commission, which has a great plurality, maybe 27 employee boards. The Commission has the full power to determine the membership of those boards. So far as I know, it exercises that power quite wisely and to the satisfaction of the people affected.

Let us give some other agencies that kind of power. I think we trust them with much more than that. Let us give them a chance to keep their own houses in order through this kind of delegation. That is what is needed.

Mr. KENNEDY. Would not this just be a way to circumvent the tradition of the impartial hearing examiner? If his decision is reviewed by an appeal board which was arguably not impartial, or perhaps very partial?

Mr. DAVIS. I am in favor of that tradition, but I think sometimes we are in danger of trying to do too much with that tradition. Let us not push it too far. I think that might be pushing it too far.

Mr. KENNEDY. Would it be better to have this impartiality on the appellant level rather than on the trial level? Here you are arguing that the trial level could be composed of impartial people but the appellate level not be so restricted. Should we not reverse that?

Mr. DAVIS. I will not agree with the proposition, for example, that the Communications Commission's examiners are impartial and that the members of the Review Board are not impartial. That simply does not seem to me to be the fact. It seems to me that the members of the Review Board are every bit as impartial as any of the examiners, and I think the members of the Communications bar would be perhaps even unanimously in agreement with that statement.

Mr. KENNEDY. Let me suggest a hypothetical to you. Suppose you had some agency members who were dedicated to the principle of low rates. Suppose that was the majority view of an agency, and I am not speaking of any particular agency. But suppose they selected a staff which shared their one concept, and then, although the agency had a section 11 hearing examiner to preside over hearings, the appellate board which would make the final decision as far as the agency was concerned would be composed in the agency's discretion solely of people who favored low rates, or it could be high rates. Would you think that could be a desirable result for a rather significant administrative proceeding as far as the people of the company are concerned?

Mr. DAVIS. I will answer your question in a way that is not 100 percent responsive. I am of the opinion that whatever views of policy a majority of the agency heads hold should govern every case. That always has been our system, that is the system in every court of plural judges, and I hope that will continue to be our system both in adminis-

trative agencies and in courts. I think any departure from that principle will not work and will cause great harm.

Mr. KENNEDY. Then would you also take the position that we should not bar these hearing examiners from discussing the cases before them with any of the agency personnel as long as what we are trying to do is draw out the agency policy and get it cranked into the decision in each case?

Mr. DAVIS. Are we talking about section 8, or are you shifting the subject now?

Mr. KENNEDY. I am talking back on the separation of functions.

Mr. DAVIS. Then we leave section 8 and go back to separation of functions.

Mr. KENNEDY. I want to draw the two concepts so that I will understand how far you are taking this agency policy argument.

Mr. DAVIS. Let me simply state on separation of functions, I would make only one change in the present Administrative Procedure Act. I would add to the words, "investigating or prosecuting," the word, "advocating." Apart from that change, I would leave the present act as it is.

Mr. KENNEDY. Is advocating a kind of policy position?

Mr. DAVIS. Advocating is trying to win for one side.

Mr. KENNEDY. And if you are advocating for the agency side, presumably you are advocating for the policy of the majority of the agency?

Mr. DAVIS. No, I am sorry, I cannot agree with that. An advocate may be advocating one view of the evidence in the case.

Mr. KENNEDY. But he is the agency staff advocate. Should he take the agency's position?

Mr. DAVIS. An advocate may be advocating one view of the applicable law in the case. Everything is not policy.

Mr. KENNEDY. All right. Now, this advocate is representing the agency's position, we shall assume, in this given proceeding. Agency staff advocate in the proceeding. He should advocate, then, the policy of the majority of the agency, should he not?

Mr. DAVIS. Depending upon what his assignment is. I know agency counsel who are instructed that they are to do in a case what they think the public interest requires and it is their judgment that should control their position. We have various practices in many agencies.

Mr. KENNEDY. Yes, but I understood your statement to be that the policy of the majority of the agency should permeate their actions.

Mr. DAVIS. I am talking about the decision of cases. In the decision of cases, the majority of the agency should have the power to determine the policy. That is a very simple proposition. Do you mean to imply that you are disagreeing with that proposition?

Mr. KENNEDY. I am questioning it. I want to know just how far you carry this position that you are setting up. You say that the agency should always have the opportunity to make its policy determination felt, in the determination of cases, is that correct?

Mr. DAVIS. In the decision of cases.

Mr. KENNEDY. All right, in the decision of cases. Why would it not, following that line of reasoning, be appropriate to have the hear-

ing examiner consult with those proponents of the agency policy on or off the record?

Mr. DAVIS. Because I do not want to contaminate the judicial function. I want to protect the judicial function from influence by the investigators, the prosecutors, and the advocates.

Mr. KENNEDY. Where is the protection if you let the appellate level not be so protected?

Mr. DAVIS. I would like to have a protection not only of the people at the appellate level, but at the trial level and the ones in between. Anyone who participates in a decision in an adjudication should be, in my opinion, insulated from contamination by the investigators, the prosecutors, and the advocates. This applies not only to the examiners and not only to the agencies, and not only to the members of the appeals board if there is one, but it also applies to all members of the staff who, in any capacity, are participating in the making of the decision. This is the law under the present Administrative Procedure Act except for that word "advocating."

Mr. KENNEDY. How can you take the head of a bureau, then, and put him on an appellate board and still keep him insulated from policy?

Mr. DAVIS. From policy?

Mr. KENNEDY. Yes.

Mr. DAVIS. I did not say he has to be insulated from policy. I say he has to be insulated from investigating, prosecuting, or advocating. This is the traditional principle which was adopted in the present Administrative Procedure Act, and, so far as I know, nobody wants to change that.

Mr. KENNEDY. I do not think we want to change it. But that is where we, I suppose, have our difficulty—at least, I have my difficulty—with what you propose.

Mr. DAVIS. What is that I propose?

Mr. KENNEDY. That the members of the appellate board can be anyone in the agency.

Mr. DAVIS. I do not want to keep them in some other capacity. If the agency decides that its general counsel, who has been trying to win cases on one side, should become a member of the review board, I assume he will not continue in his capacity as an advocate. I want a complete insulation of deciding officers from prosecuting, investigating, and advocating for all people who participate in deciding. That is what we now do. I want to continue that.

Mr. KENNEDY. I think that statement then clarifies your position in my mind. You mean that these members of the appeal board must, whether they are section 11 hearing examiners or not, must be subject to the same sort of insulation that the section 11 hearing examiner is subject to?

Mr. DAVIS. This bill so provides, if you please.

Mr. KENNEDY. I thought you were criticizing that position.

Mr. DAVIS. I am in favor of the provision of section 7 on separation of functions—no, it is section 5(a)(6)(A). That is a good provision which, in my opinion, should not be changed. It is well drafted. It has the right substance in it. I see no reason for any change in 5(a)(6)(A). I do have some question about 5(a)(6)(B). Would you like to talk about that?

Mr. KENNEDY. I did not want to get you too far away from your appeal board, because I wanted to get clear in my mind whether or not you approved of this concept of having agency staff review the decision of an impartial hearing examiner. And I think you have answered that to my satisfaction.

Mr. DAVIS. I should like to speak to that question.

All deciding officers, at whatever level, all officers who participate in a decision in an adjudication should, in my view, have no communication except in the hearing room on the record with any investigator, prosecutor, or advocate.

Mr. KENNEDY. Let us take a specific example, Professor. If the head of the bureau is the man who transmits the agency policy and finds it specifically with respect to that bureau's activity—he does not personally investigate. He has people under him who investigate. He does not personally prosecute; he has people under him who prosecute. Then he does not personally advocate in the sense of appearing in a given case. But he is the conduit for the agency policy that comes from the agency members down, so that the advocates, the investigators, and the prosecutors get the agency policy through him. Would you let him sit on an appellate board?

Mr. DAVIS. I cannot understand the concept of getting the agency policy through a conduit. It seems to me that the agency policy is either publicly announced or it is talked about within the agency.

Mr. KENNEDY. Let us take your second thought there. Talked about within the agency and he is the fellow who talks about it.

Mr. DAVIS. I see no harm in talking about agency policy within the agency. This is done in every agency, and I assume it always will be.

Mr. KENNEDY. And you are going to let the man who talks about it decide cases.

Mr. DAVIS. Just as a plural court of judges will talk about policy within the court. What else can they do?

Mr. KENNEDY. Are you going to let the head of that bureau who gives the instructions as to agency policy sit on this appeal board? This is what I am trying to find out from you.

Mr. DAVIS. Nobody is disqualified from a judicial function by having taken a position about a question of policy.

Mr. KENNEDY. I think if you just stop right there you have answered the question.

Mr. DAVIS. If that were so, every judge in the land would be disqualified from passing a second time on any question of policy that the court has passed upon. That would be an impossible system. There is no disqualification from views of policy. People hold views of policy which are quite consistent with exercising a judicial function.

Now, you have raised the question about separation of functions, and I should like to state my reasons for doubting the desirability of one feature of 5(a)(6)(B).

Mr. KENNEDY. Professor, it might be more helpful, since I did inject this question, if you would continue the order you have gone through. You were on dealing with appellate boards, and maybe it would be helpful if you continued from there.

Mr. DAVIS. May I come back later to 5(a)(6)(B)?

Senator BURDICK. Do as you wish.

Mr. DAVIS. The provision is "no presiding officer shall consult with any person on any fact in issue." A provision very much like that is in the present Administrative Procedure Act. But it is possible to construe the present act to mean something other than what those literal words say, and nearly every agency in the Government has so construed the act, and we are doing pretty well under that provision.

But if Congress now comes along and reenacts that provision as a part of this bill, on the basis of the kind of consideration that has gone on here, I think it highly probable that a literal interpretation will have to be given to this provision. And I think that a literal interpretation will be undesirable.

Let me explain why. No judge of any court is subject to this kind of limitation. All judges tend to consult with the people around them when they are making difficult decisions. They are not limiting themselves artificially to questions of law and policy. Questions of law and policy have ways of being mixed up with questions of fact.

When the Supreme Court Judge is troubled by a difficult question of such a nature that he uses the general library as distinguished from the law library, he does not limit himself to reading about policy or reading social science as distinguished from factual materials. He reads the factual materials, too, as any judge will readily tell you if you ask him. He will also talk with people about the difficult questions of fact.

Mr. KENNEDY. Would he ask somebody if the crossing gate on the railroad was up or down, if that were an issue in the case?

Mr. DAVIS. No, Mr. Kennedy, he will not, and that would be inappropriate. The same thing would be true of an examiner.

Mr. KENNEDY. Will you distinguish that situation then?

Mr. DAVIS. I will distinguish it, yes. There is all the difference in the world between the facts about the parties to the case, who did what and where and when and with what motive or intent, or what is the condition of the property or what is its value. That is a question of adjudicative fact. There is all the difference between that kind of fact and the kind of facts that judges and administrators and Congressmen resort to in trying to work out questions of policy or questions of law. We need more and more factual materials to guide our policy judgments, and judges will consult anyone about that kind of question of fact.

Mr. KENNEDY. What would an example of that kind of thing be?

Mr. DAVIS. An example of that kind of thing would be the *Philadelphia Co.* case, the recent bank merger case in the Supreme Court. The first sentence of the opinion says: "The background for this case is as follows." I cannot quote it exactly. Then the first footnote says: "For preparing this background, we have consulted the following authorities." Then there is a long list of library materials on the subject of banking. The Court goes on and makes a statement in five or six pages about what are the fundamental facts about the banking business of the United States.

The Court went outside the record to get the facts: the Court may have talked to people in order to understand this. If it did, it was appropriate, as any judge would agree. That is not the same as saying that that same judge would consult some witness to ask whose was

the hand that held the gun in a murder case. Of course, they will not do that.

But you see, there is a difference between social science facts that are needed on policy questions and facts about the parties in the individual case.

If the examiner has, let us say, a problem of cost accounting in the Interstate Commerce Commission and he does not have any training in accounting and he knows that down the hall is Joe, the accountant who is his friend, and he does not understand the language in the record that he is studying, can he walk down the hall and say, "Joe, can you help me understand this? What do these words mean as they apply here?"

This is what is done today and I see no harm in it. This makes for better decisions. I do not want that examiner to consult an investigator or a prosecutor or an advocate. I want to insulate him from them, but if this cost accountant of the Commission's staff is not engaged in that case in investigating, prosecuting, or advocating, then it seems to me that the examiner ought to be free to get help from him if he needs help.

Mr. KENNEDY. Let me ask you right there, what you want to do is get this examiner the best possible help. Would it not be better under your theory, instead of talking to Joe down the hall who knew something about accounting, let us say, that Joe would have to say in answer to the examiner's question, "I do not know what kind of books this company kept; I can only guess it might have kept its books in such-and-such a fashion." Would it not be better to go right to the investigator who actually saw the books of the company and say, "How did they treat this problem on their books?"

If you are really trying to get the best information, should you not go to the best possible source instead of to someone who is going to do some hypothetical answering?

Mr. DAVIS. I think a sufficient answer to your question is no.

Mr. KENNEDY. Good.

Mr. DAVIS. For reasons that are too obvious to spell out. It seems to me that would be injustice. You do not consult investigators in an adjudication in order to get the facts about parties. This is fundamental, elementary, agreed to by all judges, all lawyers and all administrators, I hope, and sometimes violated by some human beings in all of those capacities, and I regret the violations. I think we are doing a pretty good job of checking that.

Mr. FENSTERWALD. He could get that information from the investigator if he did it on the record?

Mr. DAVIS. It ought to be on the record or not used.

Mr. KENNEDY. Why should not this information he gets from Joe down the hall be on the record?

Mr. DAVIS. Because it does not have anything to do with the parties. It is for the same reason the Supreme Court Justice will go to the regular library and read some materials and say in his decisions, "I have gone to the Library of Congress and gotten this information," and this is done many, many times. Agencies should be free to do the same thing the Supreme Court does in this respect, including especially the examiners. I think that when an examiner imitates a

Supreme Court Judge, there is nothing wrong in that, when he imitates what a good Supreme Court Judge openly does and should do.

Mr. KENNEDY. I am only going to ask you one other question on this point. These facts in the Philadelphia bank case, or the other examples you have given us, this background material that you describe at one point, presumably those are not facts, then, that are issue in the particular case, are they?

Mr. DAVIS. To some extent, on the facts that are used for policy determination, the facts may be in issue and may be properly taken from extra-record sources. This is well recognized in Supreme Court opinions. Mr. Justice Brandeis is the outstanding Judge who has resorted to extra-record facts on issues of law and policy, and he is much acclaimed for this factual technique for deciding cases. Agencies should be free to imitate Mr. Justice Brandeis, whom we much revere for his development of that technique.

And this is not to be confused with the resort to extra-record sources for facts about the parties. Those facts are altogether different.

I would leave the present provisions on separation of functions as they are in the Administrative Procedure Act, adding the concept of "advocating" to the concept of "investigating and prosecuting."

Now, coming back to section 8, I think there are a number of inadequacies in addition to my overall dissatisfaction with the main thrust of section 8. I think that there should be an unqualified provision resembling what we now have in section 8 of the Administrative Procedure Act, which says that the agency on appeal or review shall have all the powers which it would have in making the initial decision. If we depart from that principle, which is a sound principle, and is now embodied in the Administrative Procedure Act, I predict we shall have great trouble and it will be only a few years until Congress will have to legislate again to return to the system that we now have in that respect.

Power must not be divided between agency heads and subordinates. The power must be in the agency heads and not in the subordinates. And that applies to factfinding, exercising discretion, determining questions of law, and deciding questions of policy.

Well, I think I shall not present the detailed criticism that I have in my written statement about the various provisions of section 8. I shall rest on my written statement.

I think the one thing, however, about section 8 that I want to inquire about is whether the agency ought to have the power to allow the taking of further evidence if it believes that further evidence should be taken, or to reverse on the facts without taking further evidence if it deems that the record does suffice for making the findings of fact that it wants to make. The bill does not permit the agency to reverse on the facts without sending the case back to the examiner. I think that in 9 cases out of 10 or more, it should be unnecessary to send a case back to the examiner because there is nothing more for the examiner to do. The evidence has been taken. If the parties are satisfied that the evidence has been presented, a remand is inappropriate and clearly so. Yet the bill seems to call for a remand even though there is no reason to take further evidence.

Well, I come now to section 10. The introductory clause of section 10 is a rather strange one, it seems to me. It has two things, one

of which is wholly included in the other. Except so far as, one, statutes preclude review, or, two, law precludes review.

Why say the same thing twice? Is there a reason for this? It seems to me if you say except so far as law precludes review, then you have said the whole thing and you need not say statutes preclude review. I take it the reason for this may be historical. The present act, which has operated quite satisfactorily on this subject, says except so far as agency action is by law committed to agency discretion. This is a perfectly satisfactory provision.

I have recently gone over all the judicial decisions under that clause, and I find them quite clear and consistent. I do not find any special difficulty in interpretation. Is there an intent to change the substance of what appears in the introductory clause of section 10 as distinguished from the language? If there is an intent to make a change, then I am unable to find it from this language. It seems to me what it says is we want to use new words to say the same old thing.

Well, one way to say the same old thing is to use the same old words, which are pretty good words and have been entirely satisfactory. I frankly cannot understand why we have this introductory clause drafted as it is. It seems to me it is not good as a matter of draftsmanship, it is not good as a matter of substance, because it has the listing of the two things, one of which is wholly included in the other.

Mr. KENNEDY. Professor Davis, would you at this point also direct your attention over to section 10(e), the first numbered clause, beginning on line 8, in both the present law and the bill? There it says that the court shall set aside agency action found to be an abuse of discretion. Explain to me how your reading of the cases makes that language consistent with the second clause of the preamble of section 10, "agency action is by law committed to agency discretion?"

Mr. DAVIS. Yes.

Mr. KENNEDY. Thank you.

Mr. DAVIS. There is nothing wrong with that.

Mr. KENNEDY. I did not say there is anything wrong. I just say will you explain how the case law construes those two provisions so they are consistent?

Mr. DAVIS. Yes. Let me read the language. This is the language of the existing act. I have looked at all of the cases by Shepherdizing this provision of the act, systematically going through all of the opinions to find out what the courts are doing on this, and I find that what they are doing is not at all confused by the words you just read. I will grant you that on the face it seems to say except so far as agency action is by law committed to agency discretion, the court may reverse for abuse of discretion. That is what it seems to say on its face.

But as soon as you study that over, and I have written on the subject quite extensively and my analysis is this, and every court has followed it, I think, that you emphasize the word "committed." Except so far as agency action is committed to agency discretion. Now, this means committed so far as to be judicially unreviewable.

Then, if it is that far committed to agency discretion, it is unreviewable and you never get to the problem of the scope of review in section 10(e).

Mr. KENNEDY. It is unreviewable even if there is an abuse of that discretion?

Mr. DAVIS. Even if there is an abuse of that discretion, and so the Supreme Court has held in many cases, Mr. Kennedy, that even if there is an abuse of administrative discretion, the determination by the agency is unreviewable. This has been the law from the beginning, is now the law, and ever shall be the law so far as I can tell, in the nature of things, even though it appears that any individual who is not familiar with the reasons for this may be surprised by it and somewhat disconcerted by it.

Take, for example, a decision by the President of foreign policy. He decides what to do about Vietnam. Well, supposing he abuses his discretion. Should that be reviewable by a court? I think everyone would say no.

What is it under this act, under the present Administrative Procedure Act that prevents a court from reviewing the President's discretionary power to conduct our foreign policy? It is those words, "except so far as agency action is by law committed to agency discretion." If you knock out those words, then the act will say that the President's foreign policy decisions shall be judicially reviewable for abuse of discretion. Nobody wants that.

Mr. KENNEDY. Before you go further on that, there is a definition in the present statute of agency action, which is the same term used over here in the second clause. The definition in section 2 is "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

Now, certainly, the President's decision with respect to Vietnam is not a rule?

Mr. DAVIS. It is not?

Mr. KENNEDY. It is a rule?

Mr. DAVIS. Maybe it is.

Mr. KENNEDY. Would you give us an example or an expression on the President's decision whether to send the Marines to Vietnam. Let us say that his decision is to send the Marines to Vietnam. Will you find out for us whether there is any language in the definition of "rule" which—

Mr. DAVIS. Take another illustration.

Mr. KENNEDY. Let us stick with that one.

Mr. DAVIS. Take the Presidential withdrawal of civilians from Vietnam. Was that a rule? I would say it would fit the definition of "rule" in this act, and I would say it ought not to be judicially reviewable.

Mr. KENNEDY. Which of the particular phrases in the definition of "rule" do you think the decision to withdraw civilians would come under?

Mr. DAVIS. Just go to the definition of "rule" and you will see it fits what the President would do in that case.

Mr. KENNEDY. I am looking at it, and I would hope that you would turn to it and tell me which language.

Mr. DAVIS. "Rule" means the whole or 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, and so forth. The President orders the people to leave

Vietnam. This rule requires leaving Vietnam—"designed to implement, interpret or prescribe law or policy." It certainly does interpret law or policy. The law and policy now is that no civilians shall stay in Vietnam. It is clearly rulemaking by the President.

This is rulemaking by an agency, and it is judicially reviewable unless you have the provision of section 10, "except so far as * * * agency action is by law committed to agency discretion." That is the provision that keeps it from being judicially reviewable.

Mr. KENNEDY. Do you think most scholars would agree with your interpretation of the word "rule," as including the President's decision in Vietnam? Could you tell us whether that is a common understanding of the meaning of the term, "rule"?

Mr. DAVIS. Yes; anybody who would not agree with that I would not call a scholar.

Mr. KENNEDY. Now we will test out each witness on that one and make a determination.

Mr. DAVIS. I think we are getting bogged down in a little detail here. My main point is the present introductory clause of section 10 has been operating satisfactorily; unless there is an intent to change the rule somewhat, let us not change the words. If the purpose is to keep the law as it is, let us leave the words alone in this instance, because we are asking for trouble otherwise.

Now, there has not been any trouble. Under this provision, some administrative action is reviewable and some administrative action is not reviewable. Now on the merits of what the substances ought to be, I am of the opinion that a great deal of administrative action which is not now reviewable should be reviewable. I want to increase the area of judicial reviewability. It is interesting to look at what this committee has been doing on this subject. It has fluctuated between the very extreme position of the American Bar Association and the position of keeping the Administrative Procedure Act as it is on this subject, which I interpret this to do. I think there ought to be some exploration of a middle position.

Mr. KENNEDY. Professor, you say there is no difficulty with this preamble. Why does the American Bar Association apparently take what you describe as a very extreme position, wanting to have it changed?

Mr. DAVIS. I shall try to answer that.

Mr. KENNEDY. Is there or is there not difficulty is all I want to know, without the arguments.

Mr. DAVIS. The American Bar Association, as I understand them, and I might say I am a member of the bar association and the administrative law section, senses that there ought to be more reviewability. And I am inclined to have that same sense.

I think there ought to be more reviewability. But then they try to draft the thing and they see this provision about except so far as the agency action is by law committed to agency discretion, and they scratch the whole thing, not realizing that is knocking out one of the most essential props in this entire piece of legislation.

That is not the way to change it. The way to change it is with much more particularism to deal with problems about reviewability.

Senator BURDICK. We have come to the point where I think we shall have to wind this hearing up. There have been two votes

already this afternoon and one is coming up. Can you summarize in 5 minutes what you have left? Otherwise, I shall have to adjourn the hearing in a few minutes.

Mr. DAVIS. I will try to.

On section 10, let us keep the introductory clause as it is in the Administrative Procedure Act unless there is an intent to change the substance. If there is an intent to change the substance, then there ought to be a statement of what is the change. The present draft does not do that.

Now, I think the most important—well, Senator, I am afraid I cannot conclude in 5 minutes, because what I consider the most important part of my statement has to do with two things: One is the sovereign immunity provision, which I think is unsatisfactory in this bill, although it may be satisfactory, depending upon what the intent is. The other statement that I want to make is affirmatively what this bill does not touch that should be dealt with concerning administrative procedures. May I have a little more time, either today or tomorrow?

Senator BURDICK. You keep talking until the bell rings three times.

Mr. DAVIS. All right. I come to the subject of sovereign immunity, which I consider to be extremely important. Here is opportunity really to do some good in the field of justice relating to administrative agencies. Section 10(b) of the bill, in the last sentence, the bottom of page 30, says—"the action for judicial review may be brought against the agency by its official title."

Now, I want to ask what does that mean in relation to the kind of case that is now barred by sovereign immunity? Let me give you an example of a real case.

In the California Central Valley project, which is conducted mainly by the U.S. Government and partly by State governments, a plaintiff thought that his water rights were being taken away from him by the Bureau of Reclamation. He named the officers of the Bureau of Reclamation and brought an action for an injunction and a declaratory judgment. In the Supreme Court of the United States, he lost his case without a determination of the merits on the ground of sovereign immunity. Congress had not authorized a suit against Uncle Sam.

Now, let us take that same case and look at these words—"the action for judicial review may be brought against the agency by its official title." Supposing the case had been called Rank against Bureau of Reclamation. What would the result be if this bill were law? My answer to that question is I do not know. If this were a statute, I would consult the legislative history to see whether I could find out what the intent is. But as things are, I do not know what the intent is.

Is it the intent that Congress consents whenever a party seeks judicial review of administrative action as those terms are used in this bill, that Congress consents to a suit which will name the Government agency as the defendant? I hope the answer to that question is "Yes." I would like the answer to be yes, because as I look at all administrative law, I see a good many trouble spots, but one of the

areas where I think the greatest amount of injustice occurs is in the continued use by the courts of the doctrine of sovereign immunity. This is a doctrine that stems from the time in England when the King could do no wrong—you could not sue the King. Therefore, in the American democracy, you cannot sue the Government. You cannot sue the Government without its consent. So runs the doctrine. Thirteen State courts in the last 7 years have by judicial action abolished big chunks of sovereign immunity. It is in the air today to get rid of sovereign immunity.

In the many State courts that have considered the question whether they ought to leave that problem to the legislature or whether they ought to abolish sovereign immunity by judicial action, there are many debates and many dissenting opinions, and not one word is uttered in the batch of cases in the last 7 years in favor of the doctrine of sovereign immunity on its merits. The only question on which the courts are dividing, in the State courts, is the question whether the action to get rid of sovereign immunity can properly be taken by judges, or whether the job ought to be done by the legislative body.

The legislative body long ago did in New York State, and New York has been almost alone in that respect. California in 1963 caught up with the times through legislative action. The Congress of the United States has done it in part in the Federal Tort Claims Act of 1946, which, by the way, needs to be amended and strengthened.

Mr. KENNEDY. I know you hate to argue with the other side, but why have legislative bodies been so reluctant to abolish sovereign immunity?

Mr. DAVIS. Because this is the technical kind of matter that only occasionally affects parties, and the Congress seldom responds just to matters of justice of this kind, where there are no organizations that are promoting some kind of change. In this instance, the most appropriate organization to apply some pressure and get the job done is the American Bar Association, and Mr. Benjamin this morning said to this committee that the American Bar Association supports the idea I am advancing in principle and has no objection, as I understand him, to the draft of the language that I have proposed.

This draft that I am advancing is not an offhand piece of writing. I had something in my treatise in 1958 along this line. I changed that in the 1963 pocket parts and have changed that again in the present proposal. I have been trying to learn about this subject ever since first promoting this idea. I think that the present draft may be satisfactory, although it is the kind of thing that calls for the ideas of many minds and a great deal of imagination about what the consequences will be.

I hope that this committee will see fit to pick up this idea. I think that if this bill is enacted with a provision that will clarify on the subject of sovereign immunity, taking the one sentence as it is and carrying it a little bit further to make clear that consent is given to actions against the United States, this will be the greatest accomplishment that this committee can make in this bill, in my opinion.

Senator BURDICK. Where would you insert that language?

Mr. DAVIS. I would take the last sentence of section 10(b) and I would provide as follows: I would change that sentence a little and then go on from there. This is at page 10 of my written statement.

I would like to go over this sentence by sentence, because I think this is very important:

"The action for judicial review may be brought"—that is the same as the present bill. The present bill says against the agency, by name. Change it this way: "The action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer." Now, there are a lot of reasons why any one of those three can be appropriate in any particular case. Congress should authorize any one of the three at the option of the plaintiff, I think.

Then I would go further to make clear what is intended: "Consent is given to an award of specific relief against the United States, or against an agency or officer of the United States, irrespective of the doctrine of sovereign immunity, in any suit for declaratory judgment, relief in the nature of mandamus, prohibitory or mandatory injunction, or habeas corpus."

Those are the remedies that are specified in section 10 of this bill, and also in section 10 of the Administrative Procedure Act.

Now, that is qualified a little, however: "or for any combination of these remedies, in any case or controversy"—that is necessary to comply with article III of the Constitution—"in which the court finds that the issue or issues are appropriate for judicial determination." Now, those words will become words of art as they are interpreted by courts. Those words are essential because some of the reasons why we do not get courts where they do not belong is the use of the sovereign immunity doctrine. We need something to take the place of that if we erase the sovereign immunity doctrine. Now, there is one circumstance where I think sovereign immunity may be properly retained, and I think it is important that we should recognize that that is so: "except that one who is by law entitled to recover money in an action against the United States"—that will typically be in the Court of Claims or under the Federal Tort Claims Act—"may in the discretion of the court be denied specific relief if the court finds that (1) an award of specific relief may impair a governmental program and that (2) monetary relief is in the circumstances a just substitute for specific relief."

Now, that is the proposal with respect to sovereign immunity. I would suppose that the Department of Justice at first will oppose this kind of thing, because Government lawyers as such are so accustomed to trying to protect the money of the United States against suits by plaintiffs by using this weapon of sovereign immunity. It is because they do so that we have so much injustice. That is something that it seems to me has to be changed even over the opposition of the Department of Justice, if it opposes.

I would expect that the lawyers in the Department of Justice would, in all probability, be divided among themselves about whether this ought to be done.

Mr. FENSTERWALD. I was about to say when you said they would oppose it that this was the most scholarly understatement of the year.

Mr. DAVIS. Speaking of scholars, I think it would be found quickly that scholars on this subject will be unanimous and enthusiastic about the idea, if we can only get rid of this cause for injustice. These are people who have no ax to grind. I think I have no ax to grind in coming before you here, except I want to see justice done in these

many cases in which these deserving plaintiffs lose their cases on account of the doctrine of sovereign immunity. Let us get rid of it once and for all if we can find a way to do it.

Now, I come to the final section of what I want to say. That is, there is not much in this bill in its present form. We have come a long way from the original American Bar Association position. The original bill was very extreme, as I see it, and I know that it is a controversial subject. The history has been one of starting out with the Hoover Commission Task Force Report in 1955, which was too extreme even for the American Bar Association people. They watered it down somewhat in their first draft, and each succeeding draft has been milder and less extreme, more acceptable.

The four main positions that the American Bar Association took before this committee last year have to do with the subjects of separation of functions, evidence, reviewability, and scope of review. All of them have been rejected in this bill. This becomes a bill that is largely unobjectionable except for 3(c) and section 8, both of which, I think, can be properly changed. But there is not very much affirmative push in it any more. It is largely empty when you take out the original impetus for the bill.

I think there is a great deal that needs to be done in the field of administrative law and procedure and that needs to be done by legislation. The most important remark that I can make about this bill is that it fails to reach most of the trouble spots of administrative law and procedure. Why do we not deal with the trouble spots? Let me tell you what I think a good bill would do.

A good bill would open up a good deal that is now secret, as this one tries to do, and would do this with enough refinement of detail that typical administrators would not be alarmed by it, but would support it, and I think that can be done. It cannot be quickly done; it will take a lot of study to do it. But it can be done.

A good bill could straighten out the complex and unsatisfactory law about legislative, interpretative, and retroactive rules. This bill is silent on the subject.

A good bill would deal with the misuse of trial procedures for solving economic inponderables. It would do away with such things as the Civil Aeronautics Board conducting hearings, with evidence, with cross-examination, with thousands of pages of record, a cost of \$300,000 or more to each party, 14 parties in the case, on the question of whether 2 airlines, 3 airlines, or 4 airlines ought to fly between a pair of cities. That kind of question cannot be resolved with evidence, whether or not it is subject to cross-examination. This is a tremendous abuse in our present system. This bill does not touch it. It does not even try to deal with the problem. This is one of the major problems of the administrative process in its present state of development.

Another such problem is the problem of seven applicants for a TV license in the Communications Commission, with a hearing, at a cost to some parties up to \$500,000 for the proceeding, and then a decision on the basis of what nobody can understand, including the Commissioners with whom I have talked about this question. This needs to have some attention from Congress. It is too much neglected. These trouble spots need to be dealt with.

A good bill would deal with use of trial-type procedure for rule-making. Instead of the provision in section 4 of this bill which accentuates determinations of the record in rulemaking, it should get rid of determinations on the record in rulemaking except for rate-making cases. There is no sense in the Food and Drug Administration's procedure in which they take evidence on the question of whether a peach ought to be cut into six slices or eight slices and whether it ought to be described as in water slightly sweetened or in soft syrup, or whatever it is. You cannot prove with evidence that one thing or another ought to be done. That is the procedure that is now being used because Congress calls for it in the Food and Drug Act. That kind of thing ought to be changed.

A good bill would deal with the problems of ratemaking as such. As I said earlier, there is a great deal of understanding of this subject which can be captured by the staff of this committee, and something can be drafted that will relieve against some of our most serious problems in that area.

A good bill would not leave the problem of requirement of hearing to other legislation and to the courts under the Constitution. A good bill would deal with the question of when a hearing ought to be required. This bill does not even attempt that. There is a great deal that needs to be changed in this law, as any study will show.

A good bill would contain provisions to govern trial-type hearings that are held even though neither the statute nor the Constitution requires such hearings. Do you realize that this bill does not contain any provision for the many adjudications that are not required to be determined on the record after opportunity for agency hearing, except the little bit in section 5(b), which I think is all wrong for reasons that I have stated before? I think a good bill would deal with the subject of adjudication that is not required to be determined on the record.

A good bill would go much more deeply into the extremely difficult problems of official notice. What this bill does on official notice is to go a little bit beyond what is in the Administrative Procedure Act, and what it does is good as far as it goes. I think this is one of the major problems in the administrative process in its present stage of development. It needs attention. There is a great deal that can be done by legislation.

In my statement to the committee last year, I had a draft of a provision which I think can do some good. I do not know why it has been rejected. I think the reason, and this will be without disrespect, is that it is not understood. It is a very difficult subject matter. It is very difficult to understand what I have proposed there. I would be glad to go into that very fully with the committee's staff to see if we cannot work out something that will do some good on this subject. The California Law Revision Commission has been dealing with that subject and they have adopted the main ideas that I have presented which are the same as what I gave to this committee last year. That is about to be, as I understand it, enacted by the California Legislature.

A good bill would go much more deeply into a good many other subjects. I think what is needed on the subject of evidence is a clear statement that Congress rejects the residuum rule. The present bill does not deal with the residuum rule. The residuum rule may or may

not be the law of the Federal courts. The Federal courts do not know whether it is or not. We have a great deal of confusion on this subject. Some courts say it is and some courts say it is not, and some courts have something in between.

The residuum rule is that the finding must be supported with evidence which would be admissible in a jury case. Now, the reason why we have jury trial rules of evidence, as we call them, has to do with special considerations about juries. We cannot trust the juries to handle some kinds of evidence. In judge-tried cases we relax the jury trial rules of evidence. In agency-tried cases, we relax the rules of evidence. But if we use the residuum rule, we have this crazy system of determining what may be relied upon by rules that have been developed for the purpose of determining what may be admitted—something quite different. And the determination of what may be admitted has to do with jury. Then when we apply that to agencies, we get very bad results.

Many courts, State courts, have rejected the residuum rule on their own. A good bill would deal with this subject and find out what needs to be done and provide for it.

A good bill would be concerned not only with adjudication, rule-making, and judicial review, and that is what this bill is limited to except for the few things in section 6, but it would get into the most difficult subject matter of all, and that is the exercise of discretionary power in the absence of hearing safeguards. It could require openness in the exercise of discretionary power; it does not do that. It deals with the product, but it does not deal with the process. It could forbid secrecy except when special reasons justify secrecy in the process. It could require findings of fact and statements of reasons for some determinations even when hearings are not required. This bill does not even do that for all adjudication. I think it ought to do it for some exercise of discretionary power. We can find out what are the areas where that is feasible.

We could require a system of precedents and of consistency, even when you do not have a proceeding and even when you do not have any kind of formality. A good bill would require the exploitation of the principle of check even when the procedures are as informal as conversation. Some agencies are doing that to some extent, and we can learn from those agencies that are doing it.

A good bill would provide criteria on the subject of exhaustion of administrative remedies. This is the subject matter of much confusion in judicial opinions. I have recommended in my treatise a way to resolve that confusion. A half dozen courts have adopted that, including some of the lower Federal courts. It is possible that we are on our way to work that out, but it would be much better if that kind of system could be written into a statute which would be authoritative and take care of the problem. I think the problem can be properly resolved by legislation. This bill does not even attempt to deal with exhaustion of administrative remedies.

One of the subjects of administrative law that is most confusing of all is the subject of ripeness. On no other subject is Supreme Court law so contradictory. The Court closes the judicial doors to cases that many observers think are deserving of consideration, and the Court

opens the judicial doors to many cases that many observers think are not deserving of consideration. The cases are going in all directions and the Supreme Court is often violating its own case law. We have had some extreme views that have been developed within the Supreme Court which we are now in the process, I think, of getting away from. A little push by Congress on this difficult subject could help the judges in developing a much better system. We are litigating altogether too many questions of whether the judicial doors are open or closed to cases in the name of ripeness or lack of ripeness.

A good bill would deal with the subject of nonstatutory remedies or forms of proceedings. What is needed above all is to get rid of mandamus and suits in the nature of mandamus. Rule 81(b) of the Federal Rules of Civil Procedure provides that mandamus is hereby abolished. It was recognized way back there in the 1920's or 1930's that mandamus ought to be abolished. But it has survived its abolition. It has just a new name now, relief in the nature of mandamus.

What is wrong with it is that it is governed by intricacies developed out of the Middle Ages that no longer have any good sense in them for modern problems. The way to get mandatory relief today that is satisfactory is the mandatory injunction. But because of the mandamus tradition, many courts will tend to relate the mandatory injunction to mandamus and will follow the needless and harmful intricacies. We could simply provide in one sentence that relief in the nature of mandamus shall no longer be available, that anybody who wants mandatory relief shall ask for mandatory injunction, and that mandatory injunction shall be governed by equitable principles, not by the principles of mandamus law.

(A complete statement by Mr. Davis follows:)

COMMENTS ON ADMINISTRATIVE PROCEDURE BILL, S. 1336, 89TH CONGRESS, BY
KENNETH CULF DAVIS, PROFESSOR OF LAW, UNIVERSITY OF CHICAGO

This year's bill is a better one than last year's. Indeed, I have counted about 30 of my recommendations of last year that have been adopted and incorporated in the present bill. From my subjective standpoint, that is real progress! The changes I have recommended include major ones, as well as the correction of a good many ineptitudes. I am especially pleased that almost all of the extreme positions of the American Bar Association have been rejected, including especially their extreme positions on evidence, on separation of functions, on reviewability, and on scope of review.

The present draft is beginning to look a little bit like the kind of thing that Congress can properly enact. The most serious infirmities in the present draft, in my opinion are in section 3(c) and in section 8. I shall state my criticisms section by section. Then at the end of my remarks I shall try to put this bill into a large perspective, and I shall try to state constructively what I think a good administrative procedure bill should do.

The new definitions in section 2(d) of order, opinion, and adjudication are based upon my recommendations of last year, and I approve them. They seem to me to improve upon the definitions in the present Administrative Procedure Act. But I have two small suggestions about these definitions. In the first sentence, the words "in any proceeding" do no good and may possibly do harm. Most orders are issued without anything in the nature of what we commonly call "proceedings," although I confess that I am unable to define "proceedings," and although the bill fails to define "proceedings" despite the words on the subject in section 2(g). I also suggest that in the second sentence, defining opinion the words "presented on the record" should be deleted. Opinions are often written in cases that are not determined on the record.

Perhaps I should point out that the changes in section 2(d) are not merely changes in meanings of terms. They involve rather important changes in appli-

capability of the act's provisions. For instance, ratemaking for a single company has never been subject to the provisions of section 5 of the Administrative Procedure Act. Because of the changes in section 2(d), ratemaking for a single company will become adjudication, and it will be subject to section 5. I think this is a good result.

Section 3 is slightly improved over last year's version, but much additional work on it is still needed, in my opinion, especially on section 3(c).

My suggestions of last year to eliminate the exceptions at the beginning of the section have been adopted, and I think that is a gain.

Section 3(a) adopts two suggestions I made last year, and I find it quite satisfactory in its present form.

Section 3(b) adopts many of my suggestions of last year, and I think it is greatly improved. One of my suggestions, however, has been carried too far. I recommended that a provision be included to require opening to public inspection the portions of operating instructions to an agency's staff that amount to substantive law. Section 3(b) now requires opening to public inspection "staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale." I have two suggestions about this: (1) The "unless" clause is useless and should be eliminated. (2) Opening to the public all instructions "that affect any member of the public" goes too far and needs to be cut back. For instance, one who is investigated may be affected by instructions to the investigator about how to investigate, but some such instructions are properly confidential. I recommend that the provision be revised to read as follows: "staff manuals and instructions to staff to the extent that they embody agency interpretations of law."

Although I warmly approve the purpose behind section 3(c), I think it has not been responsibly drafted. The exemptions in section 3(e) are much too crude.

The requirement that each agency shall "make all its records promptly available to any person," except for what is contained in the eight exemptions of 3(e) is not limited to current or future records.

Has anyone ever made an estimate as to how many billion dollars, or tens of billions, might have to be spent to go through all records of all executive departments and all independent agencies and sort out the exempt information from the information that is not exempt?

The fact is that agency records since 1789 have not been kept in such a way that the items within the eight exemptions are separated from other items. Perhaps it would take the whole population of the United States several years to do the sorting, even if the whole population were freed from other tasks.

Yet under this bill as drafted, a single plaintiff could name all executive departments and all agencies as defendants in a single proceeding, and the court, if it is faithful to the language of the statute, would be required to order all the departments and all the agencies to make all their records "promptly" available to the plaintiff, minus what is in the eight exemptions.

I weigh my words carefully, and I speak without exaggeration when I say that my judgment is that 3(c) as modified by 3(e) is irresponsible. I implore this committee to discharge its responsibility and to consider further whether it can be enacted in its present form.

If 3(c) and 3(e) are not drafted with greater refinement, my opinion is that any responsible President will be forced to veto the entire bill.

A simple change that is obviously necessary is to limit the words "all its records" to "all records compiled after the effective date of this act." That would meet a part of my objections but not all of them. I think a great deal of committee staff work for 6 months to a year is necessary in order to develop the needed refinements in the eight exemptions of section 3(e).

Perhaps I should add parenthetically that H.R. 5012, introduced by Representative Moss February 17, 1965, provides that "Every agency shall * * * make all its records promptly available to any person except information that is * * * specifically required by the President to be withheld * * *." The result of this is to labor to legislate and to leave us precisely where we are now. Under the present system, each agency in general determines what shall be concealed and what shall be disclosed. The President, of course, has to act through each agency, of necessity. So under H.R. 5012, each agency will in practical effect continue to determine, as now, each question of concealment or disclosure, and no gain will be accomplished.

I recommend that section 3(c) of the Administrative Procedure Act be left unchanged until the necessary staff work has been done to draft a proper substitute.

Although nearly all the recommendations I made about last year's draft of section 4 have been adopted in the present draft, some features of the present draft seem to me unsatisfactory.

The elimination of the exceptions for interpretative rules and general statements of policy may be undesirable, although all the considerations are not on one side. If the choice were merely between (a) party participation and (b) no party participation in the making of interpretative rules and general statements of policy, then I would favor party participation, and I would go along with the present draft on this point. But that is not the choice. The crucial consideration is that nothing in S. 1336 or in any other legislation can compel agencies to disclose all the policies that have become clarified in the minds of the administrators. Nothing can prevent an agency from failing to disclose policies to affected parties.

Indeed, I think that in the present stage of development of the Federal administrative process, one of the major failings of most agencies is reluctance to clarify the law they administer. For this reason, I think that everything should be done that can be done to encourage agencies to move toward earlier clarification. Two of the main methods for such earlier clarification are interpretative rules and general statements of policy. Good legislation should avoid any kind of new barriers to issuance of interpretative rules and general statements of policy.

On the problem of whether or not the procedural requirements of section 4 should be applied to interpretative rules and general statements of policy, the primary concern of affected parties relates to the agencies' choice between (a) disclosure of policies, and (b) concealment of policies.

On this choice, the impact of the present draft of section 4 is on the wrong side. The present draft, if adopted, will discourage agencies from issuing either interpretative rules or general statements of policy.

Even though I prefer party participation, I do not want to pay the price in terms of discouraging more frequent use by the agencies of interpretative rules and general statements of policy. Therefore I favor continuing the present exemption from section 4 of interpretative rules and general statements of policy.

In section 4, I do not like the three statements that "the agency shall make its decision." This is bad as a matter of language; we do not customarily call the promulgation of rules a "decision." What should be said is that "the agency shall promulgate the rules."

The provision in section 4(c)(2) that "the officer who presided shall make a recommended decision" is a bad one. Section 8(a), even in an adjudication required by statute to be determined on the record, is less strict, for it adds the words "except where such officers become unavailable to the agency." At least such an "except" clause should be added. But in rulemaking, I see no need for requiring the same officers. I would strike the provision entirely. If it is kept, I would substitute "recommended rules" for "recommended decision."

Section 4(h) exempts "advisory interpretations and rulings of particular applicability." I see no more reason for exempting "advisory" interpretations than any other interpretations. I recommend striking the word "advisory." I think this exemption ought to include "action of particular applicability, such as orders, interpretations, and rulings."

In section 5, the elimination of the exceptions from the introductory clause conforms to my recommendations of last year. So does the change of the rest of the introductory clause to substantially what it has been in the Administrative Procedure Act.

In section 5(a)(3), the word "order" is used twice for what should be called "statement." We must remember that "order" is defined in section 2(d) to mean a final disposition.

The provision of section 5(a)(5) that "Every agency shall by rule provide for abridged procedures which shall be on the record * * *" goes too far. The word "shall" should be changed to "may." For instance, an examiner handling social security claims for old age, survivors, and disability insurance, uses procedures that are about as fully abridged as they can be, and yet they come under section 5(a)(4) concerning "regular hearing procedure."

The provision of section 5(a)(5) that "agency personnel of appropriate ability" may conduct hearings in the modified hearing procedure undermines the whole idea of having a staff of examiners who are specially qualified.

The last sentence of section 5(a)(5), that the officer who conducted the abridged proceeding "shall make his decision" needs to be qualified to conform to section 8(a); the words should be "shall make his decision except when he becomes unavailable to the agency."

The provision of section 5(a)(6)(A) on separation of functions now eliminates the earlier extremism and is entirely satisfactory. But the provision of section 5(a)(6)(B) that "no presiding officer * * * shall consult with any person or agency on any fact in issue * * *" goes too far. Sensible examiners are not likely to comply with it. Two examiners will go to lunch together and talk about each other's cases. When an examiner is not sure how to interpret testimony of an expert witness, the examiner should be allowed to consult an agency specialist about the meaning of unfamiliar terms, or about the question whether the examiner may take official notice, or about the interpretation of some specialized concepts. If the agency heads are free to consult agency specialists who have not participated in investigating, prosecuting, or advocating, the examiner should be free to consult the same agency specialists. If the examiner does consult them, the procedural protection for the adversely affected party will be helped, not hurt, because then that party will have a chance to know at an earlier time what the specialist will advise the agency, and will have a chance to meet that advice before the agency's decision has been announced.

The provision of section 5(a)(7) that in an emergency "an agency may take action without the notice or other procedures required by this subsection" fails to do what it apparently attempts to do. If it means that an agency may in an emergency act without a hearing, then it has no effect whatsoever, because the requirement of hearing does not come from "this subsection." If it does not mean that, then it is harmful; for instance, if a hearing must be held, no gain is made in taking care of the emergency by providing that the prosecutors may participate in deciding. The existing law adequately takes care of emergency action. The entire provision of section 5(a)(7) fails to do any good and it should be deleted.

Section 5(b) applies to "all other cases of adjudication except those involving inspections and tests." More than 90 percent of "other cases of adjudication" are cases in which no hearing is held. For instance, during 1963 the FCC licensed 735,000 transmitters, and each case was an adjudication, but during the year the FCC in all types of its business held only 226 hearings. The Immigration Service adjudicated 693,000 cases, but it held only 13,000 hearings. The Social Security Administration adjudicated 3 million cases, but held only 28,000 hearings. Yet section 5(b) is drafted as though every adjudication involves a hearing. For instance, it says that "Without delay after the conclusion of the proceeding, the officer who has conducted it shall make his decision." These words are unreal. The typical adjudication does not involve a "proceeding" that is "conducted" by an officer. In the typical adjudication, an application is made in writing, the agency's employee grants or denies it in the name of the agency, and nothing more is done.

Section 5(c) never gets around to saying what it applies to. Section 5(a) applies to adjudications required to be on the record after opportunity for agency hearing, and section 5(b) applies to other adjudications. If section 5(c) applies to all adjudications, as it may, then it is ill conceived, because it provides opportunity to settle "in advance of the hearings," and no hearings are held in more than nine-tenths of adjudications. If it applies only to cases in which hearings are held, then it is bad as a matter of substance, because parties should have the opportunity to settle cases that may be decided without hearings.

Section 6(a) moves in the right direction in providing the right to be "accompanied, represented, and advised by counsel," but this right should be unqualified, not qualified. It should not be limited to "investigations" and "proceedings" but it should apply to all dealings between "any person" and "any agency." The provision should read: "Any person who voluntarily or involuntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." It should apply to persons who seek from an agency such things as advice, formal advisory opinions, declaratory orders, a prosecution of someone, a refusal to prosecute, initiation

of a proceeding, agency sponsorship of legislation, an investigation, a limitation on an investigation, disclosure of information, nondisclosure of information. The provision for right to counsel should, in short, apply to all dealings between any person and any agency's representative.

Section 6(e) provides: "Unless otherwise provided by statute, every agency shall by rule provide for the issuance of subpoenas and shall issue subpoenas upon request to any party to an adjudication and shall by rule designate officers, including the presiding officer, who are authorized to sign and issue such subpoenas." Does this sentence authorize agencies which now have no subpoena power to issue subpoenas? If that is the intent, it should say so. If that is not the intent, then the words should be limited to agencies that have a subpoena power.

The second sentence of section 6(e) says that the presiding officer or the agency may quash a subpoena for reasons of relevance or scope. What if the objection is to jurisdiction or authority to issue the subpoena? What if the resistance to the subpoena is on grounds of self-incrimination? What if other appropriate objections are made? I suggest that the sentence should read: "When objection is made to the subpoena, the presiding officer or the agency may quash or modify it."

Section 6(f) provides: "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding." Supposing an application, petition, or other request is made that is not "in connection with any agency proceeding." Frankly, I don't know what applications are or are not "in connection with any agency proceeding," for I don't know the meaning of "proceeding," and the definition in section 2(g) does not help me. But what I do know is that prompt notice should be given of denial of any application, whether or not in connection with a proceeding. Why not strike the words "in connection with any agency proceeding"? Similarly, the requirement in the second sentence of section 6(f) of a simple statement of reasons should apply, whether or not the application is in connection with a proceeding.

Section 7(c) rejects the extreme position of the American Bar Association about evidence. The present provision seems to me entirely satisfactory.

The provision of section 7(d) about official notice seems to me unobjectionable, except that it passes up the opportunity to do some good on this subject, as I proposed last year.

The last sentence of section 8(a) says: "In proceedings in which the agency presides at the taking of evidence, its decision shall be the final agency action in the proceeding." This provision is unsound, because it cuts off rehearing or reconsideration. The decision should be final only if the agency makes it final; it should not be final if the agency decides to reconsider. The sentence should be deleted. It is not only unsound but it is also unnecessary.

By limiting appeals to "the questions raised by the exceptions," and by limiting exceptions with respect to findings to assertions that findings are "clearly erroneous," section 8(c)(1) has the effect of withdrawing from the agency the power upon an appeal to set aside a finding which it deems to be erroneous. This means a withdrawal of power from the agency; it means that to some extent the power that each agency has had will be divided between the agency and the examiner. If the agency no longer has full power over factual determinations, surely the agency can no longer have responsibility for results in its field, for responsibility can be no broader than power. The provision is unsound. The sound and essential idea is that of section 8(a) of the Administrative Procedure Act, that the agency on appeal or review shall have "all the powers which it would have in making the initial decision." This idea should be retained.

The requirement of section 8(c)(2) that an appeal board must be composed of agency members or hearing examiners unduly limits the agency with respect to composition of an appeal board. The FCC's highly successful review board is not composed of either agency members or hearing examiners; perhaps it would not be so successful if it were. The agency should be given full freedom in making selections of personnel for appeal boards.

Section 8(c)(2) in its present form does not allow the agency to refuse to consider an appeal until after the appeal board has considered it and made a decision. The agency should have power to make this choice. The agency should also have power to determine by rule what classes of cases shall go to the appeal board and what classes of cases shall go from the presiding officer directly to the

agency. And the agency should have power to review or refuse to review any decision of the appeal board.

Section 8(c)(3) applies only to the agency and not to the appeal board. It should apply also to the appeal board.

The most objectionable feature of the entire bill, S. 1336, is the push made in section 8 to divide power between the agency and its subordinates. All final power over all questions, subject to judicial review, should be in the agency, and the agency should continue to have full responsibility for all decisions. That the agency must work through a staff, including presiding officers, should not mean that power will be withdrawn from the agency. No power should be transferred from the agency to presiding officers. The agency should not in any degree lose control within the area where it has responsibility.

These remarks are addressed especially to section 8(c)(4), which seems to me alarmingly unsound. The agency's power to review on its own motion is there limited to questions of law and policy; the first sentence, through the word "only," says that an agency may not "order the case before it for review" on the ground that the findings are erroneous. Each agency should continue to have this power.

The second sentence of section 8(c)(4) seems to me especially queer in several respects. Under the first sentence, the agency may not order a case before it because it disagrees with a finding of fact; under the second sentence, the agency may raise "any issue of fact it deems material." Does this mean that if the only question in a case is one of fact, the agency is powerless to review, no matter how strongly it disagrees with the findings? Does it also mean that if a case involves a question of fact and a question of policy, the agency may review both questions? If so, the question of the agency's power to review questions of fact will depend upon the utterly fortuitous question whether the case also happens to involve a question of policy, and such a result is ridiculous. But if this is not what section 8(c)(4) means, then it has a meaning that I am unable to find.

The second sentence of section 8(c)(4) is also objectionable for additional reasons. The proviso says that "if the agency raises any issue of fact it deems material, the agency shall remand the case with instructions for further proceedings before the presiding officer." Does the term "further proceedings before the presiding officer" mean that the hearing will be reopened for taking additional evidence? This is what it seems to mean. But any such "further proceedings" will be complete nonsense in any case in which all the evidence that should be taken has already been taken, and nine-tenths or more of the cases in which "the agency raises any issue of fact" will be of that character.

What is the agency to do if it finds that the presiding officer's findings are not supported by substantial evidence? Does the agency have less power with respect to findings that go out in the agency's name than a reviewing court has? The answer to this question is yes if the words are interpreted according to their plain meaning, and yet any such result would be absurd.

Does the agency have to allow the taking of further evidence even if it believes that no further evidence need be taken? The answer to this question is yes if the words are interpreted according to their plain meaning, and yet any such result would be absurd.

What I am saying is that section 8(c)(4) seems to me a complete absurdity. I see no cure for it but to strike it in its entirety and start again. The only words that should be kept are the following ones: "On such review the agency shall have all the power it would have if it were initially deciding the proceeding," except that the word "proceeding" should be changed to "case." Such a provision should be unqualified, and all other provisions of the bill should be in conformity with the vital principle of this provision.

Section 8(c)(5) provides: "The action on review or on appeal if no review is taken shall be on the record and be the final action of the agency except when the decision is remanded or set for reconsideration or rehearing." Each element of this strange sentence seems to me either undesirable or unnecessary: (1) The idea that "action * * * shall be on the record" is all wrong. The finding of facts must be on the record. The conclusions of law need not be on the record. The determination of policy need not be on the record. The "action" is not on the record. (2) The phrase "if no review is taken" does violence to legal language. A party "takes" an appeal. But an agency does not "take" review. (3) The statement that "action * * * shall be * * * final * * * except when the decision is remanded or set for reconsideration or rehearing" accomplishes

no useful purpose, and it may be harmful. Without setting the case for reconsideration or rehearing, the agency may want to make a correction in its order or in its opinion. All courts and all agencies have power within a limited period to make changes and to express afterthoughts, without setting the case for reconsideration or rehearing. This customary power should not be taken away. Since section 8(c)(5) does no good and since it is harmful in several ways, it should be deleted in its entirety.

Section 9(a) says: "Every agency shall have a duty * * * to set * * * any investigation * * * required to be conducted pursuant to this act * * *." This makes no sense, since this act does not require any investigation to be conducted. The whole provision of section 9(a) is badly drafted. The last sentence forbids any "substantive rule" except "within jurisdiction." Why the word "substantive"? Is it the intent that procedural rules need not be within jurisdiction? I would strike all of section 9(a), for it does no good.

The introductory clause of section 10 seems to me all right in substance but bad in the draftsmanship. It seems to me illogical to have two phrases, one referring to what is precluded by law and the other to what is precluded by statute. One is wholly included within the other. Apparently the intent is to make no change in the results under the Administrative Procedure Act. If that is the intent, then a good way to express that intent would be my making no change in the language of the Administrative Procedure Act. If the intent is to make some change, then that intent should be expressed. For my part, I would leave the introductory clause of section 10 as it is in the Administrative Procedure Act.

The provision of section 10(a) seems to me to be excellent. I assume that it means that a Federal taxpayer will have standing to challenge an illegal expenditure by a Government agency, but this is far from clear and should be made clear. The question of a taxpayer's standing is a major one. It should not be dealt with in such a cryptic fashion.

Probably the most important provision in S. 1336 is the last sentence of section 10(b): "The action for judicial review may be brought against the agency by its official title." Heretofore, nonstatutory remedies for judicial review have had to be brought against officers, not against agencies, because sovereign immunity has prevented such suits against agencies. Under this provision, suits for declaratory judgments, for mandatory relief, for prohibitory or mandatory injunction, and for habeas corpus can be brought against the agency by its official title. Congressional authorization of such suits must mean congressional consent to such suits, and congressional consent is all that is needed to escape from the judge-made doctrine that the Government cannot be sued without its consent.

I hope I am correct in my interpretation of the last sentence of section 10(b). I hope the intent is to circumvent the doctrine of sovereign immunity. But if this is the intent, I think it should be made somewhat clearer than it is in the present draft. The present version is likely to cause unnecessary litigation over the question whether or not sovereign immunity may sometimes be a defense. Frankly, I think that occasionally sovereign immunity should be a defense; the provision in its present form can be interpreted to do essentially what I want, but it needs refinement.

I propose that the following be substituted for the last sentence of section 10(b): "The action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Consent is given to an award of specific relief against the United States, or against an agency or officer of the United States, irrespective of the doctrine of sovereign immunity, in any suit for declaratory judgment, relief in the nature of mandamus, prohibitory or mandatory injunction, or habeas corpus, or for any combination of these remedies, in any case or controversy in which the court finds that the issue or issues are appropriate for judicial determination, except that one who is by law entitled to recover money in an action against the United States may in the discretion of the court be denied specific relief if the court finds that (1) an award of specific relief may impair a governmental program and that (2) monetary relief is in the circumstances a just substitute for specific relief."

The last sentence of section 10(c) seems to me in part the opposite of what should be intended: "* * * agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for * * * an appeal to superior agency authority." The words seem to say that one is entitled to appeal to superior agency authority may go to court before appealing to the superior agency authority. What should be pro-

vided is exactly the opposite. One who has a right of administrative appeal should not be entitled to go to court until he has taken his administrative appeal. My proposition is the heart of the doctrine of exhaustion of administrative remedies, developed by the courts. I assume that the proposal to depart from what every judge knows instinctively must stem from an inadvertence and is not intended.

Perspective.—We have come a long way from the proposals of the second Hoover Commission's Task Force in 1955. In my opinion, their recommendations were rather wild and would have been extremely harmful to the Federal administrative process. The American Bar Association recognized this, and its first bill moved in the right direction, making the proposals milder. But it kept too many of the 1955 recommendations, in my opinion. The further history has been one of gradually, step by step, moving away from the extreme recommendations of the American Bar Association. The present bill, S. 1336, has only a few remnants of that extremism.

The present draft, now that the extreme proposals have been eliminated, does not provide for any very significant changes. The most important are those of section 3(c) and those of section 8, and these changes are in my opinion highly objectionable, although I am in complete agreement with the objectives of section 3(c), as distinguished from its crudeness.

The most important desirable changes in the present draft are, in my opinion, those relating to standing and those relating to sovereign immunity. But the one on standing does not say, as it should say, that a taxpayer has standing to challenge an illegal expenditure, and the one on sovereign immunity is so indirect that I can't be sure that it deals with sovereign immunity. Both of these provisions, I think, need to be clarified.

Perhaps the most important remark that can be made about the present bill is it fails to reach most of the trouble spots of administrative law. A good bill would bring some improvements to our system at all the points of greatest deficiencies.

A good bill would deal effectively and responsibly with the problem of government information. It would be based upon comprehensive studies that would determine what information should be kept confidential and what information should be open to public inspection. It would open up a very great deal that is now secret, and it would do this with enough refinement of detail that typical administrators would not be alarmed by it.

A good bill could straighten out the complex and unsatisfactory law about legislative, interpretative, and retroactive rules. The present bill is silent on this vital subject.

A good bill would deal with the misuse of trial procedures for resolving economic imponderables. It would provide that trial procedure shall not be used except to resolve specific issues of fact. It would end such spectacles as the Civil Aeronautics Board's taking evidence, subject to cross-examination, on the question of how many airlines, from the standpoint of monopoly and competition, should fly between a pair of cities.

A good bill, instead of providing for making rules by trial methods, as this one does, would provide that trial-type procedure shall not be used for rule-making, unless the agency finds that specified issues of fact may most efficiently be resolved by the method of trial.

A good bill would deal with the procedural problems of ratemaking, as such. A good bill would not leave the problem of requirement of hearing to other legislation and to the courts through constitutional interpretation; it would deal with that problem, instead of avoiding it.

A good bill would contain provisions to govern trial-type hearings that are held even though neither a statute nor a constitutional provision requires such hearings; this bill contains nothing on this subject.

A good bill would go much more deeply into the extremely difficult problems of official notice. This bill is satisfactory on that subject as far as it goes but it does not go far enough into the problem.

A good bill would contain evidence provisions not only on the question of what evidence may be admitted but also on the question of what evidence may suffice to support a finding. This bill does not deal with this subject. What is most needed is a clear provision that the residuum rule is rejected, that is, that the test of reliability of evidence is not its admissibility in a jury trial.

A good bill would be concerned not only with adjudication, rulemaking, and judicial review, but also with the most difficult and important subject matter

of all—the vast and important area of discretionary power which is unchecked by either hearing safeguards or judicial review. It could require openness in the exercise of discretionary power, forbidding secrecy except when special reasons justify secrecy. It could require findings of fact and statements of reasons for some determination even when hearings are not required. It could encourage a system of precedents and of consistency in some classes of informal action. It could search for ways to utilize the principle of check for informal determinations. It could lay down some rules about fair procedure even when the procedure is as informal as conversation.

A good bill would provide criteria on the confused subject of exhaustion of administrative remedies. This can be done and it should be done. The present bill is silent.

A good bill would deal with the subject of ripeness for judicial review. On no other subject in the area of administrative law has the Supreme Court so often contradicted itself or so often failed to follow the rules it has laid down for courts and for practitioners to follow. The draftsmen of the present bill have not even attempted to deal with this subject, even though the need for legislation here is far greater than it is on many of the subjects dealt with in the present bill.

A good bill would deal with nonstatutory forms of proceedings. The most unsatisfactory one is relief in the nature of mandamus. Mandamus is abolished by rule 81(b) of the Federal Rules of Civil Procedure, but it has survived its abolition, in the form of what is called relief in the nature of mandamus. What is needed is to abolish relief in the nature of mandamus, with a simple provision that the only mandatory relief available in a Federal court shall be through mandatory injunction, which shall continue to be controlled by equitable considerations, as how, and not by the harmful intricacies of mandamus law.

A good bill would deal with judicial review in the form of tort suits against the Government and against officers. It would build on recent studies that have been made, notably the one by the California Law Revision Commission. It would abolish some of the exceptions under the Federal Tort Claims Act, especially the exceptions for deliberate torts. It would deal with the subject of officer liability in tort, including the problem of the relation between the officer and the Government when the plaintiff is entitled to recover. It would in some circumstances substitute strict liability of the Government for liability based only on fault.

A good bill would quite decisively end sovereign immunity in suits for specific relief and for declaratory judgments, with only slight designated exceptions.

A good bill would enlarge the area of judicial reviewability. Much governmental action is now unreviewable that ought to be subject to judicial check. The draftsmen of the present bill have fluctuated between the two extremes of leaving the law as it is, and providing so much review that, as the American Bar Association's bill would provide, the President's decisions about foreign policy would be judicially reviewable. A study of this subject should yield a middle position between these extremes, and a good bill would call for a middle position, in my opinion.

American administrative law is in its early stages of development, in my opinion. We have many deficiencies that need correction, and most of them can be corrected by appropriate legislation.

The present bill is the product of extreme proposals which have gradually been weakened and finally eliminated, leaving very little that is worthy of enactment. What is needed is comprehensive legislation that will be based upon full study of the many trouble spots.

Senator BURDICK. One concluding question: If your proposals were adopted, specific proposals, what would be your characterization of the legislation we would have? Good, bad, or indifferent?

Mr. DAVIS. If these proposals were adopted?

Senator BURDICK. Specific proposals you have made.

Mr. DAVIS. What I am proposing now is subject matter that ought to be dealt with in the legislation, and I assume it would have to be kicked around quite a bit to determine what is the consensus.

Senator BURDICK. I am referring now to specific proposals you made in your presentation on S. 1336.

Mr. DAVIS. Apart from what I think a good bill would contain?

Mr. FENSTERWALD. Yes.

Mr. DAVIS. I would say I think it might be worth the ponderous effort of the congressional machinery to put it through, but it would be laboring a good deal to produce something tiny.

THE BROOKINGS INSTITUTION CENTER FOR ADVANCED STUDY,
Washington, D.C., June 25, 1965.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: This letter has three purposes—(1) to make clear that many records in the National Archives are closed to public inspection; (2) to respond to the written statement of the Department of Justice, which was filed after the close of the hearing; and (3) to respond to the letter of the American Bar Association, dated June 4, 1965, which is devoted exclusively to an attack upon my oral statement to the committee.

(1) *The National Archives.*—During my oral statement to the committee, Mr. Fensterwald said that “the records which are to be permanently kept are sent to the Archives where they are available anyway. So you don’t have this problem of all records back to 1789 in a massive sense, all you have got is the records that are available in the National Archives. And they are available today, as I understand it.”

To that I said: “There is a great deal in the Archives that is not available.”

My purpose now is to implement my oral statement just quoted. The committee is plainly mistaken in proceeding on the assumption that all records in the National Archives are now open to public inspection. No more is necessary to discover the mistake than to consult the relevant statute (44 U.S.C. sec. 397) which provides that the Administrator of the National Archives must keep records confidential whenever the head of the agency whose records are involved so requests, with some exceptions. Requests for confidentiality are quite common. Of the records in National Archives less than 25 years old, possibly something like 40 percent are confidential, according to an informal estimate or guess an officer of Archives has made for me in a telephone conversation. This estimate or guess is not based on measurement or statistics and the officer himself asserts that it may be inaccurate.

The fact seems reasonably clear, however, that a large portion of the records in the National Archives are now closed to public inspection, and that the proposed section 3 may require tremendous expenditures to separate what is required to be open to inspection from what is covered by the exceptions in section 3(e).

The provisions of section 3(c) and section 3(e) in their present form are entirely unsatisfactory. They overshoot in requiring openness of information that should be kept confidential, and then they give the agencies a means of defeating the requirement of openness by making openness prohibitively expensive to someone who wants to look at the records. Seldom will the requirement of openness be of any use to a private party if the agency can tell him that he can see the records if he will pay the \$7–\$70 million that will be required to separate the closed information from the open information.

Although much further study is obviously required before a proper draft can be prepared, my surmise is that the only workable system, in the main, may be a requirement that the separation of closed information from open information must be made at the time the records are first compiled. The bill in its present form makes no such requirement.

The observation I have just made seems to me to have a good deal of meaning. The meaning is that not even a good beginning has been made toward drafting a satisfactory bill on the subject of public information. It seems to me obvious that much further study of the problem of open records is necessary before a satisfactory bill can be drafted.

(2) *The Department of Justice.*—The written “appendix” to the oral statement of the Department of Justice, filed after the hearing, is disappointingly negative. It seeks to tear down what others have constructed, but it makes hardly any affirmative suggestions.

I shall not comment comprehensively on the statement by the Department of Justice, but I shall single out a few of its positions which especially call for comment.

In its point 1, the Justice Department objects to the redefinition of adjudication and of rulemaking. Its main idea in its five-page discussion is that S. 1336 is "conceptually unsound" in disregarding "the basic differences between quasi-legislative and quasi-judicial functions and to determine the application of procedural requirements according to whether the parties are named." The Department asserts what it believes to be "conceptually unsound" but it never gets around to asserting what definitions would be conceptually sound; it speaks of "the basic differences between quasi-legislative and quasi-judicial functions" without saying what those differences are. Nor does it try to explain why it rejects accepted theory.

In absence of some new affirmative idea, one must choose between the definitions of S. 1336 and the definitions of the present act. Under the present act, the definitions are woefully deficient; a cease and desist order issued by the Federal Trade Commission against the X company is a "rule," and the President engages in "adjudication" whenever he appoints an officer, recommends legislation, makes a speech, or decides to visit his Texas ranch.

The need for curing the present definitions is clear. And perfection in defining such terms as "adjudication" and "rulemaking" is unlikely.

The Department's position is essentially that we should not improve on the present definitions because the proposed definitions may seem to some minds imperfect. I think we should adopt the proposed definitions unless someone can show how to improve them. The reasons in favor of the proposed definitions are that they correct gross ineptitudes in the present act, they are reasonably satisfactory and are likely to prove workable, and no one has proposed anything better.

If the Department of Justice thinks that the proposed definitions can be improved, why does it not come forth with its affirmative proposals?

Even though the need for opening up Government information is a strong one, and even though Congress is on the way to recognizing that need, the Department of Justice apparently resists the entire movement toward more openness.

The Department of Justice itself is one of the principal violators of section 3(b) of the Administrative Procedure Act, which requires: "Every agency shall * * * make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential * * *)." With respect to its Immigration and Naturalization Service, the Department has never published a rule opening any opinions or orders to public inspection, even though most of them clearly are not required for good cause to be held confidential.

In one recent year the Immigration Service disposed of 693,190 applications, and the number of orders or opinions published was 58. Nearly all of the rest were closed to public inspection, in violation of section 3(b).

The Attorney General's regulation (19 F.R. 8071, sec. 1.70 (1954)), that all immigration records "are regarded as confidential," is a clear violation of section 3(b), for the Attorney General's own behavior conclusively shows that no judgment has been made that all opinions and orders must be kept confidential. All proceedings at the level of the Board of Immigration Appeals, involving the same information that the same cases involved in their earlier stages, are open to the public, no matter what the alien's interest in privacy may be. Even when the reasons for privacy are at their strongest, the record is open to public inspection, and the alien's name is not kept confidential.

The plain fact is that no determination has been made at any level about the need for protection of privacy. Keeping all of a class of cases confidential at one stage and then opening all of the same cases to the public at another stage cannot be the result of a judgment about need for privacy.

The legislative committees that drafted section 3(b) explained that the reason for opening to public inspection all orders and opinions was that affected parties should be entitled to "consult precedents."

The need for consulting precedents is often strong whether or not opinions have been written, and Congress carefully provided that "opinions or orders" should be open to public inspection.

The Department of Justice has a deliberate policy of concealing some of its most important precedents. One outstanding example of this should suffice. Many aliens who have come to the United States as exchange visitors could

have come in some other status. An exchange visitor who cannot get a waiver of the 2-year foreign residence requirement can sometimes get a retroactive rescission of the exchange visitor status. Hundreds or perhaps thousands of exchange visitors now in the United States could take advantage of the precedents allowing rescission of the exchange visitor status if they could know that the precedents exist. These precedents are extremely important. The orders were issued without opinions. But the Department of Justice keeps them secret. It has never published one of them. It has never opened such an order to public inspection. It has never made an announcement of its policy of allowing rescission.

Keeping the law of rescission secret involves injustice, in my opinion—clear injustice, serious injustice, inexcusable injustice. But the officers of the Department of Justice are indifferent to this kind of injustice. It was specifically called to their attention more than a year ago, and they have done nothing to correct it.

One purpose of section 3 of the Administrative Procedure Act is to prevent systems of secret law. The Department of Justice maintains a system of secret law. And it now comes before this committee and opposes a strengthening of the present section 3.

Secret law is an abomination. It has no place in any decent government. Let's strengthen section 3. Let's get rid of secret law. Let's get rid of this kind of injustice in the Justice Department. Let's do the work on section 3 that is necessary in order to make it sound and practical, and let's make it enforceable against the Department of Justice.

In its point 12, the Department of Justice has evidently made a mistake. It says that under the proposed section 5, "every case of 'adjudication' before every agency would be subject to the proposed requirements," and it says that "The application of the requirements to all informal adjudications leaves considerable uncertainty." It has apparently failed to note that section 5(a) begins with the words "In those cases of adjudication which are required by the Constitution or by statute to be determined on the records after opportunity for agency hearing," and that the "requirements" of section 5(b) are almost nonexistent.

The Department of Justice quotes the six numbered provisions of the introductory clause of section 5 of the present Administrative Procedure Act and asserts that they should not be eliminated from the bill. S. 1336 eliminates these six numbered provisions, as I suggested should be done a year ago. The Department makes a long argument that labor union certification cases should not be subject to "the proposed requirements of 5, 7, and 8." The Department's argument seems to me to be based upon a misreading of section 5 of S. 1336. The bill will not make certification cases subject to 5, 7, and 8, because such cases are not within the introductory clause of section 5(a) of S. 1336; they are not "required by statute to be determined on the record * * *." Nor are any of the other cases in the six numbered provisions. I still think that the elimination of the six numbered provisions is desirable. If the elimination will cause some harmful effect, the Department has failed to point out what it is. Its lengthy statement about certification is based upon a clear-cut mistake.

In its point 16, the Department has again apparently misread S. 1336. With respect to section 5(a)(6), it proposes that the bar against participation in decisions by officers who are engaged in advocating should apply only to "advocacy in the same or a factually related case, rather than those who engage in advocating functions generally." But section 5(a)(6) is already limited to those who are engaged in advocacy in the same or a factually related case.

My strongest objection of all is to the Justice Department's point 19, where the Department says that "the Federal Bureau of Investigation is not to be impeded in its investigations" by a requirement of the right to counsel. S. 1336 provides in section 6(a) for the right to be accompanied, represented, and advised by counsel in any agency proceeding or investigation, whether the appearance is voluntary or involuntary. The question is one of policy and in some circumstances of constitutional right. I think the provision of section 6(a) is sound as far as it goes. I see no reason for allowing the right to counsel in investigations by some agencies and denying it in investigations by the FBI. The Supreme Court in applying the due-process clause does not make an exception for the FBI. Nor should Congress.

Point 33 of the Justice Department's statement seems to me to be based upon another misunderstanding. The Department says: "Reviewable action includes not only action made reviewable by statute, but 'every final agency action for

which there is no other adequate remedy in any court.'” In quoting these words from section 10(b), the Department has apparently forgotten that they are modified by the introductory clause of section 10: “Except so far as * * * judicial review of agency discretion is precluded by law * * *. As soon as this modification is taken into account, the Department's cause for alarm disappears, except to the extent that the Department's alarm relates to sovereign immunity.

The threat to sovereign immunity comes primarily from the last sentence of section 10(b), which the Department does not mention. My opinion is that sovereign immunity is the worst sore spot in the current law of judicial review of administrative action, and that the sore spot should be cured by legislation. When a citizen has a meritorious claim against Uncle Sam, the Department of Justice should no longer be allowed to defeat the claim by invoking the outworn doctrine of sovereign immunity. The court should have full authority, without the hindrance of the doctrine of sovereign immunity, to determine whether or not the claim is meritorious. That is what the courts are for. The sound principle, which is followed by nearly all the governments of the world except that of the United States, was stated by the Supreme Court of the United States in 1882: “Courts of justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government.”

(3) *The American Bar Association's letter.*—Although the ABA letter is mostly argument in favor of a lost cause, it is also exclusively an attack on my oral statement to the committee, and I cannot leave it unanswered.

The committee in S. 1336 adopted my proposal that one who is “adversely affected in fact” should have standing to obtain judicial review. On behalf of the ABA, Mr. Benjamin said in his prepared statement that the words “in fact” have never been used by the courts in this manner. In my oral statement, I quoted from the Supreme Court's opinion in the *Bantam Books* opinion of 1963 to show that the ABA is mistaken.

Now comes Mr. Benjamin in his letter with some strange, strange reasoning. Instead of acknowledging that he was wrong in his statement that the courts do not use the words “in fact,” he astonishingly says that his statement “is correct.” He proves that the courts do not use the words “in fact” by showing that when the courts use the words “in fact” they do not use them as words of art.

Of course, the truth is, as Mr. Benjamin should acknowledge, that the courts do use the words “in fact” because the committee reports explaining the Administrative Procedure Act said that one has standing who is “adversely affected in fact by agency action.” This statement in the committee reports is now usually the law, except that some of the case law is confused because some courts have decided questions of standing without knowledge of the committee reports. My proposal to put the words “in fact” into the statute is not a proposal to change the main structure of the law of standing. All that I ask for is a clarification of the law that already exists. The statement by the committees at the time of adopting the Administrative Procedure Act is entirely sound and is the basis for the present law. The statement by the committees should be incorporated into the statute, so that lawyers and judges who do not consult the committee reports will be able to get their answers from the statutory language.

Mr. Benjamin also argues for retention of the term “aggrieved” as a basis for standing. I have no objection to keeping this term. What I object to is the ambiguity of the present provision of the APA, which confers standing upon any person “adversely affected or aggrieved by [agency] action within the meaning of any relevant statute.” The problem is whether the words “adversely affected” are modified by the words “within the meaning of any relevant statute.” As a matter of word analysis, the answer can be either way. As a matter of statutory construction by conventional methods, resort to the legislative history shows that the second clause does not modify the first one, for the committees said that one has standing who is “adversely affected in fact by agency action.” The committees wrote more clearly in their reports than they did in the statute. I think if the words just quoted were the statutory foundation for the law of standing, nothing more would be necessary. But I have no objection to saying also that parties aggrieved have standing.

On the right to counsel, Mr. Benjamin's remarks in his letter are largely well taken, except that in commenting on my comments he fails to reach my most important suggestion, which was that the right to be represented by counsel should not be limited to “any agency proceeding or investigation” but should extend to every kind of dealing between an agency and any person.

Mr. Benjamin wants exceptions to rules to be handled by what he calls adjudicatory procedure. I have objected that his term "adjudicatory procedure" could either trial or argument, and that if it means trial procedure, it won't make sense for most cases, because most cases involving adoption of exceptions to rules do not involve disputes of fact. Mr. Benjamin in his letter now says that I am "clearly mistaken" because: "How can anyone ask to be excepted from the operation of a rule without a factual showing that differences in his position from that of others subject to the rule call for different treatment?" The answer to Mr. Benjamin's question is obvious. Even when a factual showing must be made, trial procedure is inappropriate unless a dispute of fact arises. Ninety-nine percent of the facts an agency uses are found without trial procedure, for no dispute about them exists. My position still stands: Using trial procedure for making exceptions to rules is undesirable, except in the rare case involving a dispute about facts.

My final point about Mr. Benjamin's letter may be the most important one. In my statement to the committee, I gave a long list of problems that I think a good bill would try to solve. Mr. Benjamin in his letter commits the American Bar Association to opposing my suggestions. Here is one of his sentences:

"The suggestion that 'a good bill would deal with the question of when a hearing ought to be required' seems to me to ignore the basic limitation on what general procedural legislation can deal with; there is no possible way of solving this question by a statutory provision applicable across the board to all agencies."

What the ABA find not "possible" may be possible through only a slight amount of resourcefulness. I most emphatically disagree with the proposition that "there is no possible way" of solving this problem. This is not the same as saying that I have a readymade solution all worked out with full refinement. But to show that a solution is possible, I suggest the following approach: The first step is to recognize that "hearings" may be separated into two kinds, trials and arguments, and that the problem for which a solution is most urgently needed is when a trial should be required. We could make great progress if a simple statute would provide that trials shall not be held except on disputed issues of fact and that when trials are held they should be limited to disputed issues of fact. We could also explore the potentiality of a statutory provision that trials shall not be held on questions of broad economic imponderables. Such a provision could alleviate one of the great abuses of the administrative process, although a good deal of work might have to be into the determination of the limits of the provision. Perhaps the statute could be further refined by providing that parties with sufficient interests at stake should, with some specified exceptions, have a right to trial on disputed issues of adjudicative facts, but that an agency should have a discretionary power to determine whether or not trial methods should be used on issues of legislative facts.

A statutory framework along such lines as these could be very helpful both in assuring that trials are held when they are appropriate and in assuring that trials are not held when they are inappropriate. The improper use of trials is becoming a major deficiency in some agencies; the result is often undue delay and undue expense, and the items of delay and expense often go to the essence of justice.

To the American Bar Association's tired statement that "there is no possible way" to solve the problem, I say: "Let's try it and see what we can do."

Now that the major positions of the ABA have been rejected, what remains in this bill is largely empty. If the bill is to amount to anything, a new affirmative push is necessary. The most important fact about the bill in its present form is that it fails to reach most of the trouble spots of administrative law. The potentialities for dealing effectively with the trouble spots through legislation are very great.

If the committee would only tap the best of the thinking in the agencies, it would quickly discover many ways to improve the administrative process. Much of what the American Bar Association finds impossible is possible and some of it is even easy.

Respectfully yours,

KENNETH CULP DAVIS.

Senator BURDICK. Thank you.

The committee is adjourned until 10 o'clock tomorrow morning.

(Whereupon, the committee adjourned at 4:40 p.m. until the following day, May 14, 1965, at 10 a.m.)

ADMINISTRATIVE PROCEDURE ACT

FRIDAY, MAY 14, 1965

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 1318, New Senate Office Building, Senator Edward V. Long (chairman of the subcommittee) presiding.

Present: Senator Long.

Also present: Bernard Fensterwald, Jr., chief counsel; Charles H. Helein, assistant counsel; Cornelius B. Kennedy, minority counsel; and Gordon H. Homme, assistant counsel.

Senator LONG. The committee will be in order.

I would like first, without objection, to place in the record a letter from Mr. R. W. Nahstoll, president of the Oregon State Bar, in behalf of the State Bar Association of Oregon, endorsing—indicating their support of Senate bill 1758.

I also would like to place in the record at this time a letter addressed to Senator Thomas J. Dodd from the president of the Connecticut Bar Association, also indicating the support and the endorsement of this bill by that particular bar association.

(The documents referred to follow:)

OREGON STATE BAR,
Portland, Oreg., May 12, 1965.

Re S. 1758.

HON. EDWARD LONG,
*Subcommittee on Administrative Practice and Procedure,
Senate Judiciary Committee,
Washington, D.C.*

DEAR SENATOR LONG: The Oregon State Bar has on several previous occasions endorsed its support of, and currently supports, the principle that members of the several State bars should be permitted to represent clients before all Federal departments and agencies, without being subjected to special admission requirements and examinations.

The Oregon State Bar, therefore, is in support of S. 1758. We commend your interest in this matter and wish you all success in this important legislation.

Very truly yours,

R. W. NAHSTOLL.

CONNECTICUT BAR ASSOCIATION,
Hartford, Conn., May 7, 1965.

HON. THOMAS J. DODD,
*Senate Office Building,
Washington, D.C.*

DEAR TOM: It has been brought to our attention that hearings on Senate bill S. 1758, will be held during the period of May 12, 13, and 14. This bill, as you know, would permit lawyers to practice before Federal agencies without being subjected to special admissions requirements.

On behalf of the Connecticut Bar Association, I want to reiterate the position that we took in favor of S. 1466 in the 88th Congress. I am told that S. 1758 is substantially the same legislation as S. 1466, and we want to go on record strongly in favor of S. 1758.

We hope that you will support this important legislation when it comes up for action in the Senate.

Cordially,

BERNARD H. TRAGER, *President.*

Senator LONG. There are quite a number of other endorsements by various bar associations in regard to the support of that particular bill which will be placed in the record either today or sometime during the course of the hearings on this legislation.

We have quite a number of witnesses today. I would like to ask our witnesses to condense their statements as much as possible. I would like to indicate to them that if it is desirable to them, the prepared statements, if they have such, will be placed in the record in their entirety and if it is agreeable to them, they comment from their statements which we hope perhaps will hold down and help us with our time problem. We do have 11 witnesses at least, and that gets to be rather time consuming. So we will ask the indulgence and cooperation of the witnesses in that particular. We are grateful to you for your help.

Our first witness this morning is Mr. Norbert Schlei, the Assistant Attorney General, who has consented to come here this morning. He was scheduled in the last 2 days, but due to the time problem, we were unable to hear Mr. Schlei at that time. We do appreciate his rearranging his schedule so he could come back here today.

Please come forward and make your statement.

Indicate who your associate is.

STATEMENT OF NORBERT A. SCHLEI, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY WEBSTER MAXSON, DIRECTOR OF THE OFFICE OF ADMINISTRATIVE PROCEDURE

Mr. SCHLEI. I have with me Mr. Webster Maxson, who is Director of the Office of Administrative Procedure, which is a constituent office in the Office of Legal Counsel.

Mr. LONG. I understand the gentleman is well known to the committee and the staff of the committee.

Mr. SCHLEI. Mr. Chairman, recently we received a request for a list of administrative agencies which conduct proceedings for the adjudication of private rights. Our response listed 106 Federal agencies.

That was not a complete list. Some adjudicative agencies were omitted because their functions were not germane to the particular matter in which the list was to be used. In some instances only parent organizations were identified, omitting separate enumeration of constituent agencies which conduct adjudications. For example, the Patent Office was listed as a single agency although it includes the Board of Patent Appeals, the Board of Patent Interferences, and the Trademark Trial and Appeal Board. Multiple boards were similarly treated. Veterans' Administration rating boards and the Agricultural Stabilization and Conservation Committees, were counted as 2 of the 106 agen-

cies. In fact, there are 250 separate VA rating boards and 3,062 ASC Committees, each a separate "agency," as that term is defined in the Administrative Procedure Act, conducting its own cases of adjudication.

Obviously, a complete list of Federal adjudicative agencies would include considerably more than 106 agencies. However, even that list would represent only a part of the total number of agencies which conduct proceedings which would be subject to the requirements of S. 1336. In general, rulemaking authority is even more widely distributed among Federal agencies than authority to adjudicate private rights. Many agencies develop policies and promulgate rules affecting private interests, but do not conduct cases of adjudication. The Rural Electrification Administration is an example.

Although no estimate of the total number of proceedings which would be affected by the proposed requirements is available, the data compiled and published by this subcommittee last year indicates that during the fiscal year 1963 the total number of "formal" cases which were pending before all agencies, that is, proceedings in which hearings are held and the determination is based on the evidence of record, was 112,882. I am told that the number of "informal" adjudications, that is, cases wherein formal hearings are not required, must be assumed to be several times this figure.

Perhaps the second most remarkable feature of the administrative process in our system, next to its size, is the variety of functions in which it is employed and the variety of procedures which results. Because of the "case or controversy" limitation upon court actions and because public interest considerations in agency proceedings frequently give them a dimension not found in disputes between litigants in court, the variety of procedures employed by administrative agencies is necessarily greater than in court actions.

Many administrative proceedings are essentially investigative in nature. They determine the need for regulatory control and provide the basis for the regulatory prescription. They inquire into the reasonableness of rates, prices, charges, and allowances. They determine whether the public interest is served by proposed mergers, abandonment of common carrier services, and stock acquisitions.

Other proceedings range from simple status determinations, for example, determinations of nationality, to quasi-criminal actions against violations which result in the imposition of sanctions—from determinations as to which of two or more private interests must prevail, as in comparative licensing proceedings and reparations proceedings, to the fixing of wages and prices. Some are mechanisms for the equitable distribution of privileges or restrictions, such as import quotas or production allotments. Many are designed to protect the public against hazardous drugs, postal frauds, mislabeling, discriminating prices, unfair labor practices, and deceptive advertising. A great number are concerned with the interpretation and adjustment of public contracts. Others range from claims for damages, benefits, and subsidies, to licensing proceedings, proceedings for the removal of privileges, tests of the validity of regulatory obligations, and control devices for the allocation of radio frequencies, the use of air routes, or the availability of Federal services. The variety of Federal administrative proceedings is almost without limit.

Because of the broad distribution of rulemaking and adjudicative powers, the extensive use of these powers in the performance of Federal functions, and the tremendous variety of procedures employed, it is obvious that the development of a procedural statute to be applied "across the board" is an impossible undertaking. Almost any requirement which is suitable in some cases will be entirely inappropriate in others. It is evident from the legislative history of the Administrative Procedure Act of 1946 that the draftsmen of that act felt that, with respect to every provision, they had pressed to the outer limits of feasible application or coverage.

Their appreciation of the problems occasioned by the variety of agency proceedings is demonstrated by the fact that the 1946 act does not impose procedural requirements in cases of adjudication in which determination on a hearing record is not required. This broad class of cases was excepted from the requirements of the act because it included the most diverse procedures. In imposing requirements in the three general classes which remained, that is, formal and informal rulemaking and formal adjudications, the 1946 act makes special provisions in respect of 42 different kinds of proceedings. In some cases such cases are subjected to different requirements. In most cases they are generally excepted from the requirements applicable to other kinds of cases. In contrast, S. 1336 would extend the coverage of the act to all classes of proceedings, whether rulemaking or adjudication, formal or informal, and would apply the same requirements to virtually all formal rulemaking and formal adjudication. Instead of provisions for 42 different kinds of proceedings, or exceptions therefor, the bill refers to only 8 kinds of proceedings.

S. 1336 embodies some 35 proposed changes which we consider substantial. One of these, proposed section 6(b) relating to control of practice, deserves our full support. We object strenuously to the other 34. Half of these, we think, may have some merit if properly limited in their application. For example, section 6(c) of the present act provides that wherever Congress has granted to an agency the power to compel attendance by subpoena, subpoenas shall be available "upon a statement or showing of general relevance and reasonable scope of the evidence sought." The bill would revise this provision to require every agency, unless otherwise provided by statute, to issue subpoenas automatically, upon request, to any party to an adjudication.

Although I am not advised of the particular problem area, it is entirely possible that there are proceedings in which the subpoena power is not now available but should be made available. Congress should grant the power in those instances. On the other hand, I doubt that anyone can seriously urge that every one of the 3,062 agricultural stabilization and conservative committees to which I have heretofore referred must be required to issue subpoenas automatically to any party to an adjudication before them. This would be the effect of the bill.

I understand that cases before these committees are single-party proceedings conducted in most cases without participation of counsel. Their purpose, typically, is to determine the appropriate farm marketing quota of an individual farmer who has appealed the quota assigned to him.

This example is representative of 17 of the 34 substantial changes which we feel demand further developments. If appropriately limited in its application, it might provide useful changes in present procedures. In its present form, it would have most undesirable consequences. In other words, it is a proposal which is clearly suitable as it might be applied to some proceedings, and just as clearly inappropriate as it might apply to others.

The remaining 17 changes which we consider substantial are changes which we think have no proper application. All 34, in their present form, would have seriously adverse effects upon agency processes.

With regard to the 17 proposals which present problems of application, the assumption of the draftsmen appears to be that the basic deficiency of the present act is simply that its requirements are too limited in their application. The solution proposed by the bill appears to be to eliminate all limitations and to extend the application of all requirements generally. Instead of affording special procedures in ratemaking proceedings, as the present act does, the bill would treat almost all ratemaking proceedings as adjudication, and subject them to the same requirements as cease and desist order proceedings, licensing suspension cases, proceeding to challenge the validity of regulatory obligations, and other forms of adjudication.

In so doing, it is our view, Mr. Chairman, that the bill moves in the wrong direction. We think that the problems of ratemaking cases can best be overcome by specific study of ratemaking and greater, rather than lesser, particularization of the treatment of those cases.

If any single factor has contributed substantially to the frustration of efforts to improve the provisions of the Administrative Procedure Act over the past 19 years, it is perhaps the tendency to deal in generalities and abstractions. In its present form, the bill is, for the most part, a further effort of this nature. We think the need is for more particular examination and focalized treatment, not increased generality.

Proposed section 3 presents serious problems which merit special discussion. The President, perhaps because of his long service in the Senate, is keenly aware of the problems of freedom of access to official information. He is particularly appreciative of the value, in our system of government, of the broadest possible dissemination of official information consistent with the responsibilities of the Government for the protection from disclosure of matters which, in the public interest, cannot be made freely available. Any measure which promotes this purpose can be assured of the full support of this administration.

We are disturbed by the considerable variance between the subcommittee's expressed purpose in respect of the availability of information and the effect which the proposed provisions in their present form would have in this very important matter.

As you know, Mr. Chairman, section 3 of the present act is intended merely to require departments and agencies to publish information necessary to persons having business with Government agencies, including the organization of each department and agency, their general rules and policies issued for the guidance of the public, their public procedures, and agency decisions of precedential significance.

Although the act speaks of other "matters of official record," it does not require that they be made available to the public. Section 3 requires that such matters be made available only to "persons properly and directly concerned." It is therefore not surprising that the present section 3 has not operated satisfactorily as a general freedom of information statute. It was never intended as such.

The bill proposes to provide a general public information statute by revising section 3 to eliminate all application of judgment in the treatment of the important, and often difficult, matter of public information. We think the approach of the proposal, as well as its technique, is basically deficient and falls far short of accomplishing the expressed purpose of the subcommittee in this important area.

In its present form, the proposal would seem to require the immediate public availability of instructions to agency representatives negotiating with private interests, including secret instructions as to the outer limits of what may be offered or conceded in behalf of the Government. It would seem to require every agency to produce any information it may have accumulated in its dealings with private firms engaged in public contracts, whatever the damage to the private firm involved. It would seem to require the availability of information submitted in confidence to investigators in aircraft accident investigations, investigations looking toward the development of regulatory controls, or any other investigation except one conducted for law enforcement purposes. It would seem to require the public availability of communications between the Justice Department and private parties looking toward the compromise or settlement of litigation.

It is obvious that these changes are not intended by the proponents. It is my view that the bill's effort to eliminate any application of judgment to questions of disclosure, and to substitute a simple word formula which would automatically determine the availability or non-availability of any record to any person, represents an impossible approach. There simply is no means, I submit, of resolving problems as difficult as problems of the appropriate protection of official information by any such word formula.

The inevitable result of this approach would be nondisclosure of many matters as to which there can be no justification for nondisclosure and disclosure of many matters which properly should be withheld. If it is to provide a workable public information statute, the proposal must abandon this approach.

Again, I wish to emphasize in respect of the other sections of the bill that many of the proposals, if properly limited in their application, would seem to afford appropriate solutions to acknowledged problems. However, it is my view that the real hope of substantial progress lies in concentration upon the difficult areas and the development of solutions addressed specifically to the problems, in place of the bill's requirements of general application.

Mr. Chairman, I am entirely confident of the good motives of the proponents of this bill. But I believe its enactment in its present form would please only those people who would like to turn back the clock and to get rid of the protective legislation that has been enacted over the last 50 years.

It would knock the teeth out of so many programs that most of us consider essential to the public interest and which, I think, most of

those who sponsor this legislation would consider essential to the public interest.

I think that it would make Federal cases out of innumerable transactions between Government and public that now are conducted in a satisfactory way. I think the enactment of this bill would vastly increase the cost of our Government and would vastly increase the cost of doing business with the Government on the part of individuals and members of the public.

I personally believe, Mr. Chairman, that the development of the portions of this bill that offer really substantial hope of improvement should be pursued through the administrative conference that the Congress has created so that we can study, through the experts and with the benefit of the information and the expertise that would be available in the conference, how best these provisions can be refined and made applicable where they can help and not where they would impede the ability of people to deal with their Government in a fair and effective way.

I thank the chairman very much for giving me the opportunity to appear this morning.

Senator LONG. Thank you, Mr. Schlei. Your statement has been very helpful. Perhaps it will help us work out some of the rough spots which we always find in these situations.

You just mentioned something about the administrative conference which was passed by the Congress last session.

Of course, we are very anxious that that be implemented and put in force. Has your Department taken any view about it or taken any steps to urge that it be set up and start functioning?

Mr. SCHLEI. I know of your interest in that matter, Senator, and I know that you have made many efforts to be helpful in getting it underway. I know that the people who are concerned in that effort in the executive branch have been at it, working at it very hard. As you know, there are problems involved in finding the right people. We do not want to move too fast and get people who are not right.

Senator LONG. I do not think you will be accused of moving too fast.

The question is actually directed at whether the Department of Justice has done anything to push this along to bring it to a head?

Mr. SCHLEI. Yes, Mr. Chairman, we have.

Senator LONG. We would be grateful if you would continue that part of your testimony—perhaps you covered this. I am interested in S. 1758, or that section of it, permitting lawyers to practice before the various agencies. It has been my understanding that your Department in the past has supported that particular type legislation.

Mr. SCHLEI. That is right.

Senator LONG. What is the position of the Department at this time?

Mr. SCHLEI. We support that here, Mr. Chairman.

Senator LONG. You know of—that some of the agencies themselves do not?

Mr. SCHLEI. That is correct, sir.

Senator LONG. Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I have just a couple.

You mentioned 34 major changes in the bill and divided them into

two classes of possible and hopeless. I wonder if you had written comment on these or would make them available to us for our study so we could analyze your objections to these suggestions for change.

Mr. SCHLEI. I would be delighted to, Mr. Fensterwald; in fact, I should have said in my testimony that we are preparing an appendix to the testimony that will give specific examples and lay out the 34 and 17 categories. I will be most pleased to get that up to you very shortly.

Mr. FENSTERWALD. The other question is in section 3. As I understand it, you admit that the present section 3 is not a freedom of information bill. Can you tell me if anywhere in the laws on the books today, there is any type of freedom of information bill?

Mr. SCHLEI. No, Mr. Fensterwald; I do not believe there is anything that can go by that name.

Mr. FENSTERWALD. What section 3 amounts to in my own view is a withholding statute rather than a freedom of information bill. I think the general view is that it should be changed. I think the problem is in what direction and how much. We have been wrestling with that, as you know.

One problem has been brought to my attention by previous witnesses with respect to the Justice Department and subsection (b) of section 3, with respect to the files of the Immigration Service. He has been making a study of the Immigration Service and he said that there were 700,000 orders each year, of which only 58 are made public. It would seem to me this would be a good example of the type of withholding that section 3 would get rid of. Would you make any comments on that?

Mr. SCHLEI. Well, Mr. Fensterwald, I have engaged in some discussion of that problem and the view as to the application of the law is that it calls for the publication only of those decisions which have precedential significance. After all, it would do go good to publish 600,000 routine applications of the law to the facts; that would be of no benefit to anyone and would simply disclose that the individual had a matter pending with the Immigration Service.

I think the solution to that problem is to review the performance of the Immigration Service in this regard and make sure they are publishing all cases that have precedential significance. I believe you agree that publishing 700,000 decisions would not be worth it.

Mr. FENSTERWALD. I do not think the problem is one of publication. I do not think anybody asked that they be published. I think the question is whether they are made available. As I understand it, out of the 700,000, 699,942 are confidential and cannot be seen by anybody outside of the Service. It is not a question of publication. It is just a question of general availability.

Mr. SCHLEI. That is quite true. From the beginning, immigration records have been treated as confidential, because there is a question of individual privacy involved. There are indiscriminately within those records confidential investigator's reports on the character of the people involved and there are FBI reports and some intelligence agency reports. You know, there are a great many security requirements that are made applicable in the immigration laws. Both be-

cause of the privacy consideration and the defense and foreign policy considerations that are involved in many of the records, the records have always been regarded as confidential and are only published in a nameless fashion under such titles as "Matter of X———." That way of treating these particular records has been gone over on at least one occasion, I think several occasions, with congressional committees. I think it is pretty well accepted that, so far as its legal propriety is concerned, it is a proper way to treat them. But I think we do have a problem of insuring that people are not deprived of the value of the precedents that the Service creates by treatment of its particular cases. The way of applying these values here, it seems to me, is to be very rigorous about insisting that the Immigration Service does publish everything of value to the public.

Mr. FENSTERWALD. I agree with you about the publishing. I do not think anybody is particularly concerned with the number you publish. But I think the discussion that was had here on the question of openness and the only recourse that the public has, the only method the public has to know that the Immigration Service is performing its duties at all according to law is by having some type of availability of these records.

I think the fact of 99.99 percent of the orders of the Immigration Service is a perfect example of what the authors of this bill are trying to get at in subsection (b). As I understand it, this subsection has generally caused less trouble. It is subsection (c) that causes most of the trouble. But I think this subsection causes many people trouble unless the Justice Department in the case of the Immigration Service were willing to reconsider the availability of records such as the Immigration Service has. It seems to me this is a perfect example of the withholding of information that ought to be available to the public generally.

Mr. SCHLEI. Well, Mr. Fensterwald, perhaps it would be useful if I supplied a statement, a written discussion of the question that you raise, because I am not confident of my ability to say here off the cuff all of the reasons why I think that it would be a mistake to throw open those records.

Mr. FENSTERWALD. Could I just make one request, and that is, after we receive your memo on the subject, could we send it to Professor Davis for comments and then print both of them?

Mr. SCHLEI. Certainly. I think we have already discussed it with Professor Davis.

Mr. FENSTERWALD. He has a particular interest in it and it does seem to be a good example of what we are trying to get at. If you have no objection, I would like to send it to him for comments and print both of them in the record.

Mr. SCHLEI. No objection at all.

Mr. FENSTERWALD. Thank you, Mr. Chairman.

Mr. KENNEDY. Mr. Schlei, you commented with respect to these 106 agencies that had a minimum of adjudicative procedures covered by the act. Then you said that the bill had been broadened to cover a great many more. I assume the provision you are referring to there is subsection (b) of section 3. Is that the one which is the basis of your comment?

Mr. SCHLEI. That is right. I should add there—plus the deletion of all exceptions.

Mr. KENNEDY. Yes.

Thank you.

Senator LONG. Thank you, Mr. Schlei, we appreciate your being here. Your statement and your comments have been very helpful to us. The committee will be in touch with you. We are very grateful to you for working with us on this matter.

Mrs. SCHLEI. Thank you, Mr. Chairman, it was a pleasure.

(The appendix to Mr. Schlei's statement follows:)

APPENDIX TO THE STATEMENT OF NORBERT A. SCHLEI, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ON S. 1336, THE PROPOSED GENERAL REVISION OF THE ADMINISTRATIVE PROCEDURE ACT

Included in the more than 150 proposed amendments to the Administrative Procedure Act which are embodied in the bill are 35 changes which the Department of Justice considers substantial. One of these is an attempt to implement a proposal which the Department has supported over a considerable period of time—the proposal concerning the right of attorneys to practice before administrative agencies. Seventeen of the other 34 represent ideas which the Department believes may have some proper application and may result in improvements in the conduct of some kinds of proceedings, but would be highly undesirable if applied generally, as the bill proposes. The Department is opposed in principle to the remaining 17 and urges that they be eliminated from legislative consideration.

The purpose of this appendix is to consider separately and to provide comment on each of the 35 major proposals embodied in S. 1336. They are discussed herein in the order in which they are presented in the bill.

1. *The redefinition of prescriptions for the future of particular applicability as "adjudication" (sec. 2 (c))*

A basic feature of the present act is its recognition of the fundamental differences between administrative action which is quasi-legislative in character and that which is adjudicative. It defines the former as "rulemaking" and provides requirements therefor which are markedly different from the requirements for adjudication.

Rulemaking authority is widely distributed among Federal departments and agencies. In establishing regulatory programs Congress ordinarily legislates only in broad outline the basic plan of regulation and the general standards under which it is to be administered, delegating to an administrative body responsibility for the details of translating the congressional mandate into practical application. Continuing administrative implementation of the statutory plan is essentially an extension of the legislative process. In developing subsidiary policies and promulgating implemental prescriptions for the future, of the force and effect of law, the administrative authority acts as a continuing agency of Congress, exercising delegated quasi-legislative power.

In cases of adjudication the administrative agency performs an entirely different role. There, it is constituted as a specialized tribunal, operating in the image of the courts, to determine disputes involving private rights which otherwise would be the business of the courts. In spite of their dissimilarity, rulemaking authority and adjudicative power are often assigned to the same agency along with executive responsibilities for investigation, supervision, and enforcement, because of the need for consistency and coordination in all phases of the administration of the regulatory plan. However, because administrative adjudication is fundamentally different from agency functions which are quasi-legislative in character, accepted procedures for adjudication seldom are appropriate to quasi-legislative proceedings.

Although, in form, S. 1336 would retain the dichotomy between "rulemaking" and "adjudication," it would ignore the fundamental differences in the nature and purpose of the functions and, instead, would premise the distinction upon whether the resulting agency action is of "general" or "particular" applicability. Apparently this would be determined by the caption or title of the proceeding. Any proceeding in which "the parties are named" would be treated

under the bill as adjudication. A considerable variety of proceedings would be affected by the proposed redefinition, including most ratemaking and any particularized prescription for the future of (quoting from the language which is proposed to be deleted from the present definition of "rule") "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." It seems to us conceptually unsound thus to disregard the basic differences between quasi-legislative and quasi-judicial functions and to determine the application of procedural requirements according to whether the parties are named.

Whether of general or particular applicability, rulemaking prescribes for the future and therefore is likely to involve policy formulation. Even though only a single public utility or carrier may be involved, large segments of the public may be concerned. Frequently the proceeding is in large part investigatory. Many private interests may have a right to be heard, the dispositive issues may not be readily discernible before the hearings, and the presentation of data and views may require the receipt of a considerable volume of technical or economic evidence which demands extensive staff study. In many cases, such evidence is for the most part uncontested. As in legislative actions, the outcome is likely to turn upon a fundamental choice between competing philosophies—a choice appropriately made only by the ultimate authority charged with policy responsibility. The final judgment seldom rests upon the establishment of a few critical facts or other determinative elements, as in the usual case of adjudication.

Taking account of these features, the present act provides for public notice of rulemaking through Federal Register publication, a general right of petition in respect of rulemaking, opportunity for any interested person to participate, considerable latitude to fashion the hearing process to the particular kind of presentation which best serves, and a decision by the agency itself, as the authority to which Congress has delegated policy responsibility. These requirements effectively enable an agency to operate as a quasi-legislative body wherever the function it is required to perform is quasi-legislative in nature.

S. 1336, however, appears to treat these proceedings as if they were essentially contests between the regulators and the regulated. It would impose the same requirements it seeks to impose in a proceeding looking toward the issuance of a cease-and-desist order against fraudulent practices, a case for the revocation of a license because of violations of applicable laws or regulations, or any other compliance or enforcement proceeding.

These requirements seem to us almost entirely inappropriate in the usual case of particularized rulemaking for example, where Congress has assigned to an agency the responsibility of fixing the maximum rates which a carrier or utility shall be allowed to charge the public for particular services. In such case, S. 1336 would eliminate the present requirement of notice to the public. As an adjudication, participation presumably would be limited to named parties. Prior to hearing, the agency would be required to receive, consider, and determine all offers of "settlement" submitted by the parties. The proceeding would be instituted by "pleadings," including "responsive pleadings." Subpenas would be automatically issued to any party, upon request, and deposition and discovery procedures would be required. Hearings could not be commenced until the parties were notified of the issues to be considered. (The alternative would appear to be to permit the hearings to be used for the discussion of any issue.) The presiding officer assigned to conduct the proceeding would have independent authority to dispose of the matter summarily by decision on the pleadings or on motion to dismiss, irrespective of agency objections.

Counsel for the named utility in our example might be pleased to have the rate prescribed by "settlement," without hearings and without opportunity for public participation. He might welcome the opportunity for summary disposition by an examiner without the interposition of public interest considerations and perhaps even over the strong objections of the agency. But such support as he might give to the proposal hardly justifies ignoring the true nature of the proceeding.

Where the proceeding is essentially investigatory, where broad segments of the public are vitally interested, where no decision is possible except upon a comprehensive evaluation of all of the facts and circumstances surrounding the regulated operation, where public interest considerations are substantial, and where the development and application of policy is a necessity to a proper

decision, obviously the agency cannot appropriately "settle" the matter prior to hearing. Pleadings would accomplish nothing, and a right to the automatic issuance of subpoenas might serve improper purposes without limit. The idea that a presiding officer who is not appointed by the President and confirmed by the Senate and who is without policy responsibility might summarily dispose of the proceeding on the "pleadings," before the investigatory state is even begun, before a single interested person has been heard, and irrespective of the agency's will in the matter, seems absurd.

Imposing, in such case, the decisional requirements of the bill for cases of adjudication seems even more inappropriate. S. 1336 would require the presiding officer to render the decision in every case under separation of functions requirements which would not only deny him the expert assistance of staff economists, marketing specialists, and technicians, but would appear to bar him even from consulting the chief examiner. The use of hearing examiners in such cases, isolated from expert assistance and policy guidance, inevitably would enhance the risk of uninformed and misconceived decisions and would multiply greatly the dangers of inconsistency in administrative decisions and policy. In order to avoid these ills, the bill would permit the use of other agency personnel in such cases. However, this only illustrates the error of the bill's across-the-board approach. In permitting the use of agency officials as presiding officers in "adjudications" such as the proceeding here considered, the bill undermines completely the assurances of independent judgment afforded by the examiner concept in cases in which such independence is essential to fairness and objectivity. Under the proposal, an agency official could be assigned to conduct, not only quasi-legislative proceedings, but as well adjudications of an accusatory nature.

The bill would permit administrative appeal of the presiding officer's decision. However, appeal would be allowed only on specified grounds, would be heard by an appeal board (unless a private party asked that it be heard by the agency), and would be limited to the exceptions filed. If there were no request from a private party for agency review, the agency could consider the matter only upon limited policy grounds and only after the proceeding has been decided by the presiding officer and had been considered on appeal by the appeal board.

It seems to us evident that the proposed requirements, although perhaps appropriate in some cases, if applied in the ratemaking proceeding in our example would greatly extend the time involved in the conduct of the case, even if parties seeking to impede the contemplated action did nothing to avail themselves of the greatly multiplied opportunities for delay. The expense for all concerned would be many times greater. The limitations sought to be imposed upon agency consideration of the matter would make the decisional process much less susceptible of policy guidance. The separation of functions requirements might seriously jeopardize the likelihood of achieving a "right" result. The general public, even though vitally concerned, might have no real opportunity for meaningful participation, or perhaps even to know of the conduct of the proceeding. In the long run, regulated interests would have fewer, rather than more, official decisions which they might rely upon as agency policy pronouncements.

In a case where policy considerations are absent or applicable policy is clearly established, where the trial of controverted facts is a significant part of the process, where the determination is not of general concern and turns upon particular considerations, and where agency staff assistance and agency expertise is not needed in the decisional process and the agency's imprimatur is otherwise unnecessary to lend finality and authority to the decision, the requirements proposed by the bill may be appropriate. But in the usual case of ratemaking involving a particular carrier, utility, or other business fraught with the public interest, or in other difficult cases of particularized rulemaking, present problems are likely to be overcome only by solutions tailored specifically to those problems and not by the bill's proposal to treat them as adjudications.

2. *The proposed requirement of Federal Register publication of all internal management policies (sec. 3(a))*

The present act excepts from its public information requirements any matter relating solely to the internal management of an agency and all functions requiring secrecy in the public interest. Section 3(a) of the bill would eliminate these exceptions and would require every agency to publish in the Federal Register all statements of policy and interpretations of general applicability, except (1) those relating to foreign policy or the national defense which are

specifically required by Executive order to be kept secret, (2) those relating solely to personnel rules and practices, and (3) those specifically exempted from disclosure by statute. Publication "for the guidance of the public" would be required even if the matter were one in which the public has no interest and even if the requirement (of proposed sec. 3(b)) that the policy be made available to any member of the public would satisfy any conceivable need of a member of the public to know a particular internal management policy of an agency.

The proposed requirement is patently unnecessary in many instances, for example, in respect of policies governing the use of printing and duplicating equipment, the routing of communications, retention of stock records, etc. However, the proposal presents serious problems in connection with agency functions which necessitate the development of policy statements, the publication of which would obstruct the proper performance of the function. There are many investigative and enforcement operations, for example, which must be conducted by methods and according to patterns which cannot be published. If the policies and techniques employed in detecting violations were known to potential violators, detection could become very difficult, if not impossible.

Obviously, proposed section 3(a) must be revised to provide appropriate exceptions for policy statements which must be kept confidential in the interests of the effective performance of necessary functions, and for internal management matters which are of no possible interest to the general public and (in any event, are required to be made available to interested individuals under proposed section 3(b)).

3. The proposed provision that no person shall be "adversely affected" by unpublished policies or interpretations (sec. 3(a))

Certainly, no one should be expected to comply with rules of which he has no notice. However, to extend the idea to a requirement that no person shall "be adversely affected by any matter required to be published in the Federal Register and not so published," together with the proposed requirement that virtually all agency policies and interpretations must be published in the Federal Register, would result in opening the door to endless efforts, by raising spurious defenses, to resist agency action. In almost any case in which a person might be disadvantaged by agency action, charges that the action is based upon an unpublished policy or interpretation could be expected if such provisions were adopted. As a practical matter, the proposal would afford no more effective safeguard against nonpublication than that provided in the present act, yet would work the worst kind of mischief upon the administrative process. This is one of the proposals which the Department of Justice feels has no practical application and should be eliminated from consideration.

4. The proposed requirement that all instructions to agency staff personnel be made available to any person (sec. 3(b))

Proposed section 3(b) would require every agency to make available for public inspection and copying all "instructions to staff that affect any member of the public." Possibly, only those instructions specifically directed by Executive order to be kept secret in the interest of the national defense or the protection of foreign policy would be outside the requirement. This is a new provision which did not appear in predecessor bills.

In an infinite number of situations, disclosure of the fact that a staff instruction was given or of the content of the instruction would wholly frustrate or seriously encumber carrying out a proper and necessary instruction. It would seem extremely unlikely that any advantage which may be realized from such requirement can justify the serious disadvantage to the proper performance of necessary governmental functions which inevitably must result from any such proposal.

Certainly, the public is entitled to an accounting of the manner in which public institutions perform their assigned functions. If an inquiry into staff instructions is appropriate to provide such accounting, the inquiry should be possible. However, the power to inquire should be correlative to responsibility, and the power should not be assigned, as it would be in this bill, wholly without regard to the effective performance of the necessary business of government. The idea that every member of the public can be constituted a private inspector general seems to the Department to demonstrate a remarkable lack of appreciation of the most obvious needs of any staff operation. Surely, no Member of Congress would think of imposing such requirement on congressional staff operations.

If there are particular governmental programs in which there is a genuine need for the public availability of certain staff instructions, the bill should address itself to those particular programs and those particular instructions. It should not require that all staff instructions other than those within the limited exceptions should be made publicly available.

5. The proposed indexing requirement (sec. 3 (b))

Section 3(b) of the bill seeks to require every agency to maintain and make available for public inspection a current index of all final opinions (including concurring and dissenting opinions) and all orders, statements of policy and interpretations (except statements of "general" policy and interpretations of "general" applicability, which are required to be published in the Federal Register) and instructions to staff which affect any member of the public.

In general, the Department supports the idea of a useful current index of all materials made available for the guidance of the public. Perhaps in many instances agencies are unable to fulfill requests for materials because of inability to identify precisely what is requested. However, it would seem evident that such index must be limited to materials to which the public is entitled and which may have some possible use. Orders in the adjudication of cases which are not accompanied by opinions should be excepted in order to eliminate the hundreds of thousands of informal orders in veterans, immigration, postal, amateur radio, passport, social security, customs, and other areas in which such orders are of no concern to anyone except the individual involved and are of no precedential significance. Only the precedents in these areas should be listed. Similarly, the large numbers of routine letters interpreting rules, instructions, and requirements should be omitted unless they are of precedential significance.

In request of each of the categories of materials which S. 1336 would require to be indexed, the bill is far too broad and would impose an impossible burden, to say nothing of the useless expenditure of time and money which would be required. Clearly, no agency could possibly record and index every "instruction" to a member of its staff which might affect a member of the public. In this respect and others, the proposal presents a physical impossibility. Yet the proposal would prohibit a staff instruction from being "relied upon" or "used" unless it was properly indexed. The proposal should be revised to include only those materials which an agency appropriately makes available "for the guidance of the public."

6. The proposal to eliminate judgment and discretion in the handling of official records, and to substitute a simple, self-executing word-formula governing all matters of disclosure (sec. 3(c))

Proposed section 3(c) would require every "agency" to "make all its records promptly available to any person." Proposed section 3(e) would establish eight limited exceptions to this requirement. The only executive discretion which would be permitted by the bill in connection with the safeguarding of information in the possession of the executive branch would be that reserved to the President in relation to matters which he determines must be kept secret in the interests of the national defense or foreign policy.

Often, sensitive judgments are involved in a decision as to whether a particular official record should be made available, the time when it can be made available, and to whom it can appropriately be made available without unjustifiable injury to private or public interests. Any effort to remove all application of judgment and subject these decisions to determination by a simple, self-executing word-formula cannot provide an adequate solution. However complete and comprehensive the exceptions may be, they cannot possibly anticipate every situation in which confidential treatment of a document in the possession of a Federal agency may be necessary. Any attempt to draft exceptions which will cover every possible situation, yet still preclude the use of judgment in such decisions, can only result in affording protection from disclosure to records as to which there can be no justification for nondisclosure, and in requiring the disclosure of records which must be withheld in the public interest.

Because the ready accessibility of public information concerning procedures, policies, precedents, and program developments is essential to justice and fairness to all persons affected by administrative action, section 3 of the bill is perhaps its most important section. As has been explained in detail in relation to the same proposal in the predecessor bill, the proposal contained in section 3(c) of the bill would appear to violate the doctrine of separation of powers, since it

would interfere with the constitutional responsibility of the President to preserve the confidentiality of documents and information the disclosure of which would not be in the public interest. Under the bill the standards governing disclosure would be set by Congress rather than by the President, except that the President would be authorized to direct withholding of information required to be kept secret for the protection of the national defense or foreign policy. Such limitation of the Executive's authority in the area of public information is without basis in constitutional law.

The issue was extensively debated 7 years ago in connection with the act of August 12, 1958, Public Law 85-619, 72 Stat. 547, amending R.S. 161, 5 U.S.C., section 22, the so-called housekeeping statute. On that occasion the Senate recognized the power of the President under the Constitution to withhold information on the ground that its disclosure would be contrary to the public interest and that this authority rests on the constitutional principle of separation of powers.

Although as a matter of policy this administration has severely restricted the operation and use of the doctrine of executive privilege in order to promote freedom of information, this action does not, of course, alter the applicable principles of constitutional law. It is the view of the Department of Justice that, in order to remove the constitutional doubt, the provisions of proposed section 3 should be revised to remove the limitations upon the President's authority to direct withholding of documents and information which cannot, in the public interest, properly be disclosed.

7. *The proposal to transfer to the courts ultimate responsibility for the disclosure or nondisclosure of the records of the executive branch (sec. 3(c))*

Proposed section 3 would appear to raise further constitutional doubt in respect of the responsibility which it would assign to the courts in connection with the safeguarding of records of the executive branch.

In our constitutional system of tripartite government, each of the three coequal branches has exclusive powers and responsibilities which cannot be usurped by or transferred to another branch. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the U.S. Supreme Court held that the Executive's responsibility for the safekeeping of Executive records is such responsibility. In the exercise of this constitutionally derived responsibility, the Executive is accountable only to the electorate. Under the separation of powers concept, Congress cannot transfer responsibility for Executive records to the courts.

The bill would confer upon the U.S. district courts authority to determine de novo whether any record of the Executive shall be released to a member of the public. In order to eliminate the constitutional problem, this feature of the bill, like that discussed in 6 above, must be eliminated.

8. *The inadequacy of the proposed exemptions from the public information requirements (sec. 3(e))*

The impossibility of the bill's approach—to impose an absolute requirement that all records be disclosed, subject to eight specific exemptions—is demonstrated by the difficulty the draftsmen have encountered in their efforts to provide suitable exemptions. The exemptions in proposed subsection 3(e) are the product of extensive study and many revisions. Yet, even in their present form, they are completely inadequate in many respects. For example, the President's authority to except documents from disclosure would be limited to records required to be kept secret "in the interest of the national defense or foreign policy," although as is noted above, there is no basis in the Constitution, in court decisions, or in fact for such limitation. Presumably military information which comes into the hands of the State Department or the military departments, the disclosure of which might threaten the security of other nations, would not be protected. Even U.S. forces engaged in the defense of other nations might have no protection, under the limited language proposed, against disclosure of the details of their planned operations.

All staff communications of all agencies—staff recommendations, advice, reports, analyses, and other working papers—would be available to any person unless confined to legal or policy considerations. Any reference to facts in any internal paper would remove it from the proposed exception. The Government simply could not function under any such requirement. If it were to be enacted, it would have to be circumvented. Compliance would be impossible.

Although the bill would permit agencies to hold in confidence information submitted to them in confidence by private businessmen, the enormous volume of

information which the Government assembles by regulatory investigations and by its dealings with contractors would be available to any competitor, creditor, or other person, irrespective of his need for the information or the propriety of his motives in seeking it. Such provision would represent a grotesque injustice against the hundreds of thousands of regulated businesses and Government suppliers.

Although investigatory files "compiled for law enforcement purposes" would be protected from indiscriminate disclosure, investigatory files relating to regulatory programs, public loans, grants, and benefits operations apparently would not. Although of particular importance to the Department of Justice, criminal investigation, of course, is only a part of the whole are of Federal investigation. Just as Congress must have the power to inform itself in the execution of its functions, so the agencies have a duty to keep informed in their areas of responsibility and to avoid official action based on inadequate information. The citizen's right to intelligently informed governmental administration is no less important to him than his fundamental right to effective law enforcement.

It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of regulatory, benefit, and other agency functions from complainants and witnesses surely will be seriously jeopardized. In many cases persons sought to be interviewed, not only concerning criminal violations or fraudulent practices in a regulated activity, but also with respect to competition, business conditions, or other matters in which no accusations are involved, will refuse to talk to agency investigators and employees as soon as they realize that all information furnished by them may be made public. In most cases the opening of investigatory files will clearly reveal the agency's investigative techniques, and many regulatory programs which rely upon effective investigation may be rendered ineffectual.

The proposal evidently overlooks the impossibility of conducting negotiations with private interests in full public view. For example, correspondence between the Justice Department and private litigants looking toward settlement or compromise would be available to anyone. The development of specific plans to acquire land or dispose of property could not be carried on in confidence. Any land speculator would appear to be able to examine any communication relative thereto at any time. The same availability is proposed in respect of internal communications, now carefully guarded, relative to plans for changes in interest rates, regulatory controls, support price arrangements, etc.

Because of the limitless variety of the kinds of information in the possession of Federal agencies and the infinite number of reasons for not making information available to any person, examples of instances not appropriately provided for could be multiplied endlessly. An example of how the bill's approach may reduce the public availability of information is provided by the second exception. We see no reason why an agency's personnel management rules and regulations should be kept secret.

It is the view of the Department that, if a workable public information statute is to be provided as a part of the Administrative Procedure Act, the present approach of the bill must be abandoned. The protection of private and public interests through the proper handling of confidential information is far too important to be left to the automatic operation of an entirely inadequate word formula. Problems of disclosure and nondisclosure demand careful judgments. They merit a proposal which appreciates their importance and affixes responsibility, instead of seeking to remove it entirely and to substitute a self-executing rule.

9. The proposed limitation upon the duration of "emergency rules" which are extended by full procedures (sec. 4(d)).

§. 1336 would permit the issuance of emergency rules without notice or public procedures in any situation in which such action is required "in the public interest." The maximum effective period of these rules, under the proposal, would be 6 months. However, they could be extended upon notice and public procedures in accordance with the requirements governing rulemaking generally, but only for a period not to exceed 12 months.

The fact that these rules are called emergency rules in the proposal suggests that insufficient time for ordinary procedures is the public interest consideration contemplated by the bill. If such is the case, the 6-month limitation may be

appropriate, but the limitation upon the period for which such rules can be extended appears to be without reason, since such extension is permitted only upon compliance with the regular requirements. If the public interest consideration relates to the subject of the rule and the unsuitability of such subject for public procedures, the requirement that emergency rules be extended only upon public procedures should be eliminated.

10. *The requirement that public proceedings be conducted in the development of internal management rules (sec. 4(h)).*

The present act excepts from its notice and public participation requirements all rulemaking "to the extent that there is involved * * * any matter relating to agency management." The bill proposes to limit this exception to personnel matters and to require public proceedings in the development of rules relating to any other matter of internal agency management.

There are, of course, many management operations other than matters of personnel management which require the development of substantive and procedural rules. These are matters which, under the present act, are clearly the responsibility of the officials of the agency, who are appointed by the President and confirmed by the Senate. In most instances there would seem to be no justification for multiplying their management problems and encumbering their management operations by requiring them to conduct public proceedings before adopting any management policy or procedure. If there are areas of agency management, for example, the area of procurement contracting, in which the public or some segment thereof may have a direct and proper interest, Congress should provide public procedures in that area, but not in all agency management operations.

11. *Elimination of the present exception from public rulemaking requirements of rulemaking relating to confidential operations (sec. 4(h))*

The present act permits an exception from the rulemaking requirements in any situation in which public procedures are "contrary to the public interest." This exception applies in a great many situations. The bill would substitute for this exception very limited exceptions which would not include, for example, the development of rules governing secret investigative techniques.

This deficiency in the bill has heretofore been brought to the subcommittee's attention and has been discussed at some length. See, for example, the letter from the Department to the chairman, dated August 10, 1964, printed at page 207 of the subcommittee's hearings of July 21-23, 1964 on the predecessor bill, S. 1663.

12. *The application of the proposed requirements for adjudication to every agency proceeding for the determination of the rights or obligations of named parties (sec. 5)*

All informal adjudications are exempt from the procedural requirements of the present act. Only adjudications which are required by statute to be determined on the record after opportunity for hearing are subject to the present provisions, and many of these are exempted by the first sentence of the Administrative Procedure Act, section 5.

The legislative history of the 1946 act provides evidence that the Congress exercised many careful judgments, after extended consideration, in its decisions respecting the extent to which the act's procedural requirements were to apply. Many reasons for the limitations are provided.

The present proposal would summarily set aside all of those judgments, ignore the reason for the exceptions, and extend the coverage of the proposed provisions universally. Every case of "adjudication" before every agency would be subject to the proposed requirements, except "those involving inspections and tests." The proposed requirements would include, for example, provision for the automatic issuance of subpoenas upon the request of any party and provisions for depositions and discovery in every proceeding.

The application of the requirements to all informal adjudications leaves considerable uncertainty. Clearly, the hearing before an examiner afforded to a social security claimant is a "proceeding," as that term is used in the proposed definitions. Is the across-the-desk interview with an administrative official which preceded such appeal and which resulted in the original denial of the claim also a "proceeding"? If so, is the process which results in granting a claim in another case also a "proceeding"? Because the application of the proposed

requirements depends upon the answers to these questions, the uncertainty would seem to be particularly undesirable.

The first sentence of Administrative Procedure Act section 5 excepts from the requirements of that section all adjudications, even though required by statute to be determined on the record of an agency hearing, "to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives." The proposal to eliminate all of these exceptions, which were developed after extended congressional consideration, appears to be based upon the assumption that none of the reasons which appear in the legislative history of the 1946 act and which compelled the Congress at that time are of any validity. We are not so convinced.

Consider, for example, the proposal to eliminate the present exemption of proceedings for the certification of employee representatives and to subject such proceedings to the bill's elaborate and cumbersome decisional processes in cases of adjudication, including the additional level of decision represented by the appeal broad proposal. It is generally recognized that time is of the essence in the avoidance of industrial strife. Certification proceedings are essentially investigatory. The principal concern therein is an early election. These cases are handled in considerable volume—in excess of 2,000 decisions each year. Under present practices they are conducted in two stages: (1) the investigatory stage preparatory to balloting, and (2) the investigation and determination of post-election objections. In the great majority of cases the first stage is handled entirely by a regional office. Congress and the National Labor Relations Board have worked continuously over a considerable period to develop fair and efficient procedures in these cases. To now set aside the present streamlined processes and subject these cases to the proposed requirements of 5, 7, and 8 would be disastrous to the program and would necessitate emergency legislation to correct the mistake. It would seem evident that the present exemption of proceedings for the certification of employee representatives, and perhaps others, should be retained.

13. The proposed requirement that parties to an adjudication be advised of the issues to be considered (sec. 5(a)(1))

A serious problem in many agency proceedings results from the inability to identify the determinative issues sufficiently early in the proceeding to permit an adequate presentation thereon. In respect of this problem, the proposal relative to notice of the issues to be considered may result in considerable improvement in the trial of many different kinds of proceedings.

However, early crystallization of the issues in quasi-legislative proceedings is frequently impossible. In their early stages they often are essentially investigatory proceedings—particularly protracted rate investigations and other economic proceedings. The bill's redefinition of such cases as adjudications raises serious question whether the proposal can be applied to all cases of adjudication. The extent to which the requirement can be applied should be determined and its application limited accordingly.

14. The bill's attempt to utilize the Federal rules of civil procedure and the rules of criminal procedure in administrative adjudications (sec. 5(a)(2))

The bill proposes to require every agency which conducts formal adjudications to provide rules governing pleadings, responsive pleadings, and other papers conforming to the extent practicable to the rules of civil procedure or the rules of criminal procedure for the U.S. district courts. The Federal rules of civil procedure are designed for the trial of cases or controversies between opposing litigants. The criminal rules are designed primarily to guarantee due process to persons accused of crimes. Because of the bill's broad definition of the term "adjudication," including, for example, licensing and ratemaking proceedings which may be nonadversary, there are many cases of "adjudication" as to which the rules used in the district courts would be inappropriate. The difficulty of the proposal is that it invites charges, in any case of adjudication, that the agency's procedures are defective in that they do not meet the requirement that they conform "to the extent practicable" to the district court rules. We feel that

they should not be required to conform to the extent practicable, or indeed to any extent, to an inappropriate model.

15. *The proposal to use "agency personnel of appropriate ability" as presiding officers in formal adjudications (sec. 5(a)(5))*

A fundamental reliance of the Administrative Procedure Act is the examiner concept. Prior to 1947 most agency proceedings were conducted by agency employees who might be considered "agency personnel of appropriate ability," and the often inept handling of cases, the absence of fairness in the conduct of hearings, and the frequently obvious bias of their decisions gave strong support to the enactment of the present act.

Over the past 18 years, the agencies, the Civil Service Commission, the organized bar, various study groups, and many regulated interests have joined in a continuing effort to elevate the status of examiners, to raise appointment standards, and to increase their responsibility, augment their capability, and enhance their authority. Many informed observers view the examiner function as the most important element in the fair and efficient handling of a case of formal adjudication, and feel that all efforts toward improvements in agency procedures should be subordinated to the ultimate goal of a courageous and able corps of examiners recognized by all as "Federal administrative judges."

The Department of Justice is not convinced that this effort and the development which has resulted should be lightly set aside in favor of a return to the pre-APA practice. Particularly in formal adjudications in which objectivity and independence of judgment are important the requirement of the use of examiners as presiding officers should be retained.

16. *Separation of functions requirements applicable to personnel engaged in "advocating functions" (sec. 5(a)(6))*

With certain exceptions, the present APA provisions bar personnel engaged in investigative or prosecuting functions generally from supervising presiding officers or participating in decisions in formal adjudications subject to the requirements of section 5. In order to comply with the requirement, many agencies have divided their legal services, assigning all investigative and prosecuting functions to one office, thereby leaving other agency lawyers free to advise in administrative adjudications. These agencies should not be required to undertake a further division of legal personnel unless absolutely necessary. It is likely that the purpose of this proposal could be achieved without necessitating further reorganization by requiring separation of officers who have engaged in advocacy in the same or a factually related case, rather than those who engage in advocating functions generally.

17. *The proposal to isolate decisions in difficult economic cases from expert staff assistance (sec. 5(a)(6))*

The present act imposes separation of functions requirements in formal adjudications except those which are initial licensing proceedings or proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers. The requirements do not apply in any cases of rulemaking.

The bill proposes to apply such requirements in all cases of formal adjudication, including the often complex cases of ratemaking and economic proceedings which are now defined as rulemaking. The proposal could seriously prejudice informed decisions in these cases. The services of engineers, economists, marketing specialists, and other Government experts should be available in these cases throughout the decisional processes. Under the proposal, their expert advice could be utilized only if and when the case reaches the agency. Presumably, because of the possibility that only limited review will be undertaken by the agency, the advice of staff may never be utilized in the consideration of those issues which the agency does not review. We think it obvious that the expanded coverage of the definition of "adjudication" requires a broader exception from the separation of functions requirements, rather than elimination of the present exceptions.

18. *The proposed requirement that every agency afford an opportunity for settlement prior to hearing in every case of "adjudication" (sec. 5(c))*

In the interests of affording timely and economical relief to private parties and of promoting efficiency and economy in Government, agencies should be quick to settle every case in which an appropriate settlement is possible. In its at-

tempt to promote this purpose, the bill would require every agency to afford to all parties in all "adjudications" an opportunity, prior to hearing, for the submission, consideration, and determination of offers of settlement.

Again, the bill appears to misconceive the true nature of administrative proceedings and to fail to appreciate the differences between cases or controversies in the courts and proceedings conducted by administrative agencies. Public interest considerations present in most agency proceedings add a dimension not found in court proceedings. The agency in most cases is not simply an arbiter between competing interests. In addition, it has an affirmative duty to promote the public interest in its particular program area, and this frequently involves required findings which can be made only after hearing. It should be evident that the proposed requirement should not apply in every case of "adjudication," as that term is defined.

19. The proposed extension of the right to counsel to persons appearing in the course of an agency investigation (sec. 6(a))

The present statute affords a right to counsel to any person appearing in an agency "proceeding" and to any person "compelled to appear" in an agency investigation. The bill would afford a right to counsel to any person "appearing" in a proceeding or investigation.

The proposal and its legislative history should make it clear that the Federal Bureau of Investigation is not to be impeded in its investigations by such provision.

Proposed section 6 is intended to apply to administrative agencies in the conduct of proceedings for rulemaking and adjudication. Prefatory language should be inserted to resolve any doubt in this regard. In the alternative, the FBI should be exempted specifically from the operation of the act by revision of the definition of the term "agency" in section 2(a).

20. The proposal concerning special requirements for admission to practice before administrative agencies (sec. 6(b))

There is no existing statute of general application governing the right of members of the bar to practice before Federal administrative agencies. The Administrative Procedure Act (sec. 6(a)) provides only that every person shall have the right to counsel or other duly qualified representative in any agency proceeding, and that nothing therein shall be construed either to grant or to deny to any person who is not a lawyer the right to represent others before any agency.

In 1884, Congress examined the considerations involved in Treasury Department proceedings and found a special need in those cases for protection against practice by unscrupulous agents and unauthorized representatives. Congress authorized the Secretary of the Treasury to impose admission requirements for practice before that Department (23 Stat. 258, 5 U.S.C. 261). Since that time, the 16th amendment to the Constitution and our extensive self-appraised income tax system, with its particular demands for protection against unauthorized disclosure of information furnished by taxpayers, have greatly increased the need for protection against malpractice before the Department of the Treasury. The considerations which prompted the 1884 statute would seem to be many times more compelling today. Indeed in all agencies the need for assurances against improprieties in practice is perhaps greater than ever before.

In 1957, the Office of Administrative Procedure in the Justice Department conducted a comprehensive study of special admission requirements of administrative agencies. It concluded that, in general, agency licensing of attorneys seemed to afford less assurance against malpractice than the availability of agency disciplinary authority. Upon publication of its study, it acknowledged the special needs of the Department of the Treasury and the Patent Office, particularly with respect to access to confidential information, and recommended that all other agencies which then maintained registers of attorneys consider eliminating the use of such registers. It proposed the adoption of a uniform rule which would make eligible to practice any person "who is a member in good standing of the bar of the Supreme Court of the United States or of the highest court of any State, territory, or of the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law," reserving to each agency full authority to discipline any representative appearing before it.

It is the view of the Department, consistently maintained since that time, that special admission to practice requirements should be eliminated in every case where adequate protection against improper conduct in the representation of others in agency matters can be assured by agency authority to suspend, disbar, or otherwise discipline practitioners. This is the purpose underlying proposed section 6(b).

In many cases disciplinary orders of State courts allow the respondent attorney to retain his status as a member of the bar in good standing and impose lesser sanctions than suspension or disbarment. Restrictions may be imposed upon his right to practice, or he may be denied participation as counsel in a particular matter. If the misconduct which provided the grounds for the order warrants agency disciplinary proceedings, the agency should not be barred from taking necessary action by the fact that the individual is still a member of the bar in good standing. Similarly, if the individual has been admitted in more than one State and is suspended or disbarred in only one of them, the agency should not be precluded from taking necessary action by the fact that the individual still is a member of the bar in good standing in another State. The subcommittee may wish to consider substituting the language quoted above from the 1957 proposal for the language in the first sentence of proposed section 6(b) in order to provide for such situations. Also, the legislative history should make clear the intention of the provision to authorize an agency to suspend or disbar an attorney, even though his misconduct was not committed in his practice before the agency and is not directly related to such practice.

Subject to these considerations and such exemption of the Treasury Department or other agency in which reliance upon disciplinary authority alone does not afford adequate protection against misconduct or fraud upon taxpayers or other members of the public, the Department of Justice supports the bill's proposal relating to admission to practice.

21. The proposed requirement that subpoenas be issued automatically upon the request of any party in an adjudication (sec. 6(e))

Section 6(c) of the present act provides that wherever Congress has granted the subpoena power, subpoenas shall be available "upon a statement or showing of general relevance and reasonable scope of the evidence sought." The bill would revise this provision to require every agency, unless otherwise provided by statute, to issue subpoenas automatically, upon request, to any party to an adjudication, formal or informal.

It is entirely possible that there are proceedings in which the subpoena power is lacking and should be made available. Congress should grant the power in those instances. However, the power should not be made available in every case of adjudication. Even if all agencies were to be given the subpoena power, irrespective of the nature of their functions, subpoenas should be issued only in proceedings subject to proposed section 5(a) and in such other formal proceedings as may involve a need for the power. The requirement of a showing of general relevance and reasonable scope has not imposed an unreasonable burden. In any event, it should be retained in the interests of minimizing the opportunities for dilatory tactics.

22. The proposal to require provisions for depositions and discovery in every proceeding conducted by every agency (sec. 6(h))

The bill appears to propose that every agency, whatever its function, provide for the taking of depositions and for discovery procedures. Further, the proposal appears to require that the agency's rules therefor shall conform to the rules of the district courts for civil actions except where such rules are impracticable. Again, the proposal is obviously appropriate as it may apply to some agencies, but just as obviously inappropriate as it may apply to others. Yet the bill would impose the requirement universally. This approach seems to the Department to be entirely without reason. We think the proponents of the bill should ascertain in what proceedings depositions and discovery are desirable and require their availability in those proceedings, not in all proceedings.

23. The proposal to remove agency discretion in the issuance of declaratory orders (sec. 6(k))

Under the present act, an agency has the power to issue a declaratory order if it feels that such order will remove uncertainty or dispose of a case of adjudication required to be determined on a record. The bill would remove this discre-

tion. Every agency, apparently, would be required, upon the petition of any person, to grant or deny requests for declaratory orders, and such grant or denial would be subject to judicial review as "final agency action."

The bill does not suggest what question the reviewing court would be expected to decide. Surely it does not intend to authorize the court to issue a declaratory order where the agency has declined to do so. At most, where an agency has denied a request for a declaratory order, the court could only determine whether the agency, in fact, acted upon the petition and did not act arbitrarily, capriciously, or outside its authority. Administrative Procedure Act section 5(d) would appear to be a much more meaningful provision. It is the view of the Department that it should be retained.

24. The proposal to give presiding officers authority to summarily determine proceedings to which they are assigned (sec. 7 (b))

Apparently, the bill proposes to empower the presiding officer in any proceeding to dispose of the case upon motion, prior to hearing or at any point in the proceeding, irrespective of the agency's position. We think the power should be given to the agency and should be made delegable by the agency to the presiding officer. If an agency, after extended investigation and lengthy consideration, orders a hearing to determine whether a regulatory program is needed in a particular area and, if so, what the details of the program should be, the presiding officer should not have authority to reverse the decision of the agency to undertake the inquiry by, in effect, throwing the agency out of court. In order to avoid the necessity of the agency's reordering the inquiry, subject to the possibility of its being aborted again, any challenge to the basis of the agency's decision to undertake the inquiry should be certified to the agency. In any event, it is clear that presiding officers should not be given the power of summary disposition in all proceedings. As in the case of other proposals in the bill, the proper application of this idea should be determined and the application of the proposal should be limited accordingly.

25. The proposal to remove agency discretion in the consideration of interlocutory appeals (sec. 7 (e))

Under the proposal contained in section 7(e) of the bill, a presiding officer could certify to the agency any material question arising in the course of a proceeding whenever he might be of the opinion that to do so would expedite the proceeding, and the agency would be required to determine the question forthwith.

In every case, the agency should have the power to determine whether the question should be determined at that point or at some other time. Therefore, the proposal would seem to have no proper application and should be eliminated from consideration.

26. The proposed requirement that every case of adjudication required to be determined on a hearing record be decided by the presiding officer rather than by the agency (sec. 8(a))

Because of the bill's proposal to broaden the definition of "adjudication" to include all matters involving particular private interests, including almost all proceedings which now are formal rulemaking, there may be many cases subject to proposed section 5(a) in which the essential question, and perhaps the only question, is one of agency policy. In such case, the bill should permit removal of the matter to the agency for decision, as the present act does. Since the presiding officer ordinarily is without policy responsibility, no purpose would be served in requiring him to determine such matter, subject to appeal and review by an appeal board, with agency review only after the completion of these time consuming and expensive processes.

It is evident that the initial decision concept is appropriate in many formal adjudications, but not in all. The bill, therefore, should permit the use of the concept where it is appropriate, but not require it in all cases. This is the effective of the present statute. It is the view of the Department that this feature should be retained.

27. The proposal to permit exceptions on the ground that a novel question is involved (sec. 8(c)(1))

Under present practice an exception must assign error. The bill proposes to allow an exception on the assertion that the decision below determines a

novel question, without any allegation that the decision below on that question is in error. This idea is conceptually unsound and should be eliminated.

28. *The creation of an additional stage in the decisional process through the mandatory use of appeal boards (sec. 8(c)(2))*

A basic problem in administrative procedures is the inordinate expenditure of time and money so often necessary to carry a proceeding through to final agency action. Equally basic, and obviously related, is the problem of the agencies' preoccupation with their caseload of routine matters to the extent that not enough time is spent in meeting their more important and more fundamental policy responsibilities.

In recent years efforts to subdelegate agency decisional authority in routine matters have won considerable attention as the most likely solution of these two problems. Many find the idea of subdelegation particularly attractive because they feel it necessarily will tend toward the development of standards and guiding principles and will eliminate much of the uncertainty and lack of consistency which seems to attend the ad hoc consideration of every case by the agency itself. Further support comes from foes of the so-called institutional decision. Practitioners frequently have found the hearing process considerably removed from the decisional process, and they much prefer the opportunity to present and argue their case to the authority which has been delegated the power to decide it. Most compelling is the idea that through subdelegation regulator and regulated alike will be enabled to get on with their respective business. It is assumed that agencies will have time to devote to basic policy problems, and pronouncements which otherwise would be years in the making perhaps will become a part of the regular business of the agency. Litigants before agencies expect to have in hand final verdicts months or even years ahead of the time otherwise required. Practitioners hope to handle the business of their clients without long, uncompensated periods of inactivity while their matters work their way to the top of the agency's pile of cases awaiting action.

The Department of Justice is in full sympathy with the purposes sought to be achieved by proposals to subdelegate decisional authority. However, we think it is obvious that any such proposal should permit, not require, agencies to delegate decisional authority. In any event, the choice should not be that of private parties to agency proceedings.

Proposed section 8(c)(2) seeks to require every agency, as that term is defined in section 2(a), to establish one or more agency appeal boards composed of agency members or hearing examiners, or both. All appeals from decisions of presiding officers would be determined by appeal boards unless a private party elected to have the agency itself consider the appeal. The agency apparently could review an appeal board decision only on the ground that the decision below is contrary to law or agency policy, the agency desires to reconsider its policy, or a novel question of policy has been presented.

The bill again fails to appreciate the variety of administrative proceedings. It envisages an agency overburdened with a large volume of routine cases conducted pursuant to sections 5, 7, and 8 and only a few which, because policy considerations are involved, merit the attention of the agency itself. Obviously, this is not the pattern throughout the Federal establishment. In fact, study of the subcommittee's statistics on administrative proceedings indicates that it probably is limited to less than 10 of the more than 100 authorities in the Government which are agencies within the meaning of the definition.

Clearly, the revision should be amended to make the establishment of the proposed appellate procedures optional with the agency, in order that they might be employed where appropriate, but not required where their use would result only in further burdening the administrative process by creating an additional step in the already arduous decisional process.

29. *The requirement of oral argument before appeal boards, upon the request of any party (sec. 8(c)(2))*

In respect of some questions oral argument is indispensable to understanding. In respect to others, only a written presentation is comprehensible. The decision as to the appropriate manner of presentation should be made by the authority charged with the decisional responsibility.

The bill proposes to impose upon all appeal boards a requirement that they hear oral argument in any case in which any party requests it. In the many

administrative appeals where oral argument is, in fact, unnecessary such requirement could impose a heavy burden. Private parties hopeful of early final administrative action, who permitted the matter to go to an appeal board rather than to the agency in the hope that thereby they might have a final decision sooner, might be disadvantaged far more than they are advantaged by the enactment of this provision.

In general, the bill appears to neglect the obvious fact that in the great majority of formal proceedings there is at least one party whose purpose in participating is to obstruct or delay the contemplated action. In enforcement proceedings in which there is only one private party—the respondent, it is that party who may be inclined to utilize whatever means is available to prevent or delay a final order. The bill's attempt to afford the ultimate in safeguards against unfairness and arbitrary treatment of private interests appears to open the door in many ways to unfairness at the hands of adverse parties and to paralyzation of necessary agency functions.

30. Publicity as prejudicial prejudging of agency proceedings (sec. 9(b))

To define anything as something which it obviously is not is to invite difficulties. The bill would define any publicity issued by an agency employee or officer to discredit or disparage a person under investigation or a party to an agency proceeding as prejudicial prejudging by the agency. Such prejudicial prejudging would be grounds for setting aside any agency action against such person or party.

A provision for setting aside administrative action in any case where decision after opportunity for hearing is required, but the agency has, in fact, prejudged the matter would seem appropriate. However, the provision proposed in section 9(b) might result in setting aside necessary official action in cases where the agency has not prejudged the matter.

Any investigation is necessarily preceded by internal communications explaining the circumstances which necessitate the investigation. The facts related in such communications might be very damaging to the private interests involved if released to the public indiscriminately. Yet proposed section 3 of the bill would seem to require such indiscriminate publicity in any case in which a member of the public requested the release of the internal communications. The inconsistency of proposed section 3 and proposed section 9 would present many difficult problems. We think agency action should be set aside only if there is prejudicial prejudging, and not if the agency's only error is in permitting its employees to comply with the requirements of section 3. It is the opinion of the Department that the proposed sanction against disparaging publicity is impracticable and should be eliminated from consideration.

31. Revision of the provision excepting from judicial review matters committed by law to agency discretion (sec. 10(2))

The judicial review provisions of the present act do not apply so far as statutes preclude judicial review or "agency action is by law committed to agency discretion." The bill would replace the quoted language with the words "judicial review of agency discretion is precluded by law." Although it can be assumed that the purpose of this change is to afford judicial review in some situation or situations in which review is not now available, the likely effects of the change are uncertain. Possibly, the proposed language might be construed to subject to judicial review a broad range of discretionary actions and inactions which are not subject to review under present practice. Surely, some change in the direction of enlarged reviewability is intended, and other proposals embodied in the bill (e.g., the proposal to afford judicial review of an agency's denial of a request for a declaratory order) might support the argument that a considerable enlargement is intended.

Enactment of this change would seriously disrupt present concepts, create unnecessary uncertainty, and generate needless litigation. If there are areas in which the proponents of the bill feel that the opportunities for judicial review are inadequate, the proponents should identify those areas and make specific proposals as to the extent of review sought. The proposal should not be enacted in its present form.

32. The proposal to abolish the present law of standing to seek review and to extend standing to any person aggrieved by official action (sec. 10(a))

As it was introduced in the 79th Congress, S. 7, the bill which became the Administrative Procedure Act, provided simply, in section 10, that "Any person

adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section." This was one of the provisions which underwent considerable development during the bill's legislative history.

Massachusetts v. Mellon (262 U.S. 447 (1923)), *Perkins v. Lukens Steel Co.* (310 U.S. 113 (1940)), and other cases which spoke in terms of "legal right" had made it clear that one who could demonstrate injury or threat to a particular right of his own which was entitled to protection had standing to challenge administrative action. In addition, *FCC v. Sanders Bros. Radio Station* (309 U.S. 470), which was decided in 1940, and *Scripps-Howard Radio* (316 U.S. 4 (1942)), and *KOA* (319 U.S. 239 (1943)) recognized the power of Congress to confer standing to prosecute an appeal, even where "legal right" was absent. The Supreme Court, in construing section 402(b) (6) of the Communications Act in the *Sanders Bros.* case (309 U.S. at p. 477), noted that Congress may have been of the opinion that one likely to be financially injured by the issuance of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the granting of the license by the Federal Communications Commission.

The provision which evolved during consideration of the bill sought to restate the existing law of standing and to recognize the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review of administrative action. Attorney General's Manual on the Administrative Procedure Act (1947), page 96.

The present provision is as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion, * * *. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Proposed section 10(a) would return to the provision proposed in 1945, thereby setting aside this development and the decisions under the present act since 1947. Because section 10 would apply to all agency actions and would not be limited to actions taken under the requirements of sections 4, 5, 7, and 8, the effect of the proposal would be to eliminate the present law of standing to seek review of administrative action and leave only the question whether appellant can demonstrate that he will be adversely affected by the action he seeks to challenge.

It is an attractive idea that no official action should be free from review for want of someone to challenge it, and that this possibility may be partially overcome by making everyone a "private attorney general." If the proposal could assure that every citizen would exercise his power with a sense of public purpose, it would merit consideration. But to glut the courts with spurious challenges intended only to injure competitors by obstructing the grant of subsidies, the issuance of licenses, the letting of contracts, and other official actions beneficial to individuals would be advantageous to no one but the lawyers who might engage in such practice and might be highly detrimental to the proper performance of necessary governmental functions.

It is the view of the Department of Justice that the proposal should be carefully reexamined in the light of the present law of standing as it has developed under the present section 10, to determine precisely in what areas of official action the existing requirements of standing to appeal administrative action may be too restrictive, and further, to determine how present requirements should be liberalized. If Congress wishes to extend the principle of *Sanders Bros.* into other areas, its decision to do so in each instance should be a considered decision. We are convinced that the blanket repealer of the law of standing proposed is not the appropriate solution.

33. The proposal to confer jurisdiction upon the district courts with respect to agency action (sec. 10(b))

The first sentence of section 10(b) of the bill would confer specific jurisdiction upon the district courts of the United States "to review agency action reviewable under this act, except where a statute provides for judicial review in a specific court; and jurisdiction to protect the other substantial rights of any person in any agency proceeding." Reviewable action includes not only action made reviewable by statute, but "every final agency action for which there is no other adequate remedy in any court." "Agency action" includes the whole or part of

every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

The immediate effect of these provisions might be to overrule the holding that the Administrative Procedure Act is not a waiver of governmental immunity from suit. *Blackmar v. Guerre* (342 U.S. 512); *Chournos v. United States, et al.* (335 F. 2d 918 (C.A. 10, 1964)); *Ove Gustavsson Contracting Co. v. Floete* (278 F. 2d 912, certiorari denied, 364 U.S. 894); *Kansas City Power & Light Co. v. McKay* (225 F. 2d 924 (C.A.D.C., 1955), certiorari denied, 350 U.S. 884). Areas in which the Congress intended no judicial review, such as the certification of labor representatives (*Switchmen's Union v. N.M.B.*, 320 U.S. 297; *General Committee v. M-K-T. R. Co.*, 320 U.S. 323), might be placed directly within the jurisdiction of the courts along with areas in which sovereign immunity at present bars judicial review, such as suits for specific performance of a contract (*White v. General Services Administration*, 343 F. 2d 445 (C.A. 9, 1965)), or suits for relief which would directly affect public funds or property (*Mine Safety Co. v. Forrestal*, 326 U.S. 371; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone v. Bowden*, 369 U.S. 643; *Dugan v. Rank*, 372 U.S. 609).

At present, official conduct not otherwise reviewable may be challenged only on the ground that the defendant official is acting unconstitutionally or in excess of his statutory authority. In such circumstances sovereign immunity does not protect the official from injunctive or declaratory orders. *Larson v. Domestic & Foreign Commerce Corp.*, *supra*. The Waiver possibly embodied in section 10(b) would bring before the courts every imaginable kind of agency action, even though it was within the agency's authority. Disappointed bidders, claimants of property held by Government, employers and unions disappointed by the outcome of labor elections, and a host of other litigants would all be cloaked in a waiver of sovereign immunity far broader than anything contemplated in the four waivers expressed in the Tucker Act, Tort Claims Act, Public Vessels Act, and Suits in Admiralty Act.

Sovereign immunity and limitations on jurisdiction such as those expressed in *Switchmen's Union v. N.M.B.*, *supra*, are vital doctrines which give meaning to the separation of powers between the executive, the courts, and the Congress. A blanket waiver whose consequences are wholly unforeseeable would not only be inconsistent with the principles underlying the original act, but would be undesirable because of the flood of litigation which would result from making the judiciary into overseers of almost all executive action. The Department of Justice strongly opposes this proposal.

34. *The proposal to give the courts interlocutory jurisdiction in all agency proceedings (sec. 10(b)(2))*

In its explanation of the proposal contained in section 10(b)(2), the subcommittee staff has stated that the provision is necessary to provide statutory implementation of the law of *Leedom v. Kyne* (358 U.S. 184 (1958)). The provision goes far beyond the principle of that case and seriously threatens the established doctrine of exhaustion of administrative remedies. The obvious effect of the enactment of such provision would be the filing of a great many suits in the U.S. district courts challenging all kinds of preliminary, tentative, and intermediate rulings which should properly be reviewed only in the final disposition of the matter. The uncertainty of the enactment easily could unsettle the law of exhaustion, primary jurisdiction, and ripeness for review for some time to come.

In a case in which an agency exceeds its jurisdiction, and no other remedy is available, the principle of *Leedom v. Kyne* is already available. It does not need statutory implementation. Instead of accomplishing this unnecessary purpose, the proposal in the bill would generate a host of new problems which might engage the courts and the Congress for several years before the mistake could be fully corrected. The Department, therefore, is strongly opposed to this proposal.

35. *The proposed enlargement of the venue provisions in actions for judicial review of administrative action (sec. 10(b))*

The fourth sentence of proposed section 10(b) seeks to provide venue provisions. Although the present section 10(b) is entitled "Form and Venue of Action," it contains no specification with respect to venue. The present provision governing venue generally in actions against officers and agencies of the

United States is contained in 28 U.S.C. 1391. Under that statute, except as otherwise provided by law, a civil action against a Federal officer or agency may be brought in any judicial district in which (1) a defendant resides, (2) the cause arose, (3) any real property involved is situated, or (4) in actions where no real property is involved, the plaintiff resides.

The revision would enlarge the possibilities available to complainant by adding any judicial district wherein complainant has his principal place of business. Also, it would permit suit to be brought where complainant resides even though real property is involved. Under 28 U.S.C. 1391 this district is available to complainant only if no real property is involved. This matter was carefully considered 3 years ago in deliberations concerning the development of 28 U.S.C. 1391. It is our view that with respect to actions involving real property, venue provisions should include the judicial district wherein the property is located, but should not also include the district in which complainant resides. It is likely that this proposal, together with the proposal to permit an action to be brought in the district where complainant has his principal place of business, would so multiply the possibilities available to complainant as to encourage a considerably greater degree of "forum shopping" in administrative law. This could seriously detract from the consistency so sorely needed in this area. It is our view that the provisions of the present statute, as they relate to venue, are fair and just. We have serious doubt that the enlargement of these provisions, as proposed by the bill, is necessary.

Senator LONG. Our next witness is Mr. Milton M. Carrow, attorney from New York City, representing the Association of the Bar of the City of New York and the American Civil Liberties Union.

I am intrigued by the representation of both those organizations, Mr. Carrow. Have these two groups merged, or are you wearing two different hats?

**STATEMENT OF MILTON M. CARROW, ATTORNEY, NEW YORK CITY,
REPRESENTING THE ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK AND THE AMERICAN CIVIL LIBERTIES UNION**

Mr. CARROW. No, Mr. Chairman. These two organizations have not merged. Unlike Washington, there is a dearth of administrative lawyers in New York and they had to scrape the bottom of the barrel there to bring somebody here. One of the organizations heard I was going down and asked me to submit a statement for them.

Senator LONG. Of course, I was being facetious about merging. I do not agree that they scraped the bottom of the barrel. I have a biographical sketch here of your background and your activities which will be placed in the record at this time.

(The document referred to follows:)

BIOGRAPHY OF MILTON M. CARROW

Born: New York City, 1912.

Education: A.B., Syracuse University, 1933; LL.B., Harvard Law School, 1937.

Experience: Practice of law in New York, 1937 to present. Partner, Landis, Carrow, Bernson & Tucker, 1 East 44th Street.

Army of the United States (Counterintelligence Corps), 1943-46. Arbitrator, American Arbitration Association. Chairman, Committee of Administrative Law, Association of the Bar of the City of New York. National correspondent for American Bar Association to International Bar Association, Mexico City, July 1964. Member, Special Committee on Code of Administrative Procedure, American Bar Association. Lecturer on public and administrative law, New York University School of Law.

Author: "Background of Administrative Law," text 1948.

Contributor of articles on administrative law to legal periodicals.

Senator LONG. We are certainly happy to have you.

Mr. CARROW. Thank you, Mr. Chairman. I consider it a pleasure to appear again before this distinguished subcommittee. I gather I have your permission to appear for these two organizations and I have filed reports for each of them.

My comments will first embrace the report of the Association of the Bar of the City of New York. I shall not attempt to read these reports but will comment on the points they make and if any of these comments incite any reaction on the part of the members of the subcommittee or the staff, I shall do my best to answer them.

This bill, I hope, is nearing the last stages of enactment. If for no other reason, I think it deserves enactment by virtue of seniority alone, because in one form or another, it has been under consideration since 1955, beginning with the recommendations of the second Hoover Commission task force. Since then it has gone through numerous refinements until now it ought to be as close to being a nearly perfect bill as can be found. If this is not so, we all know, nevertheless, that it has received extended, concentrated attention by the best minds in the country on this subject. In particular, the members of the staff of this subcommittee deserve the highest praise for their dedicated and devoted efforts.

Now on the commentary by the committee of administrative law of the association of the bar, this committee has studied this bill and its predecessors since the task force recommendations of 1955. In principle, the committee has supported various versions and refinements of those proposals. What is left are just a few suggestions relatively minor in nature.

The committee is gratified to see that the definitions of rule and adjudication have been to some extent clarified. There remains one area which we think is still murky; namely, in the ratemaking and licensing cases. As presently revised in 1336, it is not clear that these are included under adjudication, although, as Mr. Schlei indicated, he accepts the view—at least the Justice Department does—that they are included. In the previous version of 1336—S. 1663 (subcommittee revision)—ratemaking and licensing were specifically mentioned in the definition of adjudication. I suggest that such provision also be made in 1336.

The separation of functions provisions have caused a great deal of difficulty and I doubt whether they can ever fully be resolved.

I should like to bring the committee's attention to a separation of functions provision drafted in 1958 by our committee of administrative law. It appears in our report. Having participated in the development of the language of that provision, I can assure the committee that it received the most careful thought under a committee headed at that time by Chester Lane, formerly the General Counsel of the Securities and Exchange Commission and one of the most brilliant lawyers in the Government at that time. We spent several weekends working on this provision and I submit that it includes many thoughts that may be answers to the problems that have been considered.

For example, it suggests that presiding officers have assistants available for consultation. It indicates that agency members who are presiding officers can consult with each other. It also provides that where employees have not participated in the prosecuting and investigating

aspects, they may also be consulted by presiding officers even on questions of fact.

It also has a provision dealing with questions of law which 1336 does not consider. Here again, consultation is warranted where the person who is being consulted is not engaged in the proceeding or any similar type of proceeding. I suggest that this provision deals with those details a little better than the present provision in 1336.

Mr. FENSTERWALD. Mr. Carrow, do you have a text of that in your statement?

Mr. CARROW. Yes; the complete text of that is in my statement.

Mr. KENNEDY. With respect to that text that is in your statement, could you give us an example of what is meant in the third line from the bottom, "Or any person otherwise interested in its outcome," "its" being the outcome of the proceeding. Does that include the women's garden clubs if they are interested in beautifying the countryside and this might be something, say, at a railroad crossing.

Mr. CARROW. I think the term is used as a term of art. I think "party interest" or a "person interested" as used in these statutes have a legal meaning. I think that is the way it is used here.

Mr. KENNEDY. You say it is a term of art and then you say it is the interest of a party, but the full line is "any party or any person otherwise interested." Is this a financial interest, then, that you are speaking of, or something that significant, or is it merely, would it include the citizen's interest, would it include collateral interest of people, or just what is the meaning of this term of "art"?

Mr. CARROW. I think it certainly means more than an interest as a citizen of the United States. I do not think it would include your garden club and I do not know that I am able at this point to draw a clear line of distinction. It is a matter of judgment for the parties who will be considering the matter. I am sure that any adjudicating officer or any judge sitting on this would not hold the garden club to be a "person otherwise interested." Now, where, or under what circumstances they would draw the line, I would hesitate to make any general statement at this point.

Mr. KENNEDY. This is the issue, of course, which for some years now has been so hard to define. Who are these people otherwise interested?

Mr. CARROW. I think the intent here is not to place undue rigid restraints on the agencies as they have complained these bills do and it have left the door open for exercise of judgment in particular situations.

Our next subject is the one touching on proceedings in excess of jurisdiction. This is a matter which was in S. 1663 and has also been in and out of the bills preceding S. 1336. At the present time, it is out. We suggest that it should be back in. If this can receive serious consideration, and we think it should because it would be in accord with existing law, at least in the light of several recent cases, we recommend the adoption of a provision that incorporates a number of safeguards; namely, section 1009g, S. 1879 of the current Congress. That was formerly S. 2335. Our committee feels that is an excellent provision and should be incorporated in 1336.

One question that was raised in our committee discussions was the meaning of the language in section 10(b)(2) of 1336, dealing with

jurisdiction and venue in judicial review. The particular language that seems a little vague is:

Jurisdiction to protect the other substantial rights of any person in an agency proceeding.

Is that intended to be declaratory of existing law, or is it intended to establish a new area of jurisdiction? Several members of our committee felt that it might possibly be interpreted to be a new area of jurisdiction. Others felt that it was simply declaratory of the law and simply provided that any rights a person already has under the law may, of course, be enforced in the courts. I suggest that clarifying language be added to that provision.

We are gratified that the substantial evidence rule is being retained in 1336. We feel that the substitution of a clearly erroneous rule as a basis for review would only cause confusion.

Finally, the new idea of appeal boards, we feel, is an excellent one. We only suggest at this time that the establishment of such appeal boards be discretionary with the agencies. However, if an agency does organize the appeal board, it should follow the provisions in 1336.

That concludes my statement on behalf of the Association of the Bar.

(The prepared statement of the Bar Association of New York City follows:)

REPORT ON S. 1336, 89TH CONGRESS, A BILL TO REVISE THE ADMINISTRATIVE PROCEDURE ACT

Committee on Administrative Law, the Association of the Bar of the City of New York

This committee has, since 1957, devoted a considerable amount of time to studies of the various bills introduced in Congress to revise the Administrative Procedure Act. In June 1958, a comprehensive report was made on the then pending "Code of Federal Administrative Procedure" (ABA Code) prepared by the Special Committee on Legal Services and Procedure of the American Bar Association, and also on the "Administrative Code" prepared by the Task Force of the Second Hoover Commission in March 1955.

Our committee at that time approved in principle the objectives and provisions of the ABA Code, and made certain specific comments with respect to several of its provisions.

In our current study of S. 1336 it appears that most of the suggestions made by our committee in its 1958 report have been incorporated in the bill.

DEFINITION OF "RULE"

One of our major concerns had been the ambiguity of the definition of "rule" in the Administrative Procedure Act. The ABA Code proposed a substantial change in this definition which would remove such ambiguity and we approved their recommendation. In particular, we objected to the exemptions specifically stated in the definition and the confusion caused by the phrase "particular applicability." S. 1336 has removed the cause for these objections. There remains, however, the question whether ratemaking and licensing are considered clearly adjudicative, as was intended in changing the definition of "rule." In a previous version of S. 1336 (S. 1663, 88th Cong., subcommittee revision), it was specifically stated, in the definition of "adjudication," that licensing and ratemaking came under that rubric. This specific reference has been eliminated from S. 1336 and the problem may again become murky. It may be that the use of the phrase "named parties" in the S. 1336 definition of adjudication is intended to include licensing and ratemaking proceedings. However, we believe it would be helpful if that were further clarified.

SEPARATION OF FUNCTIONS

In our 1958 report we made detailed recommendations regarding the separation-of-functions provision (S. 1336, sec. 5(a)(b)). In fact, the committee drafted a proposed provision on this subject and we believe it warrants consideration at the present time. The recommended provision was as follows:

"SECTION 1005(c). SEPARATION OF FUNCTIONS.—No presiding or deciding officer acting pursuant to section 1006 of this Act shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for any agency. Except upon notice and opportunity for all parties to be present or to the extent required for the disposition of ex parte matters as authorized by law, no such presiding or deciding officer or agency or member of an agency acting pursuant to sections 1006 and 1007 of this Act shall consult with any person or party on any issue of fact in the proceeding, except that, in analyzing and appraising the record for decision, any such presiding or deciding officer may have the aid and advice of a personal assistant, and any agency member may (1) consult with other members of the agency in cases in which the agency is making the decision, (2) have the aid and advice of one or more personal assistants, (3) have the assistance of other employees of the agency who have not participated in the proceeding in any manner, and who are not engaged for the agency in any investigative or prosecutory functions in the same or any current factually related proceeding. Except upon notice and opportunity for all parties to be present or to the extent required for the disposition of ex parte matters as authorized by law, no presiding or deciding officer or agency or member of an agency acting pursuant to sections 1006 and 1007 of this Act shall consult on any issue of law in the proceeding with any party or any person otherwise interested in its outcome or any person who has been engaged in investigative or prosecutory functions in the same or any current factually related proceeding."

PROCEEDINGS IN EXCESS OF JURISDICTION

We note that in S. 1663, 88th Congress, as introduced, section 12 contained a provision that agency action not within its delegated jurisdiction could be enjoined by any court. This does not appear in S. 1336. In our 1958 report we approved a provision in the ABA Code of that date (1009g) entitled "Proceedings in Excess of Jurisdiction" on the ground that it approximates the principles followed by the Federal and most State courts. We note that the current version of the ABA Code (S. 1879, 89th Cong., sec. 1009g) has elaborated somewhat on the previous version by imposing penalties on persons who frivolously institute such actions or bring them for the purpose of delay. It seems to us, subject to several dissents, that this carefully drafted provision should be included in S. 1336.

JURISDICTION TO REVIEW

The language in section 10(b)(2) of S. 1336, "* * * jurisdiction to protect the other substantial rights of any persons in an agency proceeding," is unclear. Does this establish a new area of jurisdiction for the courts, or is it merely declaratory of existing law? In any case, it is too vague and should be clarified.

SCOPE OF REVIEW OF DETERMINATIONS OF FACT

In several of the proposed revisions of the Administrative Procedure Act, the substantial evidence rule, as the basis for reviewing questions of fact, is replaced by the clearly erroneous rule. In our 1958 report we objected to the fact that the ABA Code made this proposed change. We note that S. 1336 continues the use of the substantial evidence rule and we believe that is as it should be.

APPEAL BOARDS

S. 1336 brings a new idea into the Administrative Procedure Act in the form of appeal boards in section 8. Our committee believes that this is fundamentally sound, but at the present time would suggest that the establishment of such boards be left within the discretion of the agencies, provided that if such board is established it should be governed by the provisions of S. 1336.

Respectfully submitted.

MILTON M. CARROW, *Chairman.*

Senator LONG. Thank you, Mr. Carrow.

Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. Just one. I think that although you do not know what the objections of the Justice Department are at this time, the bar of the city of New York does not have this general feeling of catastrophe about the bill?

Mr. CARROW. Not at all. We are frank—we think it is a most excellent bill and we urge that, subject to these few minor changes, it be enacted.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Thank you, Mr. Chairman, I have no questions.

Mr. CARROW. Now, I have a statement by the American Civil Liberties Union. As is probably apparent, I participated in the preparation of these statements and to some extent, they may duplicate each other, which might indicate a universal approval of the suggestions made. The American Civil Liberties Union, of course, has a somewhat narrower view of this subject than does the bar association or other groups. It is primarily concerned with the civil liberties and rights of individuals and only to a limited extent, with economic organizations. It has considered the due process aspects of the bill as they affect these persons.

We have a few comments as regards the bill as a whole. The Civil Liberties Union does urge the enactment of the bill subject to a few minor changes here suggested. We have previously suggested changes to the earlier bills and we are gratified to note that most of the suggestions we have made have been incorporated in the present bill.

On the public information section, section 3, it now incorporates a quite clear statement of the kind of information that may be withheld. In only one minor aspect do we suggest further clarification; namely, in subsection (e) (6), we think that a person should have access to his own medical files. This would be in accord with the sense of section 6(d), which enables a person who submits data or evidence to procure a copy of such evidence.

On the question of adjudication in 5(b), the residual adjudicating clause, we do not find it indicated whether or not the separation of functions provision applies to that. We think it should. If it is adjudicative in nature, then the procedural safeguards provided by the separation of functions should be applicable. In its present context, this does not appear to be clear. On the contrary, I think it can be interpreted not to apply.

Also, in section 5(b), we believe there should be a provision requiring a statement of reasons for a decision. As presently written, I think it is quite possible in such a formal adjudication that a decision may be made without giving a statement of reasons. In security clearance cases, with which we have had some experience, this lack of a statement of reasons has been a stumbling block for preparation of cases for judicial review, and certainly, a person who is affected by a revocation of security clearance should at least have a statement of reasons for that kind of action.

On the question of official notice in section 7(d), we suggest that the provision be modified to provide an opportunity for a person to refute facts officially noticed prior to the decision. As presently written, this does not appear to be available to him.

The Civil Liberties Union also supports, on questions of judicial review, the incorporation of a provision authorizing an injunction against uncompleted action, and the union suggests, as did the Association of the Bar, that section 1009(g) of S. 1879 be incorporated in S. 1336.

We have learned that Prof. Kenneth Culp Davis has suggested, in previous hearings, and I was not here when he testified at the present hearing—but I assume that he made a similar recommendation—a waiver of sovereign immunity provision in 1336. We support that view in principle. We have not had an opportunity to study his particular provision in detail, but we think it is an excellent idea and that it is high time that some definitive steps from a legislative standpoint are taken with respect to this problem.

Finally, we note that in our last report to this subcommittee, we mentioned the idea of a statute dealing with the concept of an "ombudsman." It seems everybody is talking about this kind of concept. As a matter of fact, I visited the island of Jamaica earlier this year and picked up a local paper, and there in the letter column was a letter saying "We ought to have an ombudsman in Jamaica." I think this idea strikes a responsive chord and should be investigated to the extent that it can be applied in this country.

There are bills pending, as you know, for the establishment of an office of administrative counsel, S. 984 and H.R. 4273, which is a partial application of this concept. We recognize that this cannot be incorporated at this time in this bill. However, we do suggest that the committee consider another limited aspect, which appears in S. 1879, 1006(f) as "agency participation." This would authorize an agency to have somebody in a formal proceeding or informal proceeding represent the public interest. These proceedings tend to get rather complex and the adversary interests of the party or the agency becomes involved with the adversary aspects of the proceeding. We believe it would be quite helpful if some steps be taken in economic proceedings that have widespread effect to have the public interest represented.

This concludes my statement for the American Civil Liberties Union.

(The prepared statement of the American Civil Liberties Union follows:)

STATEMENT BY THE AMERICAN CIVIL LIBERTIES UNION TO THE SENATE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE ON S. 1336

S. 1336 manifests a continued, conscientious effort by this subcommittee to arrive at a distinguished revision of the Federal Administrative Procedure Act. The American Civil Liberties Union is especially gratified by the fact that the bill incorporates almost all of the recommendations it made at the hearings held on July 21, 1964.

As a consequence, subject to a few further minor suggestions hereafter made, we urge that the bill be enacted.

It probably should be repeated at this time that the interest of the American Civil Liberties Union in this bill is limited to those aspects which directly affect the civil rights and liberties of individuals as well as, in some cases, the regulation of large business enterprises. Such individuals include travelers, emigrants, immigrants, veterans, government employees, employees of private business subject to Federal regulation, persons who need Federal licenses to conduct their trades or professions, farmers, recipients of social

security benefits, and others. From this standpoint, some of the procedures with which the bill deals are not as significant as others and thus only selected subjects have been considered.

SECTION 3. PUBLIC INFORMATION

This section has been considerably improved. The transfer of all exemptions to a single subsection, as suggested in our previous report, clarifies this important subject, as does the use of a common terminology.

In only one minor aspect do we suggest further clarification. The exemption from disclosure in subsection (e) (6) should not apply to a person seeking to inspect his own medical files. This would be in accord with the sense of section 6(d) which enables a person who submits data or evidence to procure a copy thereof.

SECTION 5. ADJUDICATION

We are pleased that the subcommittee accepted our suggestion that the modified hearing procedure provided for in section 5(a) (5) be employed only on consent of the parties. This eliminates the potential layering of hearing procedures to the detriment of the individual.

In reexamining this section, we note that the context in which subsection (b) appears leaves open the question whether the separation-of-functions provision applies to the residual class of cases of adjudication covered by this subsection. We think it should.

Also, section 5(b) is deficient in not requiring that a party be furnished with a statement of reasons for a decision. Our experience in a number of instances, particularly in security clearance cases, has been that the lack of such a requirement was used by agencies as a basis for refusing to state reasons. Revocation of security clearance is a serious matter to the affected person, and he should, at least, be informed of the reasons for such action.

SECTION 6. ANCILLARY MATTERS

Section 6(k) now makes declaratory orders mandatory when requested. This is in accordance with our earlier recommendations.

SECTION 7. HEARINGS

We did not comment previously on the subject of official notice in section 7(d) but would like to urge this committee to modify the section to provide an opportunity for a party to refute facts officially noticed prior to decision. Without such an opportunity, refutation by a party could be an empty gesture.

SECTION 8. DECISIONS

In section 8(b) provision should be made giving a party a right to oral argument. The bill presently permits such oral argument only "in the discretion of the presiding officer." Although a presiding officer may be reluctant to hear oral argument, because of time pressures or otherwise, it is a procedural safeguard of which a party should not be deprived.

SECTION 12. CONSTRUCTION AND EFFECT

Our reexamination of the bill has disclosed that the present bill eliminates a provision that appeared in this section as part of S. 1663, 88th Congress, to the effect that "any agency proceeding or investigation not within the jurisdiction delegated to the agency and authorized by law, may be enjoined by any court of competent jurisdiction at any time." It seems to us that this was an unfortunate deletion. Although the cases are not altogether clear on the subject, the trend appears to be to authorize such type of review. See *Amos Treat & Co. v. S.E.C.*, 306 Fed. 2d 248 (D.C. Cir. 1962); *Elmo Division v. Dixon*, 16 Ad. Law 2d (Pike & Fischer) 679 (D.C. Cir. Feb. 11, 1965).

If the subcommittee is inclined to act favorably on this recommendation, we suggest that, in lieu of the language quoted above, the provision appearing in section 1009(g) of S. 2335, 88th Congress, be incorporated. This appears to be a carefully drafted clause dealing with all of the aspects of this subject.

SOVEREIGN IMMUNITY PROVISION

At the July 1964 hearings on the predecessor bill (S. 1663, 88th Cong.), Prof. Kenneth Culp Davis urged the inclusion of a clause whereby the sovereign immunity defense in actions involving administrative agencies would be limited to a narrow class of cases. (Hearings on S. 1663 July 21, 22, and 23, 1964, p. 266 et seq.) We support this position in principle and urge that such a provision be added to the bill.

REPRESENTATION OF PUBLIC INTEREST

In our report to the subcommittee on July 21, 1964, we recommended that some thought be given to the adoption of the "Ombudsman" concept in regard to our administrative process. This would provide informal administrative machinery to handle complaints of abuse of administrative power. Several bills have been introduced in the Congress which partially adopt this idea; namely, for the establishment of an Office of Administrative Counsel (S. 984, H.R. 4273). This Counsel would be available to Congressmen for processing complaints made by members of the public against administrative agencies.

Although it may not be feasible to carry out these ideas in the present bill, it may be possible to incorporate a limited aspect of them. It appears that several agencies, the Civil Aeronautics Board, the Securities and Exchange Commission, and the Federal Power Commission, and possibly others, at one time or another, have made efforts to provide specific representation for the public interest in their proceedings. Such a practice could well be more widely adopted, for often public interest is lost sight of in the course of considering the complex economic issues arising in many administrative proceedings.

We therefore recommend that this subcommittee incorporate in the present bill a provision now appearing in S. 2335, 88th Congress, dealing with agency participation (sec. 1006(f)). This reads as follows:

"(f) AGENCY PARTICIPATION.—Whenever an agency shall find upon its own motion or that of a party in a proceeding that the public interest may be substantially affected by the outcome of that proceeding, the agency shall act to protect that interest by appointing such members of its staff or such counsel or consultants as it may deem necessary to appear in the proceeding and develop whatever evidence and make whatever arguments may be required to clarify all the issues material and relevant to a determination of the proceeding in accord with that interest."

Senator LONG. Thank you, Mr. Carrow, for two fine statements. I appreciate your help.

The next witness is Mr. Richard Smyser, managing editor, the Oak Ridger, Oak Ridge, Tenn., and chairman, Freedom of Information Committee, Associated Press Managing Editors Association.

(Discussion off the record.)

STATEMENT OF RICHARD D. SMYSER, MANAGING EDITOR, THE OAK RIDGER, OAK RIDGE, TENN., AND CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE, ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION

Mr. SMYSER. I am Richard D. Smyser. I am the managing editor of the Oak Ridger, the daily newspaper in Oak Ridge, Tenn. I appear here today as chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association. I would like to speak primarily to the entirety of Senate bill 1160, and also section 3 of Senate bill 1336 as it incorporates that section.

A year ago, this organization, made up of the managing editors and other news executives of the hundreds of newspapers throughout the Nation that subscribe to the Associated Press wire, was quite active in support of Senate bill 1666. Our president of a year ago, Sam Ragan, of the Raleigh News & Observer, testified before this subcommittee.

Today, I bring you greetings from George Beebe, managing editor of the Miami Herald, who is president of APME for this year. I am honored to appear before you as his and the organization's representative.

Last year's bill became known within APME as "Sweet Sixteen Sixty-six." But despite the fact that 1160 doesn't lend itself quite as well to song, APME is equally enthusiastic in singing its praises.

Last month our organization testified before the Foreign Operations and Government Information Subcommittee of the House of Representatives Committee on Government Operations in support of House bill 5012. We are, therefore, frankly working both sides of the street in the hope that one of the other of these "freedom of information" bills will be successful. We are confident that such able champions of the "public's right to know" as Senator Edward Long and this subcommittee, and Representative John Moss and his subcommittee, will know what is the wisest legislative course—on which of these several bills to concentrate efforts.

Senator LONG. You know, of course, Mr. Witness, our committee and our staffs are working with Representative Moss and his staff and making every effort to get one or the other or both of them through.

Mr. SMYSER. We are in favor of both of them and we leave it to your judgment as to which is best.

Senator LONG. Representative Moss has been very helpful.

Mr. SMYSER. Friday morning, a week ago today, I listened with great interest to a television interview of Jack Bell, distinguished Associated Press writer here in Washington. The occasion was publication of his new book on the Presidency.

The public, Mr. Bell said, gets about 95 percent of the information it needs about Government. Good reporters can eventually dig out the facts, he went on. And I found myself agreeing with him. And I also found myself asking, "Then, why all this fuss about freedom of information and Federal agencies withholding information? Why APME's campaign in favor of Senate bill 1160 and House bill 5012?"

Ninety-five percent is a good percentage. However, 99 percent or even 100 percent would be better. Also worthy of consideration in extending Mr. Bell's remarks is the atmosphere in which the public gets a significant amount of its information about government—Federal, State, and local.

Turner Catledge, editor of the New York Times, has said:

For information, freely sought freely given freely received and freely used is the very lifeblood of freedom itself.

Too often, the information which the public eventually gets is not freely given. A significant portion of that 95 percent of which Mr. Bell speaks is only available after extensive efforts by reporters, and frequently after conflict with Government officials.

This is not to say that reporters should not be required to dig. This is their job. However, it is unfortunate that so much information about Government must come to the public in an atmosphere of dissension—as a sort of spoil of a war between the press and the Government.

For while this leaves the public with the information, it also leaves the public with a sense of distrust—of both the Government and the

press—wondering, too often, who is the “good guy,” who is the “bad guy.”

Is the press a hero for courageously going to bat for the “public’s right to know?” Or is the press a villain for sticking its nose too deeply into Government business and, therefore, disrupting the orderly functioning of the Government?

Is the Government a hero for resisting press pressure to reveal what it conscientiously feels in the national interest should not be revealed? Or is the Government a villain for denying the public information to which it is not only entitled, but which it vitally needs if it is to render intelligent judgments on the performance of its Government?

Senator LONG. Mr. Smyser, is it not quite often true that after you are able to get the information, in many instances, it is too old to be of benefit to the public?

Mr. SMYSER. It surely is.

We think it would be much better if more information could be given in a spirit of readiness and willingness of the Federal agency to give it. How much better if the public could assess this information on its merits, and not have to consider also the struggle between press and agency that preceded the dissemination of the information.

Present restrictions on the flow of information from Federal agencies make the pastures green for those who trade on the “exclusive,” the “exposé” and the “leak.” And too often the mere fact that information has been gained only after a struggle tends to give it a meaning that it really does not have—an aura of mystery and pseudo significance that invites distortion, misinterpretation.

For my own part, I tend often to be dismayed by the more sensational exposé-type reporters and columnists. However, confronted too often with deliberate attempts on the part of agencies to withhold information that they have no business withholding, one is led to the reluctant conclusion that perhaps the sensationalists are a necessary evil.

My newspaper, a small local daily in Oak Ridge has had some little experience with the Federal Government. Through 16 years of publication there we have seen instance after instance of Federal officials being hesitant to release information—not because the information, of itself, was properly secret—but simply because they feared that it would be misinterpreted by the press and the public. But time after time their reluctance has been proven to be unfounded. And I should emphasize that I am talking about matters that have no connection whatsoever with nuclear secrets. I am talking simply primarily about information relative to our community there. For many years, our community was operated by the Federal Government.

Herbert Brucker, editor of the Hartford Courant, said it well in a lecture back in November 1960, at Senator Long’s University of Missouri. He was attacking an attitude in government which he described as:

So why tell this or that to the peasants, who probably wouldn’t understand anyway? Such at least seems to be the reasoning, or rationalization, of the myriad men in government who somehow assume that of their occupancy of a public job gives them a property right in the news generated in that job.

The facts are, of course, that the peasants are considerably more discerning and understanding than many give them credit for being.

And the point is that whether the peasants might or might not understand, the peasants have the right to be kept informed.

The mere act of free release of information is an act of public trust and an act that draws response in kind. Conversely, the act of refusal to give information in turn creates public distrust.

It is not only the public's right to know that I would espouse here for my organization, but also the public's ability to know. Given the facts, the public will always react much more responsibly, much more positively, much more confidently, than when it is left uninformed or only partially informed.

Therefore, S. 1160 and also section 3 of S. 1336 can be just as logically looked at as bills to assist Federal agencies as they can be considered bills to assist the press or the public.

How would they help the agencies?

Simply as they are an inducement to these agencies to make fullest information available to the public. The fuller the information available, inevitably the better understood will be the agencies' programs, policies, and purposes. And, when better understood by the public, then these policies, programs, and purposes are inevitably strengthened.

It is all, we earnestly believe, as simple as that.

Two phrases in the Administrative Practices Act of 1946 are of particular concern to my organization. One is as the bill excepts from required release any "information held confidential for good cause found" and also as it restricts those to whom information may be given to "persons properly and directly concerned."

APME feels that this language has proven, over many years, to be much too broad. It has led to a situation in which agencies, when in doubt, withhold. And that situation should be the reverse. Much more consistent with the general principles of a democracy is an attitude of "When in doubt, release."

This is not to say that we believe that the Federal agencies should do the actual reporting job. On the contrary, the tendency now is to too many handouts of carefully screened and slanted information and too little simple open access to information about policies and proceedings.

There are many fine Government information specialists. And, indeed, they distribute many valuable handouts. However, even more important than the information they initiate is simply an attitude on their part, and on the part of the agency for which they work, to answer all inquiries as fully as possible—to simply create an atmosphere in which there is access. Once there is this access, then it is up to the press and the public to take advantage of it.

On April 1, after APME's statement to the Representative Moss committee in support of H.R. 5012, a question was posed by Representative Donald Rumsfeld, of Illinois, a member of the committee.

Granted, he said, that it is desirable that there be more freedom of information, is it not also desirable that there be more responsibility on the part of the press in handling such information?

We agree heartily.

Indeed, while APME, in this instance, is on the hustings urging Congressmen to act on this legislation, actually most of APME's work

is in criticizing and evaluating the press' own performance. And particularly the Associated Press performance. We have all sorts of committees involved with other phases of the Associated Press report.

Actually, under the impetus of a number of forces—competition of television, a more discerning public and a sincere desire within the trade to constantly do a better job, the press has undergone and is still undergoing a vast program of self-evaluation. There is then, as Representative Rumsfeld suggested there should be, a “reverse thrust” that is at work to improve the ability of the press to most fairly, most effectively pass on the increased flow of information that passage of S. 1160 might bring.

So often when newspaper groups testify in favor of “freedom of information” it all has a ring of special interest about it. And, indeed, there is a special interest here. We do, indeed, need to sell our newspapers. And, indeed, the more information with which we can pack them, the more likely they are to sell.

But, really, the effort for fuller information about Government is much more an effort for the welfare of the general public than the welfare of any particular newspaper or newspaper group. For it is the public that needs information—the same as it needs a strong national Military Establishment; the same as it needs protection of the right to vote, regardless of race; the same as it needs help from unusual economic conditions that have created pockets of poverty in a largely affluent nation; the same as it needs medical assistance in its old age, perhaps.

We submit, therefore, that these “freedom of information” measures are of the same basic importance as any of the other great legislative issues now before the Congress—and we earnestly urge their prompt adoption.

I thank you personally and on behalf of the Associated Press Managing Editors Association for this opportunity to appear before your subcommittee. It is a constant source of reassurance to those of us in the newspaper business, and particularly to us in the “freedom of information committee” business, to know that there are men like Representative Moss and Senator Long in the Congress taking a continuing and aggressive interest in this very basic public need—the need for information.

I would close with what we think is a very apt slogan of our own Tennessee Press Association: “What the people don't know will hurt them.”

(The complete prepared statement of Mr. Smyser follows:)

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On behalf of the Associated Press Managing Editors Association, I should like to go on record urging prompt passage of Senate bill 1160, the so-called freedom of information bill. We also would support Senate bill 1336 as it incorporates S. 1160.

A year ago, this organization, made up of the managing editors and other news executives of the hundreds of newspapers throughout the Nation that subscribe to the Associated Press wire, was quite active in support of Senate bill 1666. Our president of a year ago, Sam Ragan, of the Raleigh News & Observer, testified before this subcommittee. Today I bring you greetings from George Beebe, managing editor of the Miami Herald, who is president of APME for

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We agree heartily.

Indeed, while APME, in this instance, is on the hustings urging Congressmen to act on this legislation, actually most of APME's work is in criticising and evaluating the press' own performance.

The freedom of information committee is only one of many committees of the APME. "General news," "writing," "news enterprise," "wirephoto"—these

are the names of the other committees. All are part of what APME terms its "continuing studies"—continuing to seek ways to make the daily Associated Press report better and, therefore, improve the many newspapers that are so dependent on AP for their State, National and international news coverage.

Actually, under the impetus of a number of forces—competition of television, a more discerning public and a sincere desire within the trade to constantly do a better job, the press has undergone and is still undergoing a vast program of self-evaluation. There is, then, as Representative Rumsfeld suggested there should be, a "reverse thrust" that is at work to improve the ability of the press to most fairly, most effectively pass on the increased flow of information that passage of S. 1160 might bring.

Much is said these days about "big government"—big and getting bigger all the time. Political arguments to the contrary, it is true—our Federal Government is growing constantly. What it does has more and more effect on State and local government practices and policies.

State and local government tends to follow leads taken by the Federal Government. Therefore, by passage of S. 1160, Congress will be setting a most impressive example of liberalizing information procedures. And this example could filter down through other levels of government and have a vast effect. At present, many State and local governments tend to mimic the Federal Government and also withhold information "for good cause found." Therefore, abolishing restrictions on information at national level could also mean reform in the States, counties, and cities.

So often when newspaper groups testify in favor of "freedom of information" it all has a ring of special interest about it. And indeed, there is a special interest here. We do, indeed, need to sell our newspapers. And, indeed, the more information with which we can pack them, the more likely they are to sell.

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I would close with what we think is a very apt slogan of our own Tennessee Press Association: "What the people don't know will hurt them."

Senator LONG. Thank you, Mr. Smyser. That is a very fine statement and very helpful. In times gone by, I recall that you have been very helpful to our committee and our staff. We are grateful for your continuing interest and your presence here today.

Any questions, Mr. Fensterwald?

MR. FENSTERWALD. I have just a couple.

The comment you end up with is just the reverse of what we heard yesterday, that what the people don't know won't hurt them.

I have one question on the subject you mentioned of Government handouts. There is one such handout which has come to the attention of the committee which concerns us. That is the question of the trial by publicity. There are a number of agencies in Washington who every time they begin an investigation crank out a release which is widely distributed. The person affected by it rarely if ever gets a

chance to answer it except 2 or 3 years later, possibly. I wonder if you have any comments on that type of release?

Mr. SMYSER. As you are probably aware, there is an immense dialog going on right now about the conflict between the right to information and the right to a free trial. This is a primary subject of debate and discussion within all the newspaper groups and within the bar associations; it is, I think a very sincere dialog, a very sincere disagreement. I think some very fine results are going to come out of it and both the press and the bar are reevaluating.

I would think the results would be of interest to the committee. I would also recall Mr. Katzenbach's declaration before the American Society of Newspaper Editors just 3 weeks ago, spelling out more precisely what information the Federal Bureau of Investigation can release in advance of a trial.

Generally, I think as a newspaperman, we would certainly want to be on guard that we are not exploited for the special interest of anyone, including Government agencies.

Mr. FENSTERWALD. That is not very helpful. I was not thinking about the nonavailability of information with respect to the investigation so much as the fact that every time an investigation starts, the mimeograph machines on one side begin to turn, but if the defendant of the case is not a large corporation or someone of wealth, they do not have the facilities to give their side of the story to the press. It is a one-sided competition.

Mr. SMYSER. I would say if the agency uses the handout as a bit of publicity rather than a bit of information, it is wrong. If they are simply giving information, fine, but the motivation behind it is the key. If it is to give the information, fine. If it is to argue their case, I would consider it improper.

Mr. FENSTERWALD. That answers my question very precisely, thank you.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. I have no questions, thank you, Mr. Chairman.

Senator LONG. Thank you again, Mr. Smyser, for your assistance.

Our next witness is the Commissioner of the Interstate Commerce Commission, the Honorable Laurence K. Walrath.

Would you identify the people with you for the committee, please?

STATEMENT OF LAURENCE K. WALRATH, COMMISSIONER, INTER-STATE COMMERCE COMMISSION; ACCOMPANIED BY COMMISSIONERS ABE MCGREGOR GOFF AND PAUL J. TIERNEY, AND ROBERT W. GINNANE, GENERAL COUNSEL

Mr. WALRATH. Mr. Chairman, I would like to introduce Abe McGregor Goff, who appeared before you last year on S. 1663. Also, Commissioner Paul Tierney is with me. And on my right, Robert Ginnane, General Counsel.

Senator LONG. I welcome these gentlemen to the committee; we are glad to have them.

Mr. WALRATH. Present also are representatives of our proceeding bureaus most directly concerned with the bill. They are: Bertram E. Stillwell, Director of the Bureau of Operating Rights; Thaddeus W.

Forbes, Director of the Bureau of Finance; and Charlie H. Johns, Jr., Assistant Director of the Bureau of Rates and Practices. Also with me are Robert T. Wallace, who is on my personal staff; Leonard Goodman of the General Counsel's office; and Edward Conway, legislative attorney.

Senator LONG. Mr. Walrath, we shall be happy to have Commissioner Goff come up and be at the table, too.

Mr. WALRATH. I had earlier invited him to do that, Mr. Chairman. I am glad you suggested it.

As you will notice, Mr. Chairman, my prepared statement for today, the oral statement, is quite short.

Senator LONG. We shall be happy to put that in the record in its entirety and have you comment on it.

Mr. WALRATH. Thank you, sir. The reporter, I believe, has a copy.

First, let me say that our Commission and our personnel always appreciate the opportunity of appearing before your subcommittee. Normally, our Chairman, Charles Webb, would be our spokesman today, but he had another official engagement; he is addressing our practitioners today at their annual convention, which we think evidences the fact that we get along pretty well with our bar, sir. Our practitioners and the Commission are on very friendly terms. That engagement, of course, was made before these hearings were scheduled.

Senator LONG. We understand. We certainly appreciate the presence of two Commissioners here today.

Mr. WALRATH. We requested the privilege of a personal appearance, Mr. Chairman, mainly to emphasize the extreme importance with which we view some of the major provisions of S. 1336 and simply to highlight the disastrous impact—though I am sure inadvertent—which some of these would have on our hard-earned progress in coping with our annually increasing caseload.

Mr. Chairman, when you as the chairman of this subcommittee in 1963, and I, then the Chairman of the Commission, last reviewed the Commission's procedures in case handling, we were both concerned with the number of cases that were on file with us at any given time. You strongly urged us, as I recall it, to redouble all our efforts and to explore every possible way to eliminate roadblocks; increase our output; and decrease our average case time. We have done just that, to a great extent, because Congress has recognized our problems and has given us help in various ways.

In the intervening 2 years the Commission has, without denying due process to anyone, increased its annual disposition of cases 25.2 percent (from 7,902 in fiscal year 1962 to 9,892 in fiscal 1964)—

Senator LONG. Certainly you and the Commission and the staff are to be complimented for this increase. The delay was really a denial of justice to our citizens and this is a formidable increase.

Mr. WALRATH. At the same time that we were doing this, we have substantially reduced the time in processing normal cases. This we have done by utilizing the legal flexibility presently available under the Administrative Procedure Act and the Interstate Commerce Act, notably section 17 of the latter. Meanwhile, the filing of new formal cases has been increasing even beyond our budgeted estimates, but I am happy to report to you that so far we are avoiding accumulation of backlogs—in the normal sense of the word.

It is because certain of the requirements of S. 1336, which we have discussed in detail in our written comments transmitted to the committee on May 12, 1965, would deprive our Commission of these tools of expedition that we must appear in opposition to those changes.

We recognize that S. 1336 represents the sincere efforts of your draftsmen to produce a workable bill; certainly much of it is an improvement over previous drafts. We trust that by inviting the committee's attention to the problems it would create for us, serious damage to our accepted procedures can be avoided.

Mr. Chairman, when I say presently accepted procedures, I am not aware of any responsible complaint of any citizen or bar that due process is being denied to anybody because of expedition of our due process procedures.

In brief, Mr. Chairman, we are vitally concerned with four major areas of proposed change:

(1) The provisions in the public information section of the bill which would establish a rigid indexing requirement and would require compliance with demands for records which, without some further clarification, could be unreasonable demands;

(2) The infusion of costly and delay-producing judicialized hearing and appellate procedures into the Commission's present, comparatively simple, case-processing technique;

(3) The imposition of stringent separation-of-functions requirements in ratemaking, and in all merger and licensing proceedings; and

(4) The shifting of decisional responsibility from the duly appointed agency members to hearing officers.

As I have said earlier, the detailed reasons for our concern are contained in our formal communication of May 12, 1965, and that letter has been unanimously approved by the Commission. If it has not already been incorporated in your record I request that it be received at this point.

With your permission at this point I will illustrate the four major areas of concern outlined above.

As you know, because of our heavy caseload and because many of our cases are not of precedent value, we have indexed upon a selective basis. However, answering a question Mr. Fensterwald, I believe, asked a short while ago of another witness, I want to point out that every one of our decisions go on the press table. They are published in that sense. None of our orders are buried in the file. They are all available for anyone who asks for them. But with nearly 10,000 formal cases decided annually the indexing provision—I believe it is in 3(b) of S. 1336—would present us with an almost impossible task.

Senator LONG. Does the bar or do interested parties have any difficulty in securing various rulings in order to determine questions that may have been set by you?

Mr. WALRATH. No, Mr. Chairman. As you know, before becoming a member of the Commission, I practiced before the Commission, and, even in those days, there was no problem in obtaining the information needed. Also, there are at least two very capable servicing groups. Commerce Clearing House has access to all of our cases, and publishes digests of them. Another reliable service is the Hawkins.

Digest which publishes on a weekly basis. It indexes, cites from, and categorizes all of our cases, even those decisions which are not to be printed in bound volumes of our reports. In addition, the ICC Practitioners Journal, which publishes once a month, has a very workable, very fine index.

Mr. FENSTERWALD. Mr. Walrath, would it be feasible to amend this section to require indexing where there are not such services available, but to permit the substitution of a service of this type with a statutory requirement?

Mr. WALRATH. I am not reluctant to answer, but I am not quite sure of the matters or areas you are talking about.

Mr. FENSTERWALD. There are many agencies which do not have an indexing system or where there is no professional service like CCH to cover it. I was wondering whether it would be feasible for us to draft a provision which would require those agencies to index but would eliminate agencies like the ICC where those interested have material available and have an index available in another form.

Mr. WALRATH. I think the answer to your question is "Yes." Perhaps, if you needed it, we could even offer some experienced help in that respect. Frankly, I had not thought of the situation at other agencies, Mr. Fensterwald, but I know how available information it at our Commission. That is why we were concerned with what would appear to be an inflexible indexing requirement.

I might add that the Commission itself maintains an index which we make available to the public.

But of necessity this index is on a selected basis. It is contained in the back portion of each volume of our printed reports.

But to answer your earlier question, the Commission certainly would not oppose section 3(b) of the bill if its application were limited to agencies which have no indexing system or whose decisions are not otherwise indexed by responsible publications.

Mr. FENSTERWALD. Well, we do have in another section of this bill a provision whereby certain material can be incorporated by reference into the Federal Register rather than published there if the material is generally available to interested persons. I think we could do something of the same thing with respect to indexing and that might get us over some of the problems in this area.

Mr. WALRATH. Yes; I did not mean to overly emphasize this matter as related to the other points here, but it would present a problem to us.

Section 3(c) of the bill which requires that all agency records be made available to any person could be disastrous to us in view of the tremendous volume and diversity of our records. I am aware that section 3(e) excepts from that requirement "interagency and intra-agency memoranda or letters dealing solely with matters of law or policy." Almost every internal memorandum that I might send to Commissioner Goff or he to me or staff to us in the course of a decisional process will necessarily not only deal with law and policy, usually, but it will necessarily deal with facts in issue. If those memorandums were to be considered not within the exception and therefore available to the public, the result would be harmful to us. It would stifle the free interchange of views between us in the decisional process, which exchanges even courts have recognized are not for

public consumption. Also, the release of such internal memorandums might prematurely disclose the trend of thinking at the Commission on matters which affect large interests, for example, a big merger or rate case. I shall not go into further ramifications of section 3(e) unless you have questions. But the exception in 3(e) simply is not broad enough to protect from public disclosure matters which we believe should be privileged.

Our second area of concern is that the bill imposes stringent separation of functions requirements which, for the first time, would apply to all of our ratemaking and all our merger and licensing cases. That result comes about in a rather indirect fashion.

The bill would change the present definitions of adjudication and rulemaking, broadening adjudication and narrowing rulemaking. We have no objection to that action per se. But the separation-of-functions provision begins to apply in areas where it did not apply before.

Let me say quickly that we are not opposed to application of the separation-of-functions provision in the areas where traditionally it is intended to apply. For example, our enforcement arm, the Bureau of Inquiry and Compliance, is frequently a party in formal cases before us. That Bureau files exceptions and participates in oral argument. It would be unthinkable that we should consult with them in the decisional process. That is very clear. I know that is the type of thing the bill is intended to prevent.

On the other hand, we not only have but need expert professional staff, for example, in the areas of economics and accounting. But the language of section 5(a)(6), because of the new definitions, would mean that a hearing officer or an appeal board, no matter what the complexity of the financial or accounting question concerned, simply could not talk to anyone in the Commission for aid and assistance. That is what our specialists are there for. For example, under the bill a hearing officer could not even take a balance sheet that might have some account numbers that did not seem to jibe with our requirements to the Bureau of Accounts and ask if it was correct. Apparently, the separation of functions provision would require that he solve this problem on his own.

That is just one illustration of the problems the provision would create. We realize that under the bill agency members, Commissioners, would have ready access to those sources, but it seems clear to us that at every level of the decisional process, the expertise of specialists should be available provided they have not engaged in advocating functions or played an investigatory or prosecuting role in the case. We think that is a very important point. Application of the separation-of-functions provision as proposed in the bill would slow our processes down. It would hurt the quality of our work.

Now, the third point we want to make, a vital point, is that subsections (3), (5), and (6) of section 5(a), as well as other provisions of the bill, including section 8—all combined together, as discussed in detail in our letter of May 12, would produce an infusion of costly delay-producing judicialized hearing and appellate procedures into the Commission's present, comparatively simple case-processing techniques. These techniques have made it possible for us to dispose of a

tremendous volume of formal cases each year. The reasons for our objections are developed in some detail in our letter, Mr. Chairman.

Our fourth point concerns the shifting of decisional responsibility from the duly appointed agency members to hearing officers which would occur under section 8, section 7(b)(6), section 8(c)(1), and 8(c)(2) of the bill. All of those sections have a bearing on the problem that would be created for us.

I shall mention just one or two provisions as an example. Let us take section 7(b)(6), which together with 5(a)(3) would authorize the hearing officer to schedule and conduct prehearing conferences, apparently with no regard to the published rules of our agency or our practice. Now, there is nothing inherently wrong with that. We believe in prehearing conferences. We believe in any method of obtaining a less expensive and more expeditious trial of the issues that have to be tried. We use prehearing conferences. The point here is that when we are dealing with 10,000-plus cases a year, and where an examiner's itinerary has to be made up carefully because he may be going to the State of Washington or to Texas or to Missouri or anywhere else, to conduct a series of hearings for the convenience of parties, he is not aware of the administrative problems encountered in scheduling hearings on our total volume of cases. The only way these can be scheduled properly is by either the Bureau Director to which he is attached, or the chief hearing examiner under whom he works. Yet this section as it is now written would authorize him, the hearing officer himself, to schedule these matters. It would slow us down, make him unavailable for other emergency matters. It just could not fail to hurt the progress of our work.

Now, I will omit other difficulties which we have set forth in detail in our letter.

Well, perhaps I should not, because this gets right to the heart of our objection. I know this is not intended. But under section 8(c)(1), by the bill, a hearing officer's findings or conclusions of material fact would be subject to exceptions by the parties only on the ground that they are "clearly erroneous." That sounds very good. It is the power that you would expect to be given a trial judge if he is deciding cases at law. But we submit that no such weight should attach to the finding of a single hearing officer when what is involved is the highly competitive and complicated consequences of, say, one of the great railroad mergers. If the Commission, the members, of which are appointed by the President and confirmed by the Senate, cannot look again at the facts involved and the economic ramifications—the competitive ramifications, in such cases—if we have to accept his balancing of the testimony pro and con—then we are not able to discharge our responsibility as an agency of the Congress. It seems just that dangerous to us.

Again, under the draft bill, we could review the decision of hearing officers or of the employees appeal board only on legal or policy grounds in the absence of exceptions by the parties. Now, it is not often that we on our own motion stay the progress of cases. The recommended report of our examiners ordinarily becomes the final order of the Commission unless exceptions are filed or unless we of our own motion issue a stay order. But section 8(c)(4) would take away from us the

right to stay the cause except on legal or policy grounds. We think this provision unduly restricts the power of the agency itself to be accountable for uniformity of administration.

We are a little puzzled and concerned with section 8(c) (2), which would provide that at the option of a party exceptions to the hearing officer's decision may be addressed to the "agency" rather than to an "agency appeal board." This would appear to mean that the party himself could determine whether the entire agency would hear a case or whether it would go through the normal channels of an appeal board, whereas in our effort to expedite cases, we have limited the right of appeal to the entire Commission to cases involving issues of general transportation importance.

Mr. FENSTERWALD. Are you aware that the provisions here were put in specifically for the ICC which would exempt from section 8 those agencies that have by statute a special appeals procedure?

Mr. WALRATH. Mr. Fensterwald, I am aware of that intention. If that is the construction of the committee and it is clear in the legislative history, I withdraw any objection.

Mr. FENSTERWALD. It was put in specifically for the ICC and several other agencies that claim they have very excellent and workable procedures. If it is not clear in the record at this point that that is the intent, we had better have some language to make it clear. I can see the difficulties this causes and many of the complaints about the act seem to stem from a lack of mutual understanding as to the meaning of the language. I thought it was clear in the comparative printing at the bottom of page 36—

Mr. WALRATH. I had intended to say to you that we assumed that that was the purpose of the exception, but arguments might arise from the language used unless it were made clear in the record that the exception was intended not to deprive us of the procedures available under section 17 of the Interstate Commerce Act.

Senator LONG. I am sure that was the intention of the committee.

Mr. WALRATH. We were uncertain whether the exception applied only to the first sentence of section 8(c) (2) or whether it applied all the way down the line.

Senator LONG. So there can be no mistake on the matter, let me ask Mr. Fensterwald to state it definitely in the record now as to what the committee's intention was.

Mr. FENSTERWALD. It is our intention to exempt from the provision, from the appeal machinery set up in section 8, those agencies which by statute have another appeals procedure provided. If that is not clear, we will take another look at it and go over the language carefully. If you have a suggestion to make later on or if counsel has a suggestion to make later in that respect, that will be appreciated.

Mr. WALRATH. Well, we will look at it, Mr. Fensterwald. But at the moment, it seems to me that what you and Senator Long have just said removes our concern about that. We will check it.

Senator LONG. Mr. Kennedy has another appointment that he is late for now. I think he has a question or two he would like to ask at this point.

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. Walrath, there are two points in the Commission's letter of May 12, two problems you have with the bill, which certainly did not arise

out of inadvertence, because the bill that was introduced at the last Congress provided to the contrary these provisions. Reading your letter, I might suggest that you comment a little on your reasons why you prefer them. The two are the fact that in the modified procedure, the present bill would require the case to be decided by a hearing officer before the Commission or an employee board could decide it. The objection was raised through that earlier provision that there should be a hearing officer making these decisions even in the modified procedure.

The second point, which is somewhat tied to it because it relates to the modified procedure or the abridged procedure, is that the present bill provides that it can be used only by the consent of the parties and, as you point out or the Commission points out in the letter of May 12, sometimes it may be desirable to impose the abridged or modified procedure, even where the parties do not consent. I think those are two very important points, because in each case, they go to speeding up the work of an agency. Perhaps you would like to give a more full explanation of why you prefer it the other way.

Mr. WALRATH. Yes; well, two simple illustrations would be in the areas of our suspension work and the handling of rate matters. As you know, by statute, the period during which we can suspend the effectiveness of a rate pending investigation is limited to 7 months. Some 2,000 suspension cases are handled each year. That is a rough figure, but it is approximately that. Of those 2,000, 95 percent of them are handled by our modified procedure, simply because it is the only way we have of meeting that 7-month deadline. If we have not been able to complete our action within that period, then the rate, no matter how bad it may be, may go into effect. We can't prevent it from then becoming effective. In fact, there are decisions which indicate that even a court has no power to stay the effectiveness of a rate beyond the 7-month period.

Mr. KENNEDY. This is, of course, not a final decision in the case, but a sort of interlocutory suspension until you go through with the full proceeding, is that right?

Mr. WALRATH. The suspension action must take place within 30 days after a rate is filed, but by the time the request reaches the Commission level, we have only 10 days in which to make the decision whether to suspend. The 7-month period runs from the day on which the tariff would have become effective. Some of the proceedings which follow suspension are very complicated and in those cases an oral hearing may be desirable. But even in the simpler cases, it taxes our ability to get all the evidence in through submission of written affidavits—modified procedure—and give it effective and conscientious study. If each case had to be handled on the hearing officer level and he had to conduct a hearing and prepare an intermediate report, much time would be consumed. Then under our rules of practice, 30 days are permitted after services of the officer's report for the filing exceptions, and 20 days for replies to exceptions. By that time, we would frequently be beyond the 7-month period, and this even before the case has reached the Commission or our review board level.

Mr. KENNEDY. But the fact that the Commission suspends the rate does not mean that after the hearing process is completed, it might not authorize the rate?

Mr. WALRATH. Oh, no.

Mr. KENNEDY. In other words, it is an interlocutory type of situation?

Mr. WALRATH. That is correct.

Mr. KENNEDY. You could argue that under those conditions, it might be proper to use agency personnel other than hearing examiners in order to speed that process along.

Mr. WALRATH. It is my understanding we are not required to use hearing examiners in this type of case.

I have another example, Mr. Kennedy. It is one that does not fall in the rate category. Under section 13a(1) of the act, a railroad is privileged, since 1958 I believe, to file a simple 30-day notice of intent to discontinue a passenger train between interstate points if the railroad itself thinks that there is no public need for the train or that its operation is an undue burden on interstate commerce. On the filing of such a notice, we have a limited right to suspend the effective date of the proposed discontinuance for a period of 4 months. That actually does go to hearing. If we suspend, the case is assigned to a hearing officer and is immediately scheduled for formal public hearing.

From experience I know that many of these cases involve very vital issues. Sometimes we send a hearing officer to 13 or more points served by the train to take testimony from local users who otherwise would find it very inconvenient to come to Washington, D.C. These hearings consume a great deal of the 4-month period. I think that these train discrimination cases are a clear example of where, if we had to wait for an intermediate report from the examiner, we simply could not make an administratively final determination within the 4-month deadline. As a result, the train would be discontinued and the public would have lost its use, even though on the merits of the case we might find that it should have been continued.

Mr. KENNEDY. In that situation, all the hearing officer does is take evidence?

Mr. WALRATH. He takes evidence and analyzes it; frequently we ask him to give us a written report of what he has heard. Of course, the complete record of the proceeding is before the Finance Division of the Commission consisting of three Commissioners. The Division acts initially on these matters.

Mr. KENNEDY. You have the Commission in both situations—one a situation where in the present day you are using nonhearing examiners to decide whether or not there should be this immediate suspension, which would then set the case for a hearing.

Mr. WALRATH. Usually, the determination of whether a rate should be suspended or is made by a board and appeals are certified directly to a Division of the Commission. So it is made on either a staff board level or a Division level. In the first instance—

Mr. KENNEDY. Then you also have the situation where a hearing examiner acts just as a taker of evidence?

Mr. WALRATH. Yes.

Mr. KENNEDY. Now, on the second point as to whether you should be able to require the use of abridged procedure, you feel that is important, if the parties do not consent?

Mr. WALRATH. Certainly. In every rate case—in the rate area, there usually would be some party who would be advantaged by delay and who would not consent to a shortened or modified procedure.

Mr. KENNEDY. Thank you very much, Mr. Walrath.

Mr. WALRATH. Thank you, Mr. Kennedy.

Senator LONG. Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. On that ability to compel a shortened procedure, do you have that right by statute or by rule?

Mr. WALRATH. Let me ask the general counsel to give you the technical answer to your question, Mr. Fensterwald.

Mr. GINNANE. We do it with an eye to present section 7 under the present Administrative Procedure Act on the right to cross examination. If a party demonstrates that there are issues of fact on which he needs the right to cross examine, an oral hearing is provided. The Commission makes the judgment as to whether the parties have made a showing that they need the right to cross examine. Most carriers accept the necessity for this procedure. Only one major carrier has a policy of consistently bucking that procedure. Everybody else seems to accept its general necessity and propriety.

Mr. FENSTERWALD. Thank you.

As you know, the provision, we had the reverse provision in 1663. There was such a howl of pain from the bar that we reversed course and took it out of 1336. But we shall give further consideration to the mandatory provision when we rework the bill after these hearings.

Mr. GINNANE. The subcommittee might find it helpful to get the views of lawyers who appear in Commission proceedings and get their evaluation as to how this modified procedure works.

Mr. FENSTERWALD. Would the ICC practitioners be able to supply us with a statement if we asked.

Mr. GINNANE. Yes; many of their members are thoroughly familiar with this procedure and are well able to supply a statement.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Commissioner, I interrupted you a moment ago and I did not know if you were through.

Mr. WALRATH. Almost, Mr. Chairman, and I did not mean to take so much of your time.

I wanted to make specific reference to our communication to your committee, Mr. Chairman, which represents the unanimous position of the Commission on these points I have merely touched upon. It is dated May 12, 1965. I am sure you have copies and at this time I request that it be incorporated in the record.

Senator LONG. It will without objection be printed in the record.

(The information referred to follows:)

MAY 12, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN EASTLAND: In response to your request of March 24, 1965, for the Commission's comments on S. 1336, introduced by Senator Dirksen (for himself and Senator Long of Missouri), "To amend the Administrative Procedure Act. and for other purposes," I am authorized to submit the following comments in its behalf:

S. 1336 is a better bill in some respects than S. 1663 introduced in the 88th Congress. However, we must oppose S. 1336 for essentially the same reasons which compelled us to oppose S. 1663. Broadly speaking, the objectionable aspects of S. 1336 are as follows: (1) The imposition of stringent separation-of-functions requirements in ratemaking, and in all merger and licensing proceedings, (2) the public information section of the bill that would allow anyone to

harass the Commission by demanding to see "all its record," (3) the unneeded infusion of delay-producing judicialized hearing and appellate procedures into the Commission's present, comparatively simple, case-processing techniques, and (4) the shifting of decisional responsibility from the duly appointed agency members to hearing examiners.

The number of formal cases, particularly applications for operating authorities, has continued to rise in gear with the marked expansion in the national economy. Thus, more than 2,000 operating rights applications alone have been received by the Commission in the first 3.5 months of this year. And this vast workload can hardly be processed expeditiously and efficiently under the highly judicialized case-processing procedures embraced in S. 1336. As a matter of fact, and in order for the Commission to keep abreast of the present upward trend of new filings, we have embarked upon a study to ascertain whether our present procedures are even now judicialized beyond the point really necessary and desirable for the licensing of truck and bus operations. To be effective, regulation must not only be fair and impartial, but also swift and sure. S. 1336, therefore, seems to be diametrically opposed to effective regulation.

As stated in our comments of July 22, 1964, on the revised version of S. 1663: "But, in our judgment the basic infirmity of the proposed measure lies in the fact that, in rewriting the Administrative Procedure Act, it ignores the individuality of the tasks assigned to each administrative agency, and attempts to force all such agencies and their procedures into a single unyielding mold. Not only will this judicialized mold encumber this agency with burdensome and delay-producing procedures not suited to its administrative and regulatory processes, but also the unnecessary detail with which the subject legislation is drafted will go a long way toward nullifying at least one of the advantages of an independent regulatory agency—the ability to adapt its decision process to continuing changes in the dynamic industries which it regulates.

A mechanism has become available which is designed for the effective consideration and solution of the individual and collective problems of the Federal agencies. We refer, of course, to Public Law 88-499, effective August 30, 1964, creating a permanent Administrative Conference of the United States. We firmly believe that the best approach to improving the administrative process is the one already established by Congress—the Administrative Conference Act, which by its terms is designed to "* * * find solutions to complex problems and achieve substantial progress in improving the effectiveness of administrative procedure."

Our comments and objections to specific provisions of the bill are set forth in the order in which they appear in the proposed legislation.

DEFINITIONS

Sections 2(c) and 2(d) of the bill would change the definitions of "rule-making" and "adjudication." We have no objection to the new definitions if section 5(a)(6) of the bill is amended as hereinafter suggested.

PUBLIC INFORMATION

Section 3(a) of the bill requires publication in the Federal Register of "statements of general policy or interpretations of general applicability," but deletes the qualifying phrase of the Administrative Procedure Act, "for the guidance of the public." Similarly, section 3(b) requires an agency to make staff manuals and instructions available for public inspection if they "affect any member of the public." This latter language, coupled with the omission of the phrase "for the guidance of the public," raises insurmountable problems over whether particular staff instructions must be made public.

Section 3(b) of the bill would provide that, "Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to each final order, opinion, rule, statement of policy, and interpretation of general applicability." The section would further provide that, "No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted, or promulgated after the effective date of this act may be relied upon, used or cited as precedent by any agency against any private party unless it has been indexed * * *."

We join in the committee's desire to make available an ideally current index of all reports, orders, and other public papers, but due to the great expense of such a luxury the Commission has produced an index on only a selective basis. We, of course, concede that our index is not perfect, and probably never can be. Nevertheless, for budgetary reasons we believe that indexing must be continued on only a selective basis. Moreover, there is always a timelag between the publication of decisions and their indexing, and there has sometimes been a similar lag between the need to rely on a particular case and its publication.

The standards of a "current" index which provides "identifying information" are also too vague in the bill to serve as any real guides. For example, as we asked regarding S. 1663, (1) Since rules of general applicability already are indicated and indexed in the Code of Federal Regulations, is some other or duplicate index contemplated by the amendment in question? (2) What is the maximum period after decision within which the index would be considered current? (3) Would the index contained at the end of each printed volume of ICC decisions be considered a "current" index? Other questions for consideration concern the construction to be placed on the expression "identifying information." The Commission has a great variety of matters on which it takes actions and the indexes in connection therewith vary considerably in amount of separate record information which is maintained.

We find the penalty for failure to conform to these collateral standards for indexing particularly objectionable, for nonconformance could operate to nullify an otherwise lawful opinion or order. Professors Gellhorn and Frankel rightly noted during the hearings on S. 1663 that these penalties operate, "regardless of the wastefulness of ignoring what has previously been done, and regardless of the risk that nonutilization of unindexed precedents may produce uneven application of law." We agree with these gentlemen that the bill is here using "far too heavy an instrument to smooth out an imperfection that probably causes very little real trouble." We strongly urge the deletion of the rigid indexing requirement.

Section 3(c) of the bill would provide, subject to court enforcement and potential punishment of "the responsible officers for contempt," that, "Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person." Section 3(e) would exempt, among other things, internal personnel rules, practices, and files, matter exempted by statute, confidential information obtained from the carriers, interagency or intraagency memorandums or letters "dealing solely with matters of law or policy," and "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."

Since the word "records" in section 3(c) is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions. With the possibility of such an all-inclusive meaning, it is essential to the public interest that certain categories of documents be clearly exempted from such a general disclosure requirement.

The exemption of interagency or intraagency memorandums "dealing solely with matters of law or policy" is not broad enough to protect from disclosure all internal communications between members of the Commission and its staff in the internal decisional process. Such memorandums frequently and necessarily contain a discussion of the facts in particular cases. It is essential to proper adjudication and to the frank exchange of views within an agency that all internal memorandums be withheld from disclosure. As a U.S. District Court for the Eastern District of Michigan recently stated, "all of the internal workings of the agency are privileged, just as memorandums between a judge and his clerk"; and all such memorandums, moreover, are "irrelevant and inadmissible" in the judicial review of agency action.¹ We urge that the exemption be amended to read "all intraagency or interagency memorandums or letters." Similarly memorandums concerning budgetary and fiscal matters should be exempted specifically.

The present bill poses the question whether the Congress desires to place upon agencies the expensive burden of making available to every person who asks, the large masses of miscellaneous materials which would not be covered by the numbered exemptions in section 3(e). For example, every agency has extensive general correspondence files. At the request of a student, for example, the Com-

¹ *Walled Lake Door Co. v. United States*, 31 F.R.D. 258 (1962).

mission would be required to make available all of its correspondence with the chairman of a congressional committee or a large railroad company over a 10-year period. The costs to the Federal Government of making such material available might be substantial and would not be justified by any public benefit.

We object to the provisions of section 3(c) for judicial enforcement of demands for records. We believe a great volume of litigation would result under the proposed language. Accordingly, we suggest that the bill be amended to empower a court, in its discretion, to require a complainant to justify his demands.

ADJUDICATION

1. *Prehearing conference.*—We do not favor the provision of section 5(a)(3) of the bill which grants hearing examiners unlimited authority to assign and schedule prehearing conferences. Orderly administration of our caseload, and the efficient scheduling of hearing examiners' itineraries throughout the country requires the utmost coordination of our personnel. Independent decisions of more than 100 hearing examiners as to when they will hold prehearing conferences would cause considerable confusion and delay. Our present practice is for the Bureau Director or chief examiner to assign cases for prehearing conference in the interest of avoiding the practical administrative difficulties mentioned above.

2. *Modified hearing procedure.*—Section 5(a)(5) of the bill would authorize agencies to adopt abridged procedures without regard to the requirements of sections 5 and 7 of the bill. However, it would appear that such abridged procedures may be used only "by consent of the parties" and that they must include a presiding officers' report which would be subject to the appellate procedures of section 8. Particularly in rate cases, the Commission has utilized successfully a modified procedure in which the evidence is submitted in written form and the case is decided by the Commission or an employee board without a hearing officer's decision. Our existing modified procedure would be rendered largely useless in expediting cases if it could be employed only by consent of parties and if it must include a hearing officer's decision.

Section 5(a)(5) provides an abridged procedure where the decision is required to be made on the record after opportunity for hearing, but such procedure is described as "for use by consent of the parties." First, does section 5(a)(5) prescribe the exclusive abridged procedures that any agency may use? Second, may abridged procedures be ordered by the agency under section 5(a)(5) in particular adjudications irrespective of the consent of the parties thereto? If section 5(a)(5) is exclusive, and the agency may not require the parties under such section to follow abridged procedures, we anticipate that the section will go far to destroy the present fair and expeditious modified procedures of this Commission in rate cases. If any party may demand an oral hearing in any rates proceeding this section of S. 1336 will simply create new opportunities for some parties to delay the decision of proceedings, a matter of no small moment where after 7 months newly proposed rates may be put into effect.

3. *Separation of functions.*—Section 5(a)(6) would make significant changes in the present separation of functions requirements of section 5(c) of the Administrative Procedure Act. Under section 5(c) of the act, hearing officers and members of the agency may consult (as distinguished from relying upon extra-record information) with employees of the agency who have not engaged in the performance of investigative or prosecuting functions in the particular case or in a factually related case. This restriction in the present section 5(c) does not apply to rulemaking, as broadly defined in the present section 2(c), or in determining applications for initial licenses, etc.

Section 5(a)(6) of the revised bill would change both the application and scope of the separation of functions requirements. By reason of the proposed narrowing of the definition of "rulemaking" and broadening of the definition of "adjudication," as well as the elimination of the exemptions in the last sentence of the present section 5(c), the separation of functions requirements of section 5(a)(6) would be made applicable to practically all of the formal proceedings conducted by this Commission.

We favor the separation of functions provisions of section 5(a)(6)(A) if the Commission would not be precluded from consulting freely with the staff of its General Counsel's office, which engages in no investigating or prosecution functions and which advocates the agency position only in court. To preclude any

such interpretation, we recommend that the words "before the agency," be inserted after the word, "case" on line 24, page 14 of the bill.

Section 5(a)(6)(B) would prohibit a hearing examiner from consulting "with any person or agency on any fact in issue unless upon notice and opportunity for all parties to participate." If an examiner of the Interstate Commerce Commission has a case involving a problem of cost accounting, he ought to be able to ask a Commission cost accountant for advice and assistance. Also, an examiner should be allowed to talk to another examiner or the chief hearing examiner about the issues of a complicated case.

Discussion of a case which must avoid "any fact in issue" would not be meaningful. Section 5(a)(6)(B) fails to recognize that a hearing officer may need assistance. The necessity for staff assistance for hearing examiners is particularly evident in the many rate cases which involve complicated cost of service questions and in which more and more of the cost evidence is being presented in automated form. We urge that this provision be amended to allow a hearing officer to consult with any agency employee who has not performed investigatory or prosecuting functions in that or a factually related case and who has not participated in the preparation or presentation of any position advocated by the agency's staff in such proceedings.

The separation of functions requirements of the bill would preclude an examiner or an employee review board from consulting with any person. In contrast the bill permits the Commission or a division in reviewing examiner and board decisions to draw freely upon the specialized staff assistance denied to the examiner and the board. We believe that sound administration and fair procedures are better served if the views of the specialized staff are reflected in the decisional process at the earliest possible stage.

As indicated, the new definitions of "rulemaking" and "adjudication" in the bill would subject many of the Commission's formal proceedings to separation of functions requirements. We are inclined to believe that this shift would have no harmful result if the separation of functions requirements are defined so as to prohibit only participation in the decisional process of agency employees who have performed investigating or prosecuting functions in that or a factually related case. However, if the separation of functions requirements are not so restricted, then we would urge that those Commission proceedings which presently are defined as rulemaking and initial licensing retain their exemption from the separation of functions requirements.

Section 5(b) of the bill would give an agency considerable discretion in devising reasonable procedures to dispose of cases of adjudication not governed by section 5(a). This provision assumes, however, that there can be no valid adjudication in any proceeding unless a hearing officer has rendered an intermediate decision which can be appealed to the agency. Inherent in section 5(b) is the erroneous assumption that agency heads, appointed by the President and confirmed by the Senate, are not competent to decide any case of adjudication until there has first been some kind of intermediate decision by a hearing examiner or other subordinate hearing officer.

Moreover, many of our proceedings often do not involve controversies over evidentiary facts. Where such controversies exist, we agree that an initial decision by the presiding officer is generally desirable. However, where the determination of the controverted issue must be made primarily in the light of the broad standards set forth in the national transportation policy, or where the need for expedition is essential, the agency should be allowed to omit an intermediate report by the hearing officer.

ANCILLARY MATTERS

Subpenas.—Section 6(e) of the bill would require agencies to issue subpenas in adjudicatory proceedings without a prior "showing of general relevance and reasonable scope" as now provided in section 6(c) of the Administrative Procedure Act. Thus, all types of subpenas, including those requiring the production of records, books, papers, and other documents, would automatically issue in such proceedings. In our judgment this procedure would provide a potent weapon for delay and harassment of the parties. Significantly, the bill requires a reasonable showing before subpenas issue in rulemaking proceedings, and we see no reason for distinguishing adjudications. We know of no general dissatisfaction with the Commission's present rules governing the issuance of subpenas. These rules apply to all proceedings, and to the best of our knowledge,

have operated in the public interest and without impairing the processing of cases. Consequently, we recommend that proposed section 6(e) be changed so as to permit the agency to issue subpoenas in adjudications only upon a reasonable showing of relevance and scope of the evidence sought, as the section now provides with respect to rulemaking.

Computation of time.—We recommend that the language “Saturday, Sunday, holiday or half holiday” in section 6(g) be changed to read: “Saturday, Sunday or a legal holiday in the District of Columbia.”

The language of the bill would create uncertainty because holidays vary from State to State, and in fact, from city to city. Also, a holiday must be a legal one; otherwise there will be quibbling as to whether a religious holiday qualifies. A half holiday should be excluded from the count to avoid confusion.

Depositions and discovery.—We do not object to the requirement of section 6(h) that the agency adopt deposition and discovery rules, for we assume the section does not require the agency to make available the full gamut of judicial discovery regardless of the needs of parties practicing before it and the character of its proceedings.

Declaratory orders.—Section 6(k) states that “an agency shall act upon requests for declaratory orders.” It is not clear whether this changes the present requirement of section 5(d) of the APA that an “agency is authorized in its sound discretion * * * to issue a declaratory order.” We have no objection to the new provision if it requires the agency to decide whether or not it will grant a request for a declaratory order. We strongly object to the provision, however, if it is intended to require the agency to grant all requests for declaratory orders, whether or not one might appropriately issue in the circumstances of a particular case.

HEARINGS

Hearing powers.—Section 7(b) of the bill, like section 7(b) of the Administrative Procedure Act, relates to the powers of hearing officers. The introductory clause of section 7(b) of the act provides that “Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers” (etc.). The phrase “subject to the published rules of the agency” is intended to make clear the authority of the agency to decide policies and procedural rules which will govern the exercise of the enumerated powers by hearing officers, “Attorney General’s Manual on the Administrative Procedure Act,” page 75. Section 7(b) of the bill, however, deletes the quoted phrase, from which we infer that the bill intends to exempt hearing examiners from the procedural rules established by the agency. For example, while section 6(h) authorizes the agency to prescribe discovery procedures, section 7(b) (4) would allow examiners to require such discovery “as the ends of justice require”; apparently independently of agency discovery rules. The bill here misconceives the proper role of hearing examiners, who are employees of the agency, and not of another branch of Government. The proposed change in the bill would promote discord within the agency and uncertainty over the role of these employees vis-a-vis their employers.

Clause (8) of section 7(b) of the bill would add to the enumerated functions of presiding officers the power to “dispose of motions for summary decisions, motions for decisions on the pleadings or motions to dismiss.” In our opinion, any advantage which may be gained from applying these highly specialized judicial techniques at the hearing stage of our formal proceedings is far outweighed by the delay, administrative difficulties, and expense which would be incurred when, upon appeal, rulings on such motions are overruled. We believe that initial action in these areas should be reserved to the agencies; and, accordingly, we urge that this clause be deleted from the bill.

Evidence.—Section 7(c) of the bill further provides that “any presiding officer may, where the interest of any party will not be prejudiced thereby, require the submission of all or part of the evidence in written form.” The comparable section of S. 1663 granted this authority to the agency, not the presiding officer. The corresponding provision in section 7(c) of the Administrative Procedure Act is limited to rulemaking and determining claims for money or benefits or applications for initial licenses. The change proposed by S. 1663 would be helpful in expediting many administrative proceedings. The change now proposed by S. 1336 would create uncertainty over the agency’s control of its hearings, and could unduly delay the completion of a proceeding. We recommend the change in section 7(c) proposed in S. 1663.

DECISIONS

This Commission, pursuant to the provisions of section 17 of the Interstate Commerce Act, has established procedures for appealing from decisions of hearing officers and for the staying of hearing officers' decisions for review in the event no exceptions are filed. These procedures have been in effect for some time and, to the best of our knowledge, have not been found objectionable by the parties coming before the Commission.

Basic to all of these procedures is the right of any party to a decision by a board of employees to appeal to a panel or division of the Commission on the merits of a proceeding. In addition, our present appeal procedure also provides (1) that the parties may have the benefit of consideration by the entire Commission in cases involving issues of general transportation importance, and (2) that the entire Commission may recall any case from a division or a review board if it believes such action is warranted.

The effect of section 8 of the bill on the Commission's present appellate procedures is not clear. However, it would seem to impose a strict, inflexible and entirely new system of procedures for appeal from the hearing officer's decision. Section 8 of the bill, without any showing of unfairness or inadequacy in the Commission's procedures, would compel the Commission to abandon procedures proved sound by experience and would prevent the Commission from continuing to improve its appellate procedures in the light of new conditions.

General.—Section 8(a) of the Administrative Procedure Act generally provides that the presiding officer who heard the evidence will render a decision (variously referred to as "initial," "proposed," or "recommended") to which the parties may file exceptions. However, that section also provides that in rule-making or determining applications for initial licenses, the agency may omit this procedure "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." Section 8(a) of the bill would delete the quoted provision and provide that, "The same officers who preside at the reception of evidence shall make the decision except where such officers become unavailable to the agency."

Under section 15(7) and related provisions of the Interstate Commerce Act, the Commission is authorized to suspend proposed changes in carrier rates for periods not to exceed 7 months and to enter upon a hearing to determine the lawfulness of the proposed changes. If the proceeding is not concluded within the 7-month period, the Commission cannot prevent changes from becoming effective. Specific provisions also require the Commission to give preference to these proceedings and to decide them as speedily as possible. Under section 13a (1) the Commission may require the continuance of certain train service pending the determination of the lawfulness of the proposed discontinuance but not for a longer period than 4 months. The Commission has barely been able to meet these time limits by omitting the hearing officer's report. When a hearing officer's report is omitted in such cases, the parties are entitled under the Interstate Commerce Act and the Commission's rules to seek reconsideration. The present procedure thus preserves the substantial rights of parties, while much time is saved and confusion avoided where, as in the case of rate suspensions and interstate train discontinuances, statutory time limits are met.

Appeal and review.—Section 8(c) proposes two means of shifting the agency's decisional responsibility to hearing examiners. Section 8(c)(1) would limit the scope of agency review of an examiner's findings of fact to whether such findings were "clearly erroneous," and of conclusions of law to whether they were "erroneous." Similarly, section 8(c)(4) imposes new limitations on the agency's review of an examiner's decision on its own motion in the absence of exceptions from the parties. We strongly oppose any such shifting of the agency's decisional responsibility to hearing examiners.

Section 8(c)(1) of the bill would provide: "except for good cause shown, no exceptions by any party shall rely on any question of fact or law upon which the presiding officer had not been afforded an opportunity to pass. The appeal shall be limited to the questions raised by the exceptions." We oppose the provision for it would have the undesirable effect of turning our proceedings, which are conducted under the regulatory statute for the welfare of the public at large rather than individual private litigants, into purely adversary proceedings. The language of the bill to some extent would enable an excepting party, as a

procedural tactic, to control the scope of review of the record evidence by the agency charged by Congress with making the final decision. In addition, this technical limitation on the scope of review would provide a new means whereby parties desiring to delay the finality of a decision could do so by raising an issue wholly collateral to the merits of a proceeding; namely, whether a question determined by an agency or appeal board was in fact raised on exceptions.

Section 8(c)(2) provides that appeal boards shall be comprised of agency members, hearing examiners (other than the presiding officer), or both "except to the extent * * * that agency appellate procedures have been otherwise provided by Congress * * *." We wish to emphasize our understanding of the quoted exception as embracing the provisions of section 17 of the Interstate Commerce Act. Specifically, it is our view of section 8(c)(2) that it would permit the authorization of such duly designated members of employee boards, other than hearing examiners or agency members, as this Commission may choose pursuant to section 17.

Section 8(c)(2) would further provide that at the option of a party exceptions to the hearing officer's decision may be addressed to the "agency" rather than to an "agency appeal board." Without more, this would appear to mean that at the choice of a party exceptions must be considered by the entire Commission—rather than by a Division of the Commission or an employee review board. This would wholly undo the important action which we took in 1961, pursuant to section 17 of the Interstate Commerce Act, to limit the right to appeal to the entire Commission to cases involving issues of general transportation importance. Here again, however, we assume that the introductory exception to section 8(c)(2) is intended to preserve the flexible appellate procedures authorized by section 17 of the Interstate Commerce Act.

We recommend deletion of the requirement in section 8(c)(2), that, "Proceedings before the appeal board * * * shall include oral argument if requested by a party." In view of this Commission's caseload, it is not possible for Divisions of three members of the Commission, or other appeal boards, to hear oral argument in every case in which requests may be made.

Under the provisions of section 8(c)(4) of the bill, if a private party does not request the entire Commission to decide a case, it may nevertheless proceed to do so,

"* * * but only upon the ground that the decision or action may be contrary to law or agency policy, that the agency wishes to reconsider its policy, or that a novel question of policy has been presented. The agency shall state in such order the specific agency policy or novel question of policy involved. On such review the agency shall have all the power it would have if it were initially deciding the proceeding, provided that if the agency raises any issue of fact it deems material, the agency shall remand the case with instructions for further proceedings before the presiding officer."

The following observation of Professor Davis during the hearings on S. 1663 (p. 256) is relevant: "One of the most pernicious ideas on the loose in the realm of administrative law is the idea that someone on behalf of the agency should have power to commit the agency to a position that the agency actively opposes." The observation applies to section 8(c)(4) to the extent that particular proceedings would not meet the specified criteria for agency review, and to the extent the agency is foreclosed from deciding material issues of fact. The requirement that the agency remand issues of fact to the examiner would produce substantial and unnecessary delays in the disposition of many proceedings. The bill entirely overlooks that many proceedings before this Commission involve highly important questions of fact. For example, only an agency can properly decide as a final matter the important question of the competitive effect of a large merger. Yet, the bill would transfer this decision to a hearing examiner by limiting review of the fact question on exceptions to his recommended report to whether his decision was "clearly erroneous," and in the absence of exceptions by foreclosing review altogether on the agency's own motion. We submit that the entire membership of the Interstate Commerce Commission is and should be responsible for the administration of the Interstate Commerce Act and related statutes. Accordingly, we believe that it is of fundamental importance that the entire Commission retain the discretionary power to make the final decision in any case without the limitations and procedural restraints which would be imposed by section 8(c)(4) of the revised bill.

JUDICIAL REVIEW

The introductory clause to section 10 of the Administrative Procedure Act states that agency action is reviewable, "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." The introductory clause set forth in the bill reads: "Except as far as (1) statutes preclude judicial review or (2) judicial review of agency discretion is precluded by law." Since no substantive change in scope of judicial review seems intended, we urge the subcommittee to retain the present language of the Administrative Procedure Act in the interest of avoiding unnecessary litigation.

The first sentence of section 10(b) of the bill would provide:

"The district courts of the United States shall have (1) jurisdiction to review agency action reviewable under this act, except where a statute provides for judicial review in a specific court; and (2) jurisdiction to protect the other substantial rights of any person in an agency proceeding."

We urge the deletion of the second numbered clause because it would provide an opportunity for district court review of all kinds of preliminary, procedural or intermediate actions during the course of the agency proceeding. Such actions or issues should be reviewable only in the judicial review of the agency's final action. The stated purpose of the second clause is to avoid the construction that when a statute provides review in a specific court, the district court is without jurisdiction. It is said that such a construction would overrule the law of *Leedom v. Kyne* 358 U.S. 184 (1958), when such procedure is necessary." We believe the second clause of section 10(b) is far broader than *Leedom v. Kyne* which only sustained the jurisdiction of a district court to enjoin the National Labor Relations Board from exceeding its jurisdiction in a situation in which direct judicial review was not available.

CONCLUSION

We oppose the enactment of S. 1336 in its present form because it would preclude efficient handling of our large caseload. The strict rules proposed by the bill would destroy many of the procedures we have established after long years of trial and error. These procedures would be condemned without any reason for believing they are unfair or cumbersome. The proposed changes, like those in S. 1663 are not shown to offer any more impartial or speedy agency decisions. On the contrary, they offer an opportunity for some litigants to harass other parties and the agency with dilatory tactics. The bill, in general, is detrimental to the continuing development of fair administrative procedures to meet the needs of parties appearing before the Interstate Commerce Commission.

Sincerely yours,

CHARLES A. WEBB, *Chairman.*

Mr. WALRATH. That just about concludes my statement, except to say that we especially appreciate the fact that you have fitted us into this very tight schedule of yours. It is a privilege to be here and we hope that as the bill develops, if anything comes up that we can help you on, you will consult us.

Senator LONG. I have a question on S. 1668, the right of lawyers to practice before your Commission. Do you have any comment on that?

Mr. WALRATH. Frankly, I thought the Chairman was to be the witness today and I have not reviewed that bill. If I am correct, it pretty much accords with our practices. Any lawyer can appear before us. There is no need for any special qualification. We do have a \$10 filing fee, but that goes to the U.S. Treasury.

Senator LONG. You have no difficulty with lawyers being permitted to practice before you without a special examination being taken?

Mr. WALRATH. Oh, no. I think we either said or by silence in our letter of May 12 indicated that we have no objection to section 6(b) on page 17 of the draft bill.

Senator LONG. And the practice before your Commission is highly specialized, is it not?

Mr. WALRATH. Yes, sir; most of it is, I would say.

Senator LONG. The matters before your Commission where the parties are represented by attorneys represent very sizable amounts of money?

Mr. WALRATH. That is to a large extent correct, sir. There are many small cases, of course, but a substantial number of our cases have ramifications which involve the total economy of our country. That is true, sir.

Senator LONG. Do they come with the lawyer of their choice?

Mr. WALRATH. Sir?

Senator LONG. Do the parties before your Commission come with lawyers of their choice?

Mr. WALRATH. Entirely so, and if they have not been on our register before, we admit them for the purpose of that case upon request. There is no rule thrown in the way of any attorney who is admitted to practice in courts of his own State to appear before us.

Senator LONG. You do not have to check your record to see whether they filed their income tax return before you let them practice before you?

Mr. WALRATH. No, sir; we assume they are honorable.

Senator LONG. I think I have made my point of comparison with the other agency that I wanted to make.

Mr. Commissioner, thank you so much. We appreciate very much your appearing here before us today.

Mr. WALRATH. Thank you, sir.

Senator LONG. The next witness is Mr. Dan S. Bushnell, a practicing attorney of the city of Salt Lake, Utah.

Mr. Bushnell, will you come around, please, sir?

STATEMENT OF DAN S. BUSHNELL, SALT LAKE CITY, UTAH

Senator LONG. Mr. Bushnell, they have handed me your statement and I am already shocked, a statement of 45 pages in length. The Senate is going into session and time is running out. I would like to tell you that we shall put this statement in the record in its entirety. We are very happy to have you appear before us today and we shall put your statement in the record in its entirety, but I would like to ask that you summarize this and make it as brief as possible.

It would be very helpful to us if you would do that, because I have a number of other witnesses that I want to hear and we are going to run a little late today to try to finish with them.

Mr. BUSHNELL. Thank you, Mr. Chairman. I had this in mind after talking to Mr. Fensterwald and his suggesting that this procedure be followed. That is the reason why some of the things are included in the statement and others are exhibits.

Senator LONG. Without objection, your entire statement will be printed in the record.

Mr. BUSHNELL. The approach I would propose would have to be somewhat different. Rather than the approach based upon abstraction or academic discussions or that of authorities on administrative

practice, I do not intend to do that. Instead, I hope to bring to the attention of the committee the conduct of a particular agency which seems to point up the need for legislation of this nature. It is the SEC, and I do not want it to appear that I am using this committee as a sounding board to carry on a grudge fight with them. We are seriously interested in the legislation before this committee and feel that there are abuses which should be corrected and can be corrected by the proposed legislation.

During these last 4 years, I have appeared before hearing examiners of the SEC. There has been litigation in two U.S. district courts, an appeal to the Tenth Circuit Court of Appeals, and presently an appeal before the Ninth Circuit Court of Appeals, and another litigation before the District Court of the State of Utah. From this information, I feel that it would be most helpful to the committee if we could place it in a specific context. So as I have indicated, I do not want it to appear that I am just being unhappy with the SEC, but I think the committee can better understand our position if I take a moment to give the facts of the situation with reference to section 9(b) involving publicity.

The proposed wording says that: "Publicity issued to discredit or disparage" would be considered prejudicial prejudging. I submit that this is a good step toward the problem, a serious problem of publicity, but it is not sufficient. The reason I say that is based upon these actual trials that I have conducted involving this agency. It would place a burden upon the injured party to show that the publicity was issued for the purpose to disparage or discredit. Such a burden of proof cannot be sustained.

We have attempted in numerous cases to procure written documents and memorandums which would show the intent or the reason or the purpose. These are routinely refused by the court and equally routinely is the claim of privilege asserted by the agency. We have been denied the opportunity to take depositions of members of the staff or of the Commission to determine why, under the particular circumstances, they found that this publicity was necessary.

The distinction should be made, I believe, that we are not talking about muzzling the press, we are not talking about making things more secret. To the contrary, we would much rather take our chances with the press than the SEC and its type of releases, which, as Mr. Fensterwald has said, are commenced by starting the mimeograph machines working. Let me give the facts and basic under which these releases have arisen.

The Shasta Minerals & Chemical Co. filed a registration statement with the SEC in April 1961. After some 200 days of negotiation and attempting to comply completely with all of their requirements and without any complaint from any stockholder, without any complaints being the basis for an investigation, they stopped the effectiveness of the registration statement, or prevented it from becoming effective, and called for a hearing. But as a part of that hearing, they issued for "immediate release" a lengthy news release with the urgency normally tied in with a responsible Government agency which had these news interest-catching words, "antifraud provisions," "fraud and deceit," "false and misleading statements."

This news release, as could be suspected, received broad coverage over radio, television, and in the newspapers.

After an extensive hearing, involving the subpoenaing of some 50 witnesses, taking 1,576 pages of testimony, the submission of briefs, the arguing of this matter before the Commission, the matter was finally discontinued and they never made any determination on these charges.

Mr. FENSTERWALD. What kind of press release did they put out at that time?

Mr. BUSHNELL. It is one that they prepared themselves, and has typed on the top of it "for immediate release," and gives the date. Then they pass it out to the press.

Mr. FENSTERWALD. I am talking about when they get through with the case.

Mr. BUSHNELL. When they get through with the case, it was a routine entry and nothing came out on it.

Mr. FENSTERWALD. You mean they did not turn the mimeograph machines on?

Mr. BUSHNELL. They certainly did not. And in connection with two other cases, it was the same situation.

In connection with this public offering, the staff suggested that an independent underwriter be procured so that the company would not be in the position of selling its own stock. So a company called Keystone Securities was formed as a separate broker. Then, after this suspension hearing took place, this broker concluded as a responsible businessman, a civic leader in Salt Lake City, that he could not be affiliated with anything that was having this claim of "fraud" and "misleading statements" associated with it, so although he had not been in the business of a broker, and the statement made by SEC themselves would show there had only been about 24 transactions during a 7-month period, he filed an application for withdrawal. I submit the normal procedure would have let that go through without any consequence. To the contrary, the SEC said, "We want to make a test case out of this to determine whether an underwriter can be charged vicariously with any wrongdoing of the issuing company." And again, we had a blast in the newspapers, in the Wall Street Journal, where "manipulation and fraud," "false and misleading information," "fraud and deceit" were asserted. And they were not even charging this man with it except because of his relationship with the proposed issuer.

The third case involves a suit started in Hawaii. In Hawaii they proposed to take the deposition of a director of this company, one of these affiliated companies. The director said, "Fine, I'll make myself available at the office of the agency in San Francisco." They said, "That's fine, too, but Mr. Bushnell, attorney for the company, cannot represent you." He said, "I don't want to appear."

So they brought the action in the district court in Hawaii to compel him to appear with some other attorney other than myself. That was the sole issue before the court.

Senator LONG. Just a minute. Do I understand you to say that at a hearing before SEC, they would not permit this man to have an attorney of his choice represent him?

Mr. BUSHNELL. That is true. This matter of representation has been used to badger and try to coerce and intimidate this company

since they enacted the rule in March of 1964. And since then, they have been using it against this company as a threat.

Senator LONG. I understand there are representatives of the SEC here. I want them to furnish me the information as to why you say what you say is true, that they would not permit this man to be represented by you or whatever attorney he desired. I want to have that information before me after this hearing.

Mr. BUSHNELL. Thank you.

At the beginning of this hearing, though, in Hawaii, where the sole issue was what legal counsel could represent the man, again, the SEC, through their regional administrator, a Mr. Pennycamp, a man who has been in the department for a long period of time, proceeded to issue out another news release. The news release there again discussed the question of "illegal sales," "false and misleading statements," "fraud and deceit." Although they will attempt to exonerate themselves, Mr. Chairman, by saying the release they issued did not contain all this language, in my investigation and talking to the news reporters, they did not rely on the news release. Rather, I found, they handed the reporter the application that had been filed with the court, knowing full well that the repeating of these catchword phrases would be picked up by the press. The press practically ignored the true issue before the court.

I would like to take a few moments before I go back to these three propositions and just discuss how serious the law is in this situation. This procedure, we submit, is in conflict with fundamental due process, with the rules of practice and code of ethics adopted by SEC, with the policy of the Administrative Procedure Act, and the canon of ethics of the bar. Such conduct has received the censure and condemnation of the courts, legal commentators, and the press. But notwithstanding this, the SEC persists in such conduct.

Senator LONG. Mr. Bushnell, it is general practice, is it not, that any good newspaper man or reporter or any representative of any news media will generally use whatever information is furnished him? You are not making a charge that any newspaper man or representatives of the press misquoted anything handed them? They used what information they had? Your charge is against the SEC for furnishing them inflammatory or erroneous information?

Mr. BUSHNELL. Yes; let me carry this a step further. I talked to the reporter and he said, "I was concerned about this when it was handed to me. I took it to my city editor, and he said, 'It came from a responsible Government agency; print it.'"

The Administrative Procedure Act as now enacted did not expressly prohibit publicity used this way. It was assumed that maybe the legislative history would be sufficient to deter such conduct. That obviously is not the situation now. If the SEC or any of these agencies comes in and says, we'll police ourselves, you should not listen to that, because the present canon of ethics of the SEC says:

The power to investigate carries with it the power to defame and destroy.

It further says:

No public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law has been violated and that the public welfare demands it.

Yet in spite of these rules, they persist in this practice.

This was not just an agency matter that was involved in Hawaii, this was a matter before the U.S. district court. Mr. Pennycamp appeared there in the position of an attorney. I would say as an attorney, then, he should have been bound by the canon of ethics of the American Bar. These are set out in my statement, and I shall not go into it any further now.

The cases have consistently criticized this conduct. In a district court case, it says that the power of publicity could be used as an instrument of oppression and they ought not to use these things labeled as "believed to be true," which is what the SEC does.

In *Gilligan Will & Co. v. SEC*, the SEC was criticized by the circuit court, which said that they saw no necessity for press releases of the kind questioned therein.

There is another case involving the SEC, in which the judge said:

It is a well-recognized principle of administrative law, that investigations ought to be so conducted that harmful publicity will not be used in lieu of sanctions provided by law.

Professor Loss, who is the authority on securities laws and was a former counsel for the Commission, states that the decisions have not caused "the commission to discontinue its practice of issuing press releases which summarize the charges made when it initiates a revocation proceedings, or when a complaint for injunction is filed or an indictment is returned."

One of the law review commentators criticized the SEC for this. The Wall Street Journal had an editorial on July 19, 1963, entitled, "A Question of Irresponsibility." Part of it reads as follows:

One newspaper referred to it as a "scathing" indictment of the New York Stock Exchange. Another reported how the exchange's "abuses" had been assailed. A boldface headline said the exchange had been found "remiss." The radio breathlessly told breakfast listeners about the "serious inadequacies" found in the Nation's securities markets.

In checking into it, they found that this was nothing more than a memorandum to the staff of the Commission. The article said:

Tomorrow, or next day, the Commissioners may disclaim any responsibility for any particular idea or language—after, of course, all those snarl words have been emblazoned in headlines and shouted over the airwaves.

* * * it's no place either for a responsible Government body to fire off with much fanfare a report which has the coloration of being official but which is actually by underlings, responsible for nothing.

In these particular cases the U.S. district judge for the State of Utah involving these very parties and the people who are now conducting these investigations stated:

And it disturbs me about the problem of publicity. I have had too many cases here—and too many would be one—where there is a big blaze of publicity on the commencement of action by the Commission; and then when the facts begin to be explored, the Commission comes in and asks for dismissals and reduces charges.

The Commission in utter disregard and defiance of this admonition, in the very proceeding—namely, the Hawaii proceeding—issued damaging publicity even though the case only involved a technical issue having nothing to do with the question of illegal sales.

As to this question of whether there is any public necessity for these news releases, in the first case involving *Shasta v. San Diego*, the com-

pany was not threatening to go ahead and make sales. It had not made any sales. It had for 6½ months been attempting to comply with each and every regulation of this Commission. There was no evidence that they were not going to do everything required by law and there was no need for this blaze of publicity. This very conduct indicated to the contrary.

With the Keystone matter, the man was actually filing an application for withdrawal from the securities business. Again, there was no threat of any illegal sales which showed any public necessity for such irresponsible publicity.

In discussing the Hawaii situation, alleged illegal sales was not even an issue. You must know, Mr. Chairman, as a former attorney, if they think there is going to be a violation, the Commission can procure temporary injunctions or restraining orders, and it is sufficient then for the press in our opinion to pick up the news story, which they will, but at least some showing of good cause has been made to a court before a temporary restraining order is procured. This is sufficient to prohibit any violations in the public interest if they think it has been or will be carried on. The SEC might contend that these three cases are unusual. But to the contrary, they routinely file a certificate with the clerk of the court that this is a routine investigation and that there is no reason why they should not be permitted to go ahead with their activities.

The inadequacy of any remedy has been brought forcefully home to me when my client says, "What can we do about it?" and I research the law and say, "We can do nothing." Defamation suits for libel or slander will not lie. It is stated in *Loss*, volume 3, page 933:

It is now quite clear from two cases decided by the Supreme Court in 1959 that executive officers of the Government have an "absolute privilege" for defamatory statements issued in the course of their official duties.

A suit under the Federal Torts Claims Act was attempted and again it was held that relief under this act was not available. In *Hurst Radio, Inc. v. FCC*, the plaintiffs sought to bring a declaratory judgment to show that the charges against them were not valid, and again, the courts held that such an action was not available. The cases are without limitation that no suit will lie to enjoin these investigations.

I think it can be stated without any supporting argument that irreparable injury is caused by such publicity. You know what the situation is when items appear in the papers, calling people cheats, frauds, liars, crooks? That is what all these statements amount to. What about the wives and the parents and the children that are involved with this stigmatizing of these people?

The principal officer of the Keystone Securities was a bishop of the Latter-day Saints Church. He is a lay priest in charge of some 500 members. After he was blasted in the paper charging him with "fraud and deceit" and "misleading statements," at 6:30 the next morning, at his request, I had to go with him before his superior officer to explain what this was all about. It was little consolation to say to him, "This is a test case where they are claiming vicarious liability." This man has been permanently, seriously, irreparably damaged. Nothing can be done to take this away.

Senator LONG. No remedy in damages in court?

Mr. BUSHNELL. No remedy. We cannot go to court. I have tried every theory in my imagination to get some redress on this matter. There is absolutely none.

In spite of this, let me tell you what happened in all of these cases. The San Diego case was settled without any support of these claims. The Keystone matter, this broker, they withdrew all of the charges of fraud and deceit and illegal sales, but still coerced a settlement of aiding and abetting such conduct, which later they never even substantiated.

I tried to get before the Commission to argue this thing, at least to urge a private hearing so that we could hear this matter on the merits. I will discuss this again in a minute. The point I want to make is simply this, that the burden of proof upon the injured party is not any relief. To hold that a case has been prejudicially prejudged and to have the action set aside, doesn't undo the damage. We have to have something strong enough in this legislation to be a deterrent. When the injured party has the burden of proof, I can assure you the courts go over backward in indulgences and in presumptions of propriety by responsible Government agencies. They do not take seriously claims of abuse or oppression. And even when they do, they feel that the law gives them no way that they can go.

The matter involved here was such that the district judge in Hawaii tried to make it clear to members of the press in the courtroom that this director was not being investigated, he had not refused to testify, and that there was no claim of illegal sales by him. But of what consequence was that after he had been blackened and stigmatized and defamed in the papers? We must put some teeth in this law which would at least put the burden upon the Commission to show a justification for such publicity. If the burden is not put upon the Commission to show a justification, then there is no relief afforded by this bill. The bill that was introduced in the last session was much stronger since it would make it a matter of court contempt to misuse such publicity. I at least submit that before any publicity is released, it ought to be with the approval of some responsible Commission authority and not someone at the staff level.

Let me leave that for a moment and talk about subpoenas. The statutes specifically, many of them, say that the district courts may enforce the subpoenas of these agencies. One provision which might be used to change that is in section 6(e), which says:

In any proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

If this is made mandatory, then there is no control whatsoever of these agencies and these processes.

To show you the flagrant, arrogant, autocratic attitude of these agencies which go before these courts, let me read to you not my statement, but a few statements that the U.S. district judge of Utah stated, and I submit he is one of the most conscientious, most respected district judges in our district. He said:

But if the Government has nothing to say in response to an apparent, very arbitrary, unexplainable position that they have the right to deny registration and to initiate prosecutions, and even persecutions, because they don't like the

promoter, and there is nothing to be said on that point, I am going to look at this a little more carefully than even I have before. * * *

I know that they say, "we have an investigatory power and that's it." But it may not be that simple. At least the court is entitled to some explanation in view of these charges, so that any ruling won't take the appearance or the substance of approving things the court doesn't approve. * * *

Charges are made here. Maybe they're not determinative, but the Commission representatives simply say, "We'll accept those allegations for the purpose of this hearing." Without explanation. It disturbs me. * * *

And if the Government is content to simply say, "Well, we'll admit that's a fact, but what are you going to do about it?"—what an attitude to take before a U.S. district judge. Again he said:

"Well, suppose we're doing that, give us a carte blanche to go right ahead anywhere and persecute as well as prosecute." I'm going to do that reluctantly if I think it is persecution rather than prosecution. I may have to do it, on the state of the law here, but we ought to know that the law permits such unconscionable things, if those things are right and charges and suggestions are made.

The court further stated:

I have searched for a law which would permit me to resolve those things by blocking the administrative proceedings at this point, and I have searched for a reason to do so, because some of these things have been disturbing to the court.

In view of that, he felt he had to support this subpoena.

I submit this legislation should provide that the district courts have authority to withhold enforcement of these matters when a proper defense is made and that they can exercise their discretion concerning these matters. The companion bill, Senate bill 1879, provides for something of that nature.

Talking about section 9 for a moment, about reasonable dispatch, it says that these matters should be handled expeditiously. The SEC law says registration statements should be considered in 20 days. If they are set up for hearings, it should be within 15 days. The SEC puts some restrictions on hearing examiners and cite with some pride how fast they are handling these matters, saying they are handling them in an average of 78 days. It took 200 days for them to process ours, and we weren't battling them. We were trying to comply with everything they had in mind. After they set it down for hearing, it took 9 months before we got it for argument. Finally, after the argument, they kept it under advisement for 2½ years. During that 2½ years, I was making an issue about this before the district court of Utah, and the tenth circuit court of appeals, and Mr. North, associate general counsel of the SEC, who is in these chambers, admitted that on two occasions he went to the Secretary of the Commission and said, "Get a decision in this matter, it is embarrassing to me before the courts."

Nevertheless, this was not determined, and finally, in an attempt to resolve these matters, all these hearings, I worked out a settlement with Mr. North and he withdrew the charges. He said, "We have to have some basis so the Commission can save face, so will you consent to this," and the order so provides that the pleadings were amended to include an alleged violation of the bookkeeping requirements "so they could go ahead and save face in the situation."

A decision, even though on the merits was never rendered, some 3 years had expired since the matter was filed.

It is claimed that they are to protect the stockholders. The hearing was not the result of stockholder complaints. Of the 50 they subpoenaed, 15 took the stand and all 15 stood pat for the company.

This company spent about a million dollars in development work. It owned \$95,000 on its property, but it was tied up for over 3 years, being permitted to do nothing. If the officers of the company had not shown ingenuity to raise the money to pay the balance on this property those stockholders would have lost everything. Yet the SEC is supposedly protecting the public.

It is paradoxical that the company they are now investigating, in spite of it, and in spite of all these hearings, brought in a silver producing mine, has a mill going, and is actually in production. The Government on the other hand, through the DMEA is saying, "May we lend you some money to get into production; we are in critical need of silver?" Yet the SEC, upon our invitation, bring their engineers out to thoroughly investigate the properties and the operations and they can find nothing wrong, but they continue to go ahead because they hate to be opposed, and this company is opposing them. They are the worst losers I have run into in 15 years of practice.

Senator LONG. That must be the only Federal agency you have had any experience with. You have certainly not had any experience with the Food and Drug Administration of HEW.

Mr. BUSHNELL. That is correct. I do not claim to be an authority on this matter, but I have certainly learned by hard knocks.

With respect to settlements, your section 5(a)(7)(C) says settlement should be permitted. In the Keystone matter, I tried to offer a settlement, or in the alternative, offered to argue before the Commission that this matter be set for private hearing instead of public hearings. We were not afraid to fight it on the merits, this vicarious liability. But they would not even allow me to come before the Commission. Preemptorily, arbitrarily, they sent me out a letter saying, "Your request for oral argument is denied, based on representations of the staff."

This is a matter that has caused criticism of this Commission before. The Hoover Commission criticized them for it, said that they at least ought to permit the advocate to come in and present his side of the matter.

I would suggest—I do not know to what extent the Commissioners are cognizant of all these situations. But it is a strange thing that they insulate themselves as much as they do from this situation. Whether they know what the staff is doing I would really question. Not being arrogant, as I am accusing them of being or claiming any pride in the statement I have made, I think it would be a good thing if each of the five Commissioners were required to read this statement and see if they have in fact had a proper presentation of this matter by the staff, and that publicity is being used this way.

On this question of investigations, not only do they raise the question of whether certain attorneys can represent the witnesses but they told me in advance of one examination, involving the principal of this company, that we could not secure a copy of his testimony. Three days before, Mr. LaPrade, out in our court, blatantly

stated before the judge, "We are trying to get evidence to make a criminal reference against this man." Yet they insisted on taking his testimony and not letting him receive a copy.

We took in our own court reporter and said, "We'll make our own copy if you won't give it to us." They couldn't proceed with him there, so we had to dismiss him.

We went ahead without any assurance that we would receive a copy.

Senator LONG. Let me understand, this is what type of hearing?

Mr. BUSHNELL. They were just taking testimony as part of their investigation. They wanted the books and records of this company.

Senator LONG. And they would not let you have a copy of the proceedings?

Mr. BUSHNELL. We said we would like assurances that we can have a copy of this testimony when it is given.

Senator LONG. And they refused to let you have it?

Mr. BUSHNELL. They said, "You could make a request when it is over with and we'll consider it at that time." We did get it afterward, but we had no assurance that this would be made available to us.

On this question of production of documents, again we are completely without any remedy. They bring their suits to enforce their subpoenas. We claim they are harassing and persecuting us. We make a demand for documents. In spite of the law that says that if they come in to court as a plaintiff, they are under the same rules of discovery, as any other litigant, yet they claim their privilege and we can get none of these documents. The relief that is needed is legislation with some teeth in it if it is going to do any good for the practitioner.

One other abuse I think should be called to the attention of this subcommittee, this question of duplicitous proceedings—well, let me put it this way.

On November 9, when they instigated the hearing at San Diego, which was a public hearing, on the same date they issued an order for a private hearing involving the same allegations, the same issues. After we had gone to a lengthy hearing in San Diego, while that is being briefed and argued before the Commission, they then tried to go after us to get exactly the same information to determine exactly the same thing on a private investigation. This is what gave rise to this subpoena enforcement action. We said, "You were in my office for 2 days, we gave them to you. You had them down at the hearing for 10 days. Now why should we be harassed when this matter is before the Commission?"

Still, they went into court and said, "Well, we are investigating, go ahead and give us the right to do it."

During this time, I have been involved with some 11 attorneys for this Commission. We have estimated it has cost this little company some \$38,000, and I am sure that it has cost the Government twice that much—

Senator LONG. Is this still pending?

Mr. BUSHNELL. Yes, we are still before the U.S. district court in Utah and they are still appealing it.

Senator LONG. What do you think this testimony before the committee will do? Do you think it will affect the attitude of the SEC Commissioners against your clients in this investigation?

Mr. BUSHNELL. We have given that serious thought, as you must know. We finally weighed the proposition and concluded that we did not need to kneel down and take off our hats and be submissive and let them knock us around. If they want to investigate us, let them come and investigate us. This matter needs to be brought to the attention of someone, and we are going to do it. If this fight needs to go on, we are going to fight this situation.

Senator LONG. I think you have brought it to the attention of the committee, certainly. This committee has had quite a number of inquiries from other Senators who have heard of this situation and they are apparently quite concerned, along with us.

Mr. BUSHNELL. Thank you. I hope that is the situation.

Let me tell you one other thing about the time factor. They issued an investigation order on Silver King 2½ years ago to determine whether there had been or would be violations of the law. They came in and took the testimony of this president and all the books and records and found there had been no violations. So they waited another 18 months on the same order and made another investigation, and again the evidence would not show any violations.

Now we are going on another round, based upon the same order, now 2½ years old. We should have, it appears to me, some kind of limitation which says within 6 months an investigative order ought to be automatically terminated unless there is a finding or showing at that time for good cause the order shall be continued in effect.

As you can see, I get involved in these matters. I would like to be objective. There are lots of things I could say and I would like to document all these matters, with corroborating evidence at the appropriate time. I do not think this is the appropriate time.

(The complete statement of Mr. Bushnell follows:)

STATEMENT OF DAN S. BUSHNELL BEFORE SENATE SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE ON S. 1336

My name is Dan S. Bushnell, I reside at 1404 East South Temple Street, Salt Lake City, Utah. I am an attorney at law, duly licensed to practice before the courts of the States of Utah and California, as well as various Federal courts. Since January 1961, I have been the attorney for Shasta Minerals & Chemical Co. and I was the attorney who organized Silver King Mines, Inc., in May of 1962, and have been the attorney for that company, as well as for the president of both of those companies. At the present time I am an officer of Silver King Mines, Inc. Since April 1961, I have represented the above mentioned companies and their president in various transactions involving the Securities & Exchange Commission, commencing with the filing of a registration statement; administrative hearings before an examiner for the Commission; arguments before the Commission; court proceedings in the U.S. District Courts for the Districts of Utah and Hawaii; appeals involving the 9th and 10th Circuit Court of Appeals; as well as numerous proceedings for the procuring of evidence by agents for the SEC. As a result of this experience, I have personally come in contact with the practices and procedures of this Commission involving the utilization of adverse publicity, unreasonable delays, denial of access to Commission records, multiple harassing proceedings, direct statements and threats by agents for the Commission, entrapment proceedings, subpoena enforcement proceedings and the arrogant usurpation of authority and interpretation of the

statutes administered by the Commission and its agents, as well as the indulgences granted by the courts to such agencies.

As a result of this firsthand experience, I am seriously concerned about many of the provisions contemplated in the legislation now being considered. Recognizing the time demands placed upon our Senators, I have taken the liberty to include in this lengthy statement a discussion, not only of the factual background giving rise to the problems presented, but also recommendations as to the proposed legislation and in many instances, statements or summaries of the law as it now exists. It is hoped that this information will be of help to you. Exhibits and written statements could be furnished to corroborate and substantiate the assertions made in this statement concerning the conduct of the SEC.

SECTION 9(b). PUBLICITY

(P. 39)

A. Introduction

Section 9(b) should place the burden upon the agency to show good cause for instigating publicity.

As the proposed section is now worded, it places the burden upon the injured party to establish before a reviewing court that the publicity was issued by the agency to discredit or disparage the injured party. It is an unrealistic burden of proof to require one to show the motivation or reason for the issuance of such publicity. Interoffice communications of the agency are not readily made available, if at all, to the public and the courts refuse to permit the taking of depositions of the agency members to explore their thought processes or reasoning for action taken.

It is submitted that the provision of the law should act as a deterrent to the utilization and instigation of publicity. This can only be accomplished by placing the burden upon the agency to justify such use. Research of other cases and experience in particular dealings with the SEC have demonstrated that the presumptions are all in favor of the alleged responsible Government agency. It is unlikely that except in the very most extreme cases, could an injured party sustain the burden of proof to show that the publicity was issued to discredit or disparage. Even if such a showing could be made, in most instances the damage has already been done and such a finding is of little consolation.

Publicity should not be resorted to by the agencies to prevent alleged illegal conduct. Such prevention, if necessary, can be procured by preliminary injunctions. This procedure gives a safeguard of requiring the agency to show good cause before a judicial tribunal. Once this is done the press normally picks up such judicial action, which is a lot different than the reporting of charges sent out by an agency in its initial complaint or order for investigation.

B. Factual background

So that this matter might be considered in a specific context or with a specific factual situation, I would like to review three particular instances where the Securities and Exchange Commission has, without the remotest indication of any public need or justification, utilized defamatory news releases.

SAN DIEGO PROCEEDINGS

On April 24, 1961, Shasta Minerals & Chemical Co. filed a registration statement with the SEC for a proposed public offering of stock of the company. At the expiration of numerous conferences, consultations, communications, and the filing of suggested and proposed amendments, Shasta was led to believe by agents for the SEC that it had fully complied with all of the requirements of the Commission in connection with the proposed registration. Nevertheless, without notice or warning, the SEC, on November 9, 1961, prevented said registration statement from becoming effective by instigating proceedings for a hearing to be held at San Diego, Calif.

In conjunction with the commencement of those proceedings, the Commission issued for "immediate release" a news release dated November 14, 1961, wherein it recited in detail charges that there had been violations of the "registration and antifraud provisions of the Federal securities law"; that the company and its president had "engaged in acts, practices, and a course of business which would and did operate as a fraud and deceit"; that they had "made false and misleading statements"; and other charges as are more particularly set forth

in said release, a copy of which is marked "Exhibit A," attached hereto, and by this reference incorporated herein.

As a result of the news release, exhibit A, there was broad coverage of the items therein through the radio, television, and the newspapers. A copy of some of the newspaper articles are marked "Exhibit B," attached hereto, and by this reference incorporated herein.

After an extensive hearing involving the subpoenaing of approximately 50 witnesses; the procuring of 1,576 pages of testimony; and after the submission of briefs, the matter was argued before the Commission on July 31, 1962. No decision was ever rendered by the Commission on such charges, but rather the matter was held under advisement by the Commission for approximately 2 years and 5 months, until November 24, 1964, when the stop order proceedings were discontinued.

KEYSTONE PROCEEDINGS

At the suggestion of staff members of the SEC, a separate broker-dealer, Keystone Securities Corp., was formed to be the underwriter of the proposed public offering by Shasta.

Approximately 7 months after the commencement of the proceedings in San Diego, when it became apparent that the public offering would not be made in the near future, an application was filed on June 19, 1962, requesting a withdrawal of the registration of Keystone Securities Corp., as a broker-dealer.

The SEC instead of permitting the withdrawal, which would have been the normal procedure under similar facts and circumstances, commenced revocation proceedings against Keystone and its principal officer, charging among other items, that Keystone and its president were vicariously liable for the alleged prior violations charged to Shasta and its president as asserted in the San Diego hearing even though Keystone had not participated in the preparation of the registration statement or sold any stock pursuant to the proposed public offering.

In conjunction with the commencement of such revocation proceedings a special news release was again released by the SEC reiterating in great detail claims of "manipulation and fraud," "false and misleading information," "fraud and deceit," and other charges as are shown in said release marked "Exhibit C," attached hereto, and by this reference incorporated herein.

As a result of the instigation of such adverse publicity, newspaper articles were published as shown in exhibit D, attached hereto, and by this reference incorporated herein.

The SEC thereafter agreed to waive the charges of fraud, deceit, and misrepresentation and coerced a settlement of the case on reduced charges by further threat of a public hearing with the resultant additional adverse publicity.

HAWAIIAN PROCEEDINGS

Silver King Mines, Inc., and Shasta Minerals & Chemical Co. have interlocking officers, directors, and operating personnel and Shasta is the largest single stockholder of Silver King, which in essence makes Silver King a subsidiary of Shasta.

In October 24, 1962, an investigation order was issued by the SEC in the matter of Silver King Mines, Inc. Pursuant to that order representatives of the SEC have on two separate occasions, November 2, 1962, and June 2, 1964, taken testimony from the president of the company and procured books and records and exhibits from the company. In addition, on July 7, 1964, the SEC procured the testimony of two directors and a stockholder in Philadelphia, Pa., and commenced two depositions, or the taking of testimony, of two stockholders in Honolulu, Hawaii, on October 29, 1964.

At the suggestion of Silver King, during May 1964, mining engineers of the SEC inspected the properties of Silver King Mines, Inc., at Ely, Nev., and were permitted to review drill logs, take samples, observe the drilling and mining operations, as well as the construction of a concentrating mill.

As a continuation of that investigation, on January 15, 1965, a notice was given for the taking of testimony of a director of Silver King Mines, Inc., residing in Honolulu, Hawaii. The director, through his counsel, offered to appear and testify at the regional office of the SEC in San Francisco, Calif. However, the SEC declined to take the director's testimony since he was to be represented by counsel who also represented the company and its president.

The SEC, therefore, commenced proceedings in the U.S. District Court for the District of Hawaii to compel the director to appear without being permitted to be represented by such counsel. Again, at the commencement of these court proceedings, the SEC instigated a news release which resulted in adverse publicity to the director, a respected citizen and building contractor in Honolulu, as is shown by the newspaper articles, marked "Exhibit E," attached hereto and by this reference incorporated herein. Although the news release issued by the SEC, exhibit F, attached hereto and incorporated herein, didn't contain all the items discussed in the newspapers, a copy of the pleadings in the action was delivered to the press by the SEC which did refer to the alleged violations of the antifraud provisions of the securities laws, none of which charges were issues in the suit, nor have any such charges been substantiated at any hearing.

The district court in Hawaii ruled against the SEC, holding that the director was entitled to be represented by company counsel and that the attempt to apply the rule disqualifying such counsel constituted an unreasonable application of the rule by the SEC.

C. Status of the law

The SEC has no statutory or express authority for the practice of utilizing adverse publicity as demonstrated in the foregoing cases. To the contrary, such practice is not only in conflict with fundamental due process; the rules of practice and code of ethics adopted by the SEC itself; the policy of the Administrative Procedure Act, and the canon of ethics for members of the bar. Such uncommendable conduct has received the censure and condemnation of the courts, legal commentators, and the press. Notwithstanding, the SEC persists in such conduct as indicated above. The practice is even the more reprehensible in the cases mentioned above, since the SEC has either backed down on its charges or the courts have ruled against the Commission in its claims or assertions. Nevertheless, the accused parties have been stigmatized by unwarranted, unjustified, and illegal defamatory press releases instigated by the SEC, carrying with them the assumed credibility which should be implicit in conduct by an allegedly responsible Government agency.

(1) *Contrary to policy of Administrative Procedure Act.*—The Administrative Procedure Act as now enacted does not specifically exclude publicity, but the legislative reports clearly indicate that publicity was not to be used by administrative agencies as penalties or to injure the parties involved. In a House of Representatives report, in discussing section 9(a) of the Administrative Procedure Act it is stated:

"Legitimate publicity extends to the issuance of authorized documents, such as notices or decisions; but, apart from actual and final adjudication *after all proceedings have been had*, no publicity should reflect adversely upon any person * * * otherwise and as required to carry on authorized agency functions and necessary in the administration thereof. *It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of the parties.*" (H. Rept. No. 1980, 79th Cong., 2d sess. 40 (1946).) [Emphasis added.]

That such policy has not been followed is evidently and equally apparent in the need for direct congressional prohibitions against the use of publicity. The present proposal is not sufficient to accomplish this result.

(2) *Violation of SEC rules.*—The rules and canons of ethics adopted by the Securities and Exchange Commission if properly followed, should preclude publicity as it has been used in these cases.

Section 200.54: Constitutional Obligations, contained in the code of ethics adopted by the Securities and Exchange Commission provides as follows:

"The members of this Commission have undertaken in their oaths of office to support the Federal Constitution. Insofar as the enactments of the Congress impose executive duties upon the members, they must faithfully execute the laws, which they are charged with administering. *Members shall also carefully guard against any infringement of the constitutional rights, privileges, or immunities of those who are subject to regulation by this Commission.* [Emphasis added.]

No person should be pretried or prejudged by trial in the newspaper during the investigative stage of any proceedings. The right to an impartial and objective hearing, free of such practices, needs no statute or regulation to create such right, but rather, it is inherent in due process under our Constitution.

Section 200.66: Investigations, code of ethics adopted by the Securities and Exchange Commission provides as follows:

"The power to investigate carries with it the power to defame and destroy. In determining to exercise their investigatory power, members should concern themselves only with the facts known to them and the reasonable inferences from those facts. A member should never suggest, vote for, or participate in an investigation aimed at a particular individual for reasons of animus, prejudice, or vindictiveness. The requirements of the particular case alone should induce the exercise of the investigatory power, and no public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law has been violated and that the public welfare demands it. [Emphasis added.]

In spite of such rule which seems to be emphatic that "no public pronouncement of the pendency of such an investigation should be made," the defendant has persisted to resort to such practice as demonstrated above. There was no public necessity or reason for such conduct. It is obvious that agency rules are not sufficient to accomplish the necessary restraint in the use of publicity. Congressional action is needed.

(3) *Violation legal canon of ethics.*—In the Hawaiian proceedings the instigation of the publicity was not in connection with administrative proceedings, but rather, with a case commenced in the U.S. district court. Under such circumstances, the regional administrator appearing as attorney for the Government, even though he was also a representative of the SEC, should be controlled by the canon of ethics of members of the bar.

Canon 20 of the canon of ethics of the American Bar Association provides as follows:

"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. *Generally they are to be condemned.* If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond a quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement."

(4) *Cases.*—The courts have been concerned about the possibility of publicity being used for oppression as stated by the District Court for the District of Columbia in *Bank of America, National Trust & Savings Association v. Douglas* (105 Fed. 2d 100 (DC Cir. 1939)), wherein it was stated:

"It is not difficult to see that such a power might easily be made an instrument of oppression * * * in addition to this, pretrial publication of evidence—labeled as believed to be true—ought, we think, to be avoided, especially as emanating from the tribunal charged with the judicial responsibility of weighing it and assuring the accused a fair hearing."

In a case involving the SEC the court stated that it saw no need or necessity for press releases as issued by the Commission. In *Gilligan Will and Co. v. SEC* (267 F. 2d 461 (2d Cir. 1939)) the court stated:

"* * * While we of course express no opinion on the correctness of Commissioned Sargent's assertion that section 5 of the Administrative Procedure Act does not permit such participation as occurred here by the Commission itself in both the release and subsequent proceedings, we think it appropriate to express our doubts whether such participation was either necessary or desirable.

"Apart from section 5 and the restrictions it may impose, the Commission's reputation for objectivity and impartiality is open to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. There would appear to be no such conflict between the Commissioner's duty to inform the public and its duty to prosecute as would necessitate the use of press releases of the kind here questioned" (468-9). [Emphasis added.]

In *SEC v. Harrison* ((1948) 80 F. Supp. 226), the District Court for the District of Columbia stated as follows:

"It is a well recognized principle of administrative law, that investigations ought to be so conducted that harmful publicity will not be used in lieu of sanctions provided by law * * *" (229).

In *Accardi v. Shaughnessy* (347 U.S. 260), the Supreme Court held that a deportee could not have a fair hearing before the Board of Immigration Appeals as a result of a statement made at a press conference by the Attorney General.

(5) *Practice persists in spite of criticism.*—Professor Loss made the statement that criticisms in the court decisions have not caused “the Commission to discontinue its practice of issuing press releases which summarize the charges made when it initiates a revocation proceedings, or when a complaint for injunction is filed or an indictment is returned” (III Loss 1902).

A law-review commentator in an article entitled “SEC Commissioner’s Participation in Prehearing Releases Questioned” reported in 45 Virginia Law Review 1053, page 1056, stated, after referring to the participation of a Commissioner in a press release stated as follows:

“What the court of appeals questioned, and what is questioned here, is the propriety of such participation. The committee reports on the Administrative Procedure Act, state that the top authorities in an agency may and should confine (themselves) to determining policy and should delegate the actual supervision of investigations and initiation of cases to responsible subordinate officers, but restraint in this area can only come from the Commission itself unless and until the courts undertake to define more precisely the limits of the Commission’s discretion to utilize publicity.”

Such restraint to be effective should come from Congress by enacting legislation which puts the burden upon the agency to justify such releases.

The Wall Street Journal, on July 19, 1963, in an editorial entitled “A Question of Irresponsibility” stated in part as follows:

*“One newspaper referred to it as a ‘scathing’ indictment of the New York Stock Exchange. Another reported how the exchange’s ‘abuses’ had been assailed. A boldface headline said the exchange had been found ‘remiss.’ The radio breathlessly told breakfast listeners about the ‘serious inadequacies’ found in the Nation’s securities markets. * * **

“In fact, Mr. Carey specifically said that the judgments, analyses, and recommendations are not those of the Commission. The document purports to be nothing more than a memorandum from the staff to the Commission. Tomorrow, or next day, the Commissioners may disclaim any responsibility for any particular idea or language—after, of course, all those snarl words have been emblazoned in headlines and shouted over the airwaves.

*“This is not the only curious thing about this anonymous document. The bill of indictment is indeed replete with those headline-catching phrases like ‘abuses’ and ‘serious weaknesses.’ The actual bill of particulars is something else again. * * **

“It’s no place either for a responsible Government body to fire off with much fanfare a report which has the coloration of being official but which is actually by underlings responsible for nothing. If there be injury, it will hardly be repaired if Mr. Carey and his fellow Commissioners tomorrow tell us they wash their hands of it.” [Emphasis added.]

In spite of such condemnation, censure, and criticism by the papers, the commentators and the cases themselves, the SEC has, without statutory authorization, arrogated to itself the authority and propriety of continuing to defame American citizens prior to the substantiation of any charges made by the Commission. This practice has continued, involving these very companies, even after the court had stated its concern about the use of publicity by the Commission. In *SEC v. Shasta* (C194-62), the court stated:

“But there is so much power here, particularly if the channels of publicity are used when filings are made, irrespective of the outcome of cases, and particularly if large bodies of stockholders are circularized in an attempt to stir up something under some determination to see that a particular person doesn’t have anything to do with securities, no matter what the merits of the particular securities, if these are the facts” (R. 89).

The court further stated:

“And it disturbs me about the problem of publicity. I have had too many cases here—and too many would be ones—where there is a big blaze of publicity on the commencement of action by the Commission; and then when the facts begin to be explored, the Commission comes in and asks for dismissals and reduces charges” (R. 87).

In utter disregard of and in defiance of such admonition, within a few months after the *Shasta* case was settled the proceedings in Hawaii were commenced and such publicity was again instigated. Such action was all the more reprehensible since the issue before the Hawaii court was whether a director could be represented by legal counsel for the company, yet the publicity imputed and inferred illegal and fraudulent sales by means of misrepresentation which defamed

the local director who was not individually being investigated by the SEC. The unfairness of this publicity was recognized by the district judge in that proceeding when he specifically made it a point to state for the benefit of the press that the director is not on trial, is not being investigated, and has not refused to testify. But even the printing of such a statement made by the trial judge could not undo the harm already perpetrated by defamatory inferences previously contained in the newspaper reports emanating from the instigation of the release issued by the SEC.

D. No public necessity

In none of the instances discussed herein have there been the remotest indication of any public need or justification for the utilization of defamatory news releases. To the contrary, the very nature of the applications filed by Shasta and Keystone showed that Shasta was attempting to register its stock for sale and that Keystone was desirous of terminating its limited participation in the securities business. Likewise, the Hawaiian proceedings did not even involve an issue of alleged illegal sales of securities. Notwithstanding, the SEC resorted in each instance to the reprehensible practice of stigmatizing innocent people with its flagrant charges broadcast under the guise of newsworthy activities by an allegedly responsible Government agency.

SHASTA-SAN DIEGO

For a period in excess of 6 months Shasta had been bonafidely attempting to register its stock for sale. All suggestions and recommendations in connection with the proposed public offering, as made by the agents of the SEC, had been compiled with by the company. Although the statutory waiting period had expired, which would have permitted the company to proceed with its offering, it had declined to do so until final comments from the Commission had been received by the company. After such compliance, without notification, the SEC instigated the San Diego proceedings with the unsubstantiated charges of "fraud and deceit," "false and misleading statements" which were extensively discussed in the publication marked with the urgency "for immediate release." As was to be expected, such a release did in fact receive extensive coverage in the newspapers, on the radio, and television.

After an attempt to substantiate the widely heralded charges at a hearing where numerous witnesses were subpoenaed and testified, and after the matter was briefed and argued before the Commission, it held the decision under advisement for 2 years and 4 months and then discontinued the proceedings without ever ruling upon those condemnatory claims of wrongdoing.

KEYSTONE SECURITIES CO.

This company was formed at the suggestion of the staff members of the SEC to be the underwriter for the proposed Shasta stock offering, which never came about. As shown by the Government's own inspection reports, the transactions of this company, until the time of its requested withdrawal, both as to purchase and sale of securities, was less than 24 transactions. The president of the company was a reputable business, civic, and religious leader in Salt Lake City, and because of the adverse publicity afforded to Shasta in the San Diego proceedings, it was felt that the contemplated underwriting of the proposed sale of the Shasta stock should not be carried out by Keystone Securities, and consequently, an application was filed to withdraw the registration of that company as a broker-dealer. Such an application can only indicate that Keystone desired to terminate its business as a securities dealer and that there was no threat or indication of any potential violations of the securities laws. Where then is there any necessity or justification for wide dissemination of adverse publicity to allegedly protect the public?

Again the charges were replete with claims of fraud and deceit and false and misleading statements, most of which were claims of vicarious liability in an attempt by the SEC to charge the underwriter with the alleged wrongdoing of the company, even though there had not been any sales of the stock sought to be registered with the Commission.

The SEC subsequently dropped the charges of fraud and deceit and misleading and false statements, but nevertheless, coerced a revocation of the registration of Keystone by the continued threat of further adverse publicity.

An attempt by the company to orally argue before the Commission, a request for a private hearing on the merits of the case, which would have alleviated the possibility of further adverse publicity, was summarily denied by the Commission.

The facts of the case demonstrate a utilization of the threat of tarnishing publicity as a sanction against the broker-dealer, which compelled the settlement of the case by the exclusive threat of the continued use of such conduct by the SEC.

HAWAIIAN PROCEEDINGS

These proceedings were brought for the sole purpose of determining whether a director of Silver King Mines, Inc. was required to appear and give testimony without the presence of company counsel, whom he had chosen to represent him. The director, through such counsel had offered to make himself available at the San Francisco Office of the SEC, but the Commission declined to take his testimony if he were to be represented by company counsel. A suit was thereafter commenced in the U.S. District Court of Hawaii, to compel the director's appearance without such representation. The trial court ruled against the Commission holding that the attempt by the Commission to require the director to appear without such counsel was not reasonable under all the facts and circumstances of the case.

Notwithstanding the limited issue presented by the proceedings, the SEC instigated a news release which resulted in a news story as shown by exhibit E, which is replete with news interest phrases of "illegal sales," violations of the "antifraud provisions," "untrue and misleading statements."

Although the SEC will attempt to exonerate itself by citing the actual content of the news release prepared by the Commission, the facts cannot be denied, that the SEC instigated the publicity by issuing the release calling attention to the proceedings; that the defendant had painstakingly included in the application for enforcement of the subpoena details and repetitious reference to the alleged violation; that even though the order for investigations just referred to the violation of the sections by number without classifying their nature, the application proceeded to enlarge upon the order by referring to the charges as being in violation of the antifraud provisions of the statutes; that the Commission did not just rely on the news release issued and the assumption that a reporter would read the application and glean therefrom the disparaging statements contained therein; rather the Commission made it a point to actually deliver to the reporter a copy of the application. The results of such conduct could not be any more certain than if the SEC had in fact written the article as it appeared in the newspaper. The release cloaked with the credibility differentially given to responsible Government agents, together with the interest-catching phrases set out in repetitious detail in the application, manifestly resulted in the unjustifiable and detrimental vilification of the director who was not refusing to testify when represented by counsel of his choosing. The proceedings itself being unwarranted, as so determined by the court, in addition to the technical nature of the issue raised in the litigation, compels the conclusion that there was no public necessity, justification, or provocation for the inexcusable stimulation of the shameful publicity provoked by the SEC.

In none of the instances, San Diego, Keystone, or Hawaii, has there been the slightest indication of any public necessity or justification for the issuance of news releases by the Commission. Shasta had not, nor was it proposing to make any sales, except through the registration pending before the Commission. The very act of registering the stock for sale was affirmation by the company that it intended to comply with the law. Likewise, the application of Keystone to withdraw its registration as a broker-dealer implicitly demonstrated the desire of the company and its officers to terminate any activities in the securities business. The Hawaii proceedings raised a technical issue, not directly involved at that juncture, with alleged illegal sales of stock. These cases do not even come close to raising a remote probability that some public purpose could be served by releasing publicity against the parties involved. Any threatened or probable continued illegal sales can be prevented by authorized statutory procedures such as the procuring of a temporary injunction, which is routinely procured by the SEC in appropriate cases. The Commission can only be condemned for the irresponsible and indefensible resorting to degrading public releases on flagrant charges yet to be substantiated.

E. Inadequate remedy at law

The accused party in circumstances where he is the victim of unwarranted publicity is completely helpless to seek any redress for the wrongs inflicted upon

him. There is no liability for defamation; recovery under the Federal Torts Claims Act is not permitted; a suit for declaratory judgment to disprove the charges and have them withdrawn is not available; and the action taken in instigating the adverse publicity is not, and normally will not, result in an order from which an appeal can be taken.

Even if any of the foregoing remedies might be available the relief which they would afford would be too late and too ineffectual to undo the harm which has already been perpetrated. That a person unjustly accused and defamed by such adverse publicity is irreputably damaged cannot be denied. As experienced in these cases, some of the San Diego stockholders thought the president of the company had been criminally tried and found guilty after hearing the publicity instigated by the SEC in making its unsubstantiated charges.

The accused party cannot sue for defamation based upon libel or slander even if the conduct might be classified as malicious when it is performed in the course of a Government agent's official duties. Loss, volume 3, page 1933, states the status of the law as follows:

"It is now quite clear from two cases decided by the Supreme Court in 1959 that executive officers of the Government have an 'absolute privilege' for defamatory statements issued in the course of their official duties."

A suit under the Federal Torts Claims Act was dismissed as not stating a cause of action, in *Schmidt v. United States*, 198 F. 2d 32, Cert. Den. 344 U.S. 896. The complaint in that case, in addition to other charges, complained that a member of the Commission surreptitiously took from its files "a supposedly secret report" of said inquisition and turned it over to the representative of the Detroit newspaper, who published the contents thereof. The Seventh Court of Appeals confirmed the judgment of the district court, which dismissed the complaint for failure to state a claim upon which relief could be granted.

In *Hurst Radio, Inc. v. F.C.C.*, 167 F. 2d 225, the Circuit Court for the District of Columbia dismissed an action for declaratory judgment by which the plaintiff sought to secure relief from having been listed in a blue book by the Federal Communications Commission, which listing discredited the plaintiff. The purpose for the lawsuit was to adjudicate that it was unjustly listed and to have its name taken from such book, however, the court held that the action could not be sustained.

The cases are without limitation that a suit will not lie to enjoin the investigation.

SECTION 6(e). SUBPENAS

(P. 27)

This provision should specify that the district courts, in a subpoena enforcement proceeding, shall have discretionary authority to issue or refuse to issue an order compelling compliance with the administrative subpoena.

The status of the law at the present time is uncertain. The proposed provision in Senate bill 1336 states in part as follows: "In any proceeding for enforcement, the court *shall* issue an order requiring the appearance * * *. The word "shall" should be changed to "may" and the provision should further provide that the court may exercise its judicial discretion and consider any appropriate defense to the requested order for enforcement.

As demonstrated in the transcript of record, U.S. Court of Appeals, Tenth Circuit, *Shasta v. SEC*, which will be marked as an exhibit for introduction at the hearing, it is shown that the SEC takes the position that all it needs to do is make a request upon a U.S. district court and that the court is thereafter required to issue an enforcement order. This is so even if the action of the Commission is arbitrary and oppressive, amounting to persecution and an abuse of discretion. Although the Commission in the *Shasta* proceedings agreed with the court to file an affidavit showing some reasonable cause why the subpoena should be enforced, later failed to comply with that agreement with the court. The U.S. district judge, for the district of Utah, concerning this matter and the status of the law under such circumstances, stated as follows:

"But if the Government has nothing to say in response to an apparent, very arbitrary, unexplainable position that they have the right to deny registration and to initiate prosecutions, and even persecutions, because they don't like the promoter, and there is nothing to be said on that point, I am going to look at this a little more carefully than even I have before (R. 85).

"I know that they say, 'We have an investigatory power and that's it. But it may not be that simple. At least the court is entitled to some explanation

in view of these charges, so that any ruling won't take the appearance or the substance of approving things the court doesn't approve' (R. 85).

"Charges are made here. Maybe they're not determinative but the Commission representatives simply say, 'We'll accept those allegations for the purpose of this hearing.' Without explanation. It disturbs me (R. 88).

"And if the Government is content to simply say, 'Well we'll admit that's a fact, but what are you going to do about it?' (R. 89).

"* * * but it seems to me that the Commission can't expect the court to pass over those things and make rulings where impliedly those serious charges are made without even any reference to it and simply by saying, 'Well, suppose we're doing that, give us a carte blanche to go right ahead anyway and persecute as well as prosecute.' I'm going to do that reluctantly if I think it is persecution rather than prosecution. *I may have to do it, on the state of the law here, but we ought to know that the law permits such unconscionable things, if those things are right and charges and suggestions are made*" (R. 90).

The court further stated:

"I have searched for a law which would permit me to resolve those things by blocking the administrative proceedings at this point, and I have searched for reason to do so, because some of these things have been disturbing to the court." [Emphasis added.]

The court further stated that it felt it was compelled to presume that the action of the Commission would not be abused and that it could not interfere until all administrative remedies have been exhausted. Although the court was reversed on appeal, when this matter came up again in the Hawaiian proceedings, the trial judge again took a restrictive view as to its right and authority to exercise its discretion as to whether the subpoena should be enforced. In most cases persons yield to the subpoena solely because of the air of authority with which the demand is made under the seal of a U.S. Commission. However, Congress has wisely restricted enforcement of those subpoenas to the courts. Such safeguard if of no effect, if the law is now going to be amended to provide that the courts *shall* issue an order requiring compliance. This merely makes the courts a rubberstamp for the action taken by the Commission and affords the individual no safeguards whatsoever. Not only should this discretionary authority in the courts be retained, but their right and duty to judicially scrutinize the propriety of the enforcement of the subpoena should be clearly defined.

SECTION 9. "SANCTIONS AND POWERS" (UNREASONABLE DELAYS)

(P. 39)

This section provides that the agency shall act with "reasonable dispatch." It is submitted that such a provision is not sufficiently definite to require expeditious action by the administrative agencies as was contemplated in Congress when it gave them birth. For example, Congress, in the Securities Act of 1933 has provided definite short-time requirements within which agency action on securities offerings is to be accomplished. The Commission has attempted to carry this out to some degree by further putting time requirements on the hearing examiners with reference to continuances and adjournments. Nevertheless, the SEC took under advisement the *Shasta* decision after argument on July 31, 1962, and in spite of two requests from the Associate General Counsel for the Commission for a decision, the Commission kept the same under advisement for approximately 2 years and 4 months, when it terminated the matter on November 24, 1964, without issuing a decision on the charges made. It is suggested that a maximum of 6 months should be specified for an agency to keep under advisement any pending decision.

Likewise, an investigation order should not be a carte blanche for unlimited continuous investigations and harassment of a party by staff members. In the Silver King matter, an order for investigation was issued on October 24, 1962, directing the staff to determine whether the law had been or was about to be violated. It would logically be anticipated that the staff would be required to make such a determination within a reasonable period of time. Testimony was taken from the president of the company, and the books and records of the company were procured in November 1962. It is submitted that there was no evidence of any past violations or any threatened violations which was shown by such an investigation. Nevertheless, the order apparently remained in force and effect because the staff again followed the same procedure in

the summer of 1964, when it again took testimony from the president of the company, procured the books and records from the company, and also took testimony from other directors and stockholders. Now, some 2½ years later, the order is still in effect and the staff is still harassing the company.

It is respectfully submitted that a 6-month limitation should be specified so that investigation orders would automatically terminate at that time, unless for good cause shown, the matter is called again to the attention of the agency and the agency authorizes such continuation. Without such limitation and control these matters go on endlessly: the staff members being permitted to harass the public without any responsible or authoritative control by the agencies themselves.

According to the 26th Annual Report, 1962, submitted by the SEC, the longest number of days that registration statement was pending was 109 days, with an average of 78 days. In the 29th Annual Report, 1963, of the SEC, the longest time that a registration statement was pending was 77 days, with an average of 52 days. However, the *Shasta* registration statement was filed on April 19, 1961, and would have become effective on November 10, 1961, with the lapse of approximately 200 days. However, the San Diego proceedings were commenced on November 9, 1962. These proceedings were not argued before the Commission until approximately 8 months later on July 31, 1963. The Commission then held the matter under advisement until November 24, 1964. From the date of filing in April 1961 until November 1964, approximately 3 years 7 months elapsed and the matter was only settled then as a result of an offer of settlement made by the company. This delay by the Commission persisted even though claims of unreasonable delays were being asserted by *Shasta*, both before the U.S. District Court for the District of Utah and before the Tenth Circuit Court of Appeals. As a result of these claims of unreasonable delays made by the company, the Associate General Counsel for the Commission on two separate occasions requested through the Secretary that a decision be entered since the matter was a source of embarrassment to him before the courts. It is obvious from the foregoing that some time limitation should be incorporated in the law to prevent such abuses.

SECTION 5(A)(7)(C) SETTLEMENT

(P. 24)

This proposed subdivision contemplates that all parties would be given an opportunity to submit offers of settlement. It is recommended that the provision further provide that the parties be present before the Commission to explain and argue why the proposed settlement should be adopted. In some agencies the practice has been, and still is, to only permit staff members to present an offer of settlement.

In the *Keystone* matter, the SEC would not even bother itself to hear arguments by the accused or permit him to present his reasons as to why the hearing should be private instead of public. The request to orally argue the proposed settlement, or in the alternative to have the matter heard at a private hearing instead of a public hearing, was summarily denied without even permitting counsel to appear before the Commission.

Such conduct on the part of the Commission has been criticized but nevertheless persists. 3 Loss 1896 comments upon that criticism as follows:

"One of the few criticisms directed at the SEC by the Hoover Commissions Committee on Independent Regulatory Commission was that the staff usually presents the problem alone, together with its own views and its version of the opposing arguments, before the Commission decides whether it will hear the person making the inquiry. The committee recommended that outside counsel be permitted to attend the initial staff presentation and respond to it before the Commission makes up its mind, although subsequent discussions between the Commission and the staff should not be precluded and the Commission should still be free to refuse or hear frivolous appeals."

SECTION 6(d). INVESTIGATIONS

(P. 27)

The right of every person to procure a copy of evidence submitted by him should be retained as proposed in the Senate bill. At the time that testimony was procured from the president of *Silver King Mines, Inc.*, on November 2, 1962,

the SEC would not agree to provide him with a copy of his testimony, nor would they permit him to have present his own court reporter for the purpose of recording such testimony. The witness thereafter was compelled to proceed and give testimony without any assurance that he would be permitted to procure a copy of the same, even though the representatives for the Commission had at this time in open court maintained that they were hopeful of procuring evidence with which they could make a criminal reference to the Department of Justice.

Concerning such practice, the U.S. district judge for the district of Utah, stated as follows:

"Why not? Why in would should a party who is called upon to testify before an administrative agency in this sort of thing be told that he might not even be able to have a transcript of the statement he makes? That thing is so revolting to me as an attorney-judge, I can't even understand it. Can you think of any reason why a party called upon to testify before an administrative agency in an official hearing or otherwise shouldn't be forthrightly told, 'Of course you can have a copy of what you say here and testify to before us'?"

"A grand jury might be a little different thing, because we have the idea of secrecy there involving a different principle; but is there some rule that I don't know anything about that commends the idea that a person can be subpoenaed to testify, and yet be deprived of a copy of what he says?"

RES AJUDICATA AND ABATEMENT

It is suggested that section 5 entitled "Adjudications" should include a section which prohibits an agency from harassing an accused with two separate proceedings at the same time involving the same issues. In the *Shasta* case, after the extensive hearing conducted at San Diego, the SEC still attempted to harass the accused by proceeding with what it called a private investigation based upon an order issued the same date as the public hearing and which was to determine the same issues as raised in the public hearing. While the matter was under advisement for consideration by the Commission, based upon a record of approximately 1,600 pages and numerous exhibits, the staff members of the Commission were still attempting to carry on a private investigation to attempt to determine the same issues then under consideration by the Commission. Such repetitious harassing of the persons involved should be prohibited by Congress. The companies mentioned above have been put to an expense in excess of \$38,000 in the numerous litigations and investigations commenced by the SEC. It should not be required to submit to two proceedings carried on at the same time to determine the same issue. For a detailed discussion of the facts and law involving this issue see the brief marked as "Exhibit" and submitted in this hearing entitled "*Shasta v. SEC Before the United States Tenth Circuit Court of Appeals.*"

CONCLUSION

For a long time the power, authority, and jurisdiction of administrative agencies has flourished to such an extent that all citizens in our complex society are affected thereby. The agencies themselves have usurped and arrogated authority which initially may not have been intended by Congress. The courts have likewise contributed to the problem by liberally interpreting agency authority and refusing to interfere until the administrative processes have been completed. The extreme to which this course of administrative interpretation, with judicial sanction, if not encouragement, can be carried is demonstrated in the cases mentioned herein. These cases are not exceptional only that the agency was challenged and the matter has now been called to the attention of Congress. The files of the administrative agencies would show multitudinous examples of unnoticed, unregarded instances where the authority asserted by the agencies is submissively accepted. As Congress is now doing, such practices and procedures should be carefully scrutinized and restraints should be placed upon these agencies, with clear-cut definitions of authority for the courts to require compliance with such congressional limitations.

The problem presented and the role of the courts was aptly stated in *United States v. Wheeling Downs*, 72 F. Supp. 882 wherein the court stated as follows:

"These proceedings were substantially devoid of an adherence to our fundamental principal of government of delegated powers. I fail to find in any of the proceedings prior to the filing of the injunction suit that adherence to right,

justice, and, I might say, courtesy, to which a citizen is entitled from representatives of the Government. We have witnessed the growth of what is called by some the fourth branch of the Government, the administrative agency group. If administrative agencies are to seek resort to this court, or to other courts of this land to enforce their ukase, they shall have to demonstrate that they have complied with the law which gave them birth. This court will never be used as an upper tribunal of an administrative agency, but will always be mindful of the reason for its creation, to balance the rights of an individual and his Government in accordance with law and justice (77 F. Supp. 882, 885).

As demonstrated by these cases, which are only examples of unnumbered instances of similar administrative abuses, where there has been no public necessity for the instigation of defamatory publicity; where such irresponsible conduct has been premeditated and intentional; where such action is without express authority and in violation of administrative policies and procedures; where such conduct persists in spite of criticisms by the courts, legal commentators and the press; where there is no adequate remedy or redress at law; where unreasonable delays deny parties of their rights afforded by law; where rights to copies of statements made before a Commission are denied; where ex parte presentations of offers of settlement are sanctioned; where multiple harassing proceedings are allowed; and where unwarranted, unjustified, reprehensible conduct defames and stigmatizes American citizens in violation of fundamental rights guaranteed by the Constitution, it is only right and proper that Congress redefine the authority delegated to such agencies, to prevent abuses and to assure government in accordance with law and justice.

Respectfully submitted.

DAN S. BUSHNELL.

EXHIBIT A

[For immediate release Nov. 14, 1961]

SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C.

Securities Act of 1933.

Release No. 4428.

Securities Exchange Act of 1934.

Release No. 6670.

The Securities and Exchange Commission has ordered proceedings under the Securities Exchange Act of 1934 to determine whether Kay L. Stoker, president of Cascade Corp. ("Cascade"), of Salt Lake City, *violated the registration and antifraud provisions* of the Federal securities laws in the offer and sale of stock of Shasta Minerals & Chemicals Co. ("Shasta") and of American Oil & Minerals, Inc. ("American Oil"), and, if so, whether Cascade's broker-dealer registration should be revoked.

The Commission also has ordered "stop order" proceedings under the Securities Act of 1933 which challenge the accuracy and adequacy of various informational disclosures in a registration statement filed by Shasta on April 24, 1961. In this statement, Shasta proposed the public offering of 500,000 common shares at \$2.50 per share through Keystone Securities Co. According to the prospectus, Shasta (also of Salt Lake City) is engaged in the acquisition, exploration, and (if warranted) development of properties in the West Shasta copper-zinc mining district, Shasta County, Calif., including the production of sulfuric acid. The company has outstanding 1,392,242 common shares. Stoker also is listed as Shasta's president.

According to the Commission's order, its staff charges that information developed in its investigation tends to show that Stoker, in the sale of unregistered stock of American Oil since January 1959 and of Shasta since August 1965, "engaged in acts, practices, and a course of business which would and did operate as a fraud and deceit" upon the purchases of such stock, in that he made false and misleading statements: (a) With respect to American Oil (said to have outstanding about 2,750,000 shares of assessable stock), concerning the listing of its stock on the New York Stock Exchange, the safety of an investment in American Oil, the assessability of and prior record of assessments on American Oil stock, American Oil's financial condition, and the use of proceeds of the sale of American Oil stock; and (b) with respect to Shasta, concerning the amount of ore blocked out and ready to be mined by Shasta the grade and value of its

blocked-out ore, a smelter which had been or was to be built on or near the mining properties, use of the proceeds of the sale of Shasta stock, the financial condition of and the safety of an investment in Shasta, the listing of Shasta stock on the New York Stock Exchange, the ability of Shasta shareholders to get their money back, and the availability of a rescission offer to all Shasta shareholders and the reason for making such offer.

The staff further charges that the reported information, if true, tends to show that Stoker violated the registration and antifraud provisions of the Federal securities laws. The Commission's order schedules a hearing for November 24, 1961, in San Diego, Calif. (room 332, U.S. Courthouse, 325 West F Street) to take evidence on the foregoing for the purpose of determining whether Stoker did violate the said provisions of the laws and, if so, whether the broker-dealer registration of Cascade should be revoked.

With respect to Shasta's registration statement, the Commission asserts that it has reasonable cause to believe that the statement and accompanying *prospectus* are false and misleading in respect of various information disclosures, including the reported information with respect to (1) the relationships among Shasta and its predecessor (Shasta Copper & Uranium Co., Inc.), Stoker, Woodville S. Walker, Walker Engineering Co., Keystone Securities, Russ Ballard, American Oil, and Cascade; (2) past sales of securities of Shasta and its predecessor and of American Oil by Shasta, its promoters, management officials and controlling persons, in violation of the Securities Act registration and antifraud provisions and the extent of contingent liabilities which may have arisen by reason of such sales; (3) the reasons for which Phelps-Dodge Corp. withdrew from and terminated a joint venture agreement with Shasta for the exploration and development of properties owned by Shasta; (4) the personnel and experience of the underwriter (Keystone Securities); and (5) Shasta's financial statements.

The stop order proceedings with respect to Shasta's registration statement have been consolidated with those involving Cascade, and the consolidated hearing will commence November 24 in San Diego, as indicated above. [Italic added.]

EXHIBIT B

[From the Evening Tribune, San Diego, Calif., Nov. 15]

SHASTA STOCK CASE HEARING TO BE HERE

(Tribune Washington Bureau, Copley News Service)

WASHINGTON.—The Securities and Exchange Commission last night chose San Diego for a hearing on charges of *malpractice in the sale of mining stock*.

TWO COMPANIES CITED

The hearing will be consolidated to cover *Government charges* against two companies, Shasta Minerals & Chemical Co. and American Oil Minerals, Inc., Kay L. Stoker, of Salt Lake City, is listed as the president of both firms. A commission spokesman said San Diego was selected for the hearing because numerous San Diegans have purchased stock in the two companies.

"FRAUD AND DECEIT"

He said "a dozen or so" San Diego investors may be called to testify. The spokesman said Commission rules prevented him from identifying any stockholders before the hearing.

Among the Commission charges against Stoker is that he "engaged in acts, practices, and a course of business which would and did operate as a fraud and a deceit" upon stock purchasers. The Commission already has challenged the accuracy of portions of a registration statement filed with Commission last April 24 by Shasta.

1,392,242 SHARES

In the statement, the company proposed to sell 560,000 common shares of stock at \$2.50 a share. According to the Commission, the company has a total of 1,392,242 shares outstanding. [Italic added.]

EXHIBIT C

[For release July 24, 1962]

VIOLATIONS CHARGED TO KEYSTONE SECURITIES

The SEC has ordered proceedings under the Securities Exchange Act of 1934 to determine whether Keystone Securities Corp., of 826 South Main Street, Salt Lake City, violated prohibitions of that act and the Securities Act of 1933 against *manipulation and fraud* and, if so, whether its broker-dealer registration should be revoked.

Keystone has been registered with the Commission as a broker-dealer since July 12, 1961, and M. R. (Russell) Ballard, Jr., is its president. In its order, the Commission recites *charges of its staff* that information developed in an investigation tends to show that certain activities of Keystone and Ballard with respect to Shasta Minerals & Chemical Co. violated the said provisions of the Federal securities laws. Shasta filed a registration statement with the Commission in April 1961 proposing the public offering of 500,000 shares of Shasta common at \$2.50 per share. That statement, as amended, names Keystone as underwriter. *The staff charges* that the *Shasta registration statement* (against which "stop order" proceedings are pending under the Securities Act) contains *false and misleading information* and omits material facts with respect to the following, and that Keystone and Ballard aided and abetted Shasta in its filing: (a) prior sales of Shasta stock in violation of section 17 of the Securities Act and the true facts surrounding a January and February 1961 rescission offer by Shasta; (b) financial statements and the financial condition of Shasta; (c) the relationship of Shasta, its promoters and management officials, with Keystone and Ballard; (d) the activities of Shasta, Kay L. Stoker and others in the offer and sale of Shasta stock in violation of sections 5 and 17(a) of the Securities Act; and (e) the fact that Phelps-Dodge Corp. withdrew from its joint venture with Shasta because the results were unfavorable from the standpoint of Phelps-Dodge.

The staff further charges that, in the offer and sale of Shasta common during the period January to November 1961, Keystone and Ballard engaged in activities which operated as a "fraud and deceit" upon certain persons in that (1) in addition to the foregoing, and for the purpose of conditioning and inducing investors to purchase Shasta stock to be offered under the said registration statement, they offered and sold Shasta shares at prices ranging from \$1.50 to \$1.60 per share to certain members of the Shasta-Stoker group, which prices were in excess of those previously charged public investors; and (2) distributed a letter to Shasta shareholders for the purpose of inducing their purchase of Shasta shares to be offered under the registration statement, *and included therein certain false and misleading information*, including that with respect to the stage of development, nature of, and potential value of Shasta's mining properties. *The filing of a false financial statement* by Keystone and its violation of the Commission's recordkeeping requirements also are charged by the staff.

A hearing will be held, at a time and place to be announced, for the purpose of taking evidence to determine whether the staff charges are true, and, if so, whether Keystone's broker-dealer registration should be revoked. [Italic added.]

EXHIBIT D-1

[From the Wall Street Journal, July 25, 1962]

SEC ORDERS HEARINGS ON ALLEGED VIOLATIONS BY KEYSTONE SECURITIES

AGENCY SAYS STUDY TENDS TO SHOW FIRM ADDED SHASTA MINERALS IN FILING FALSE REGISTRATION

(By a Wall Street Journal staff reporter)

WASHINGTON.—The Securities and Exchange Commission ordered proceedings to determine whether Keystone Securities Corp., Salt Lake City, *violated the securities laws in connection with an offering of Shasta Minerals & Chemical Co.*

The SEC said it will schedule a hearing to determine whether Keystone violated the "*prohibitions * * * against manipulation and fraud*" and, if so, *whether its broker-dealer registration should be revoked.*

Loss of its registration means a broker-dealer can no longer engage in an interstate securities business.

In Salt Lake City officials of Keystone couldn't be reached immediately for comment.

The SEC said Shasta Minerals & Chemical filed a registration statement with the Commission in April 1961 proposing a public offering of 500,000 common shares at \$2.50 a share. Keystone was named the underwriter of the planned offering, the agency said.

The Commission said an investigation by itself "tends to show" that the Shasta registration statement "contains false and misleading information" and that Keystone and its president, M. R. Ballard, Jr., "aided and abetted Shasta in its filing." The allegedly false information and the omission of "material facts," according to the SEC, related to Shasta's financial condition; its relationship with Keystone and Mr. Ballard; the activities of Shasta and other in the offer of Shasta stock in violation of the Securities Act; and "the fact that Pherlys-Dodge Corp. withdrew from its joint venture with Shasta because the results were unfavorable from the standpoint of Phelps-Dodge."

The SEC staff further charged that between January and November last year Keyston and Mr. Ballard *"engaged in activities which operated as a fraud and deceit upon certain persons."* The charge was that they offered and sold Shasta shares to certain individuals *"for the purpose of conditioning investors"* to buy the stock that was to be offered under the registration statement. Moreover, the staff alleged, they distributed to Shasta shareholders a letter intended to induce further purchases of Shasta shares. The letter, the staff charged, contained *"certain false and misleading information"* concerning the development and potential value of Shasta's mining properties. [Italic added.]

EXHIBIT D-2

SECURITIES FIRM FACING SEC HEARING

Keystone Securities Corp. and its president have been charged by the Securities and Exchange Commission with engaging in practices which violate Federal law.

In an order from the Denver regional office, the SEC ordered a hearing to determine whether the Salt Lake firm, headed by President M. R. Ballard, Jr., should lose its brokerage registration.

The charges involve sale of Shasta Minerals & Chemical Co. stocks, in which Keystone was an underwriter. The SEC claims the registration statement proposing a public offering of 500,000 shares *contained false and misleading information and omits material facts.*

CHARGES FACE S. L. CONCERN

The Securities and Exchange Commission has ordered proceedings to determine whether Keystone Securities Corp., 826 S. Main, *has violated prohibitions* of the Securities Exchange Act of 1934 and the Securities Act of 1933.

The Denver regional office announced its action Wednesday to determine whether Keystone's *broker-dealer registration should be revoked.*

It noted that Keystone has been registered with the Commission as a broker-dealer since July 12, 1961, and that *M. R. (Russell) Ballard, Jr., is its president.*

In its order, the Commission charges that certain activities of Keystone and Mr. Ballard with respect to Shasta Minerals & Chemical Co. are in violation of provisions of the Federal securities laws.

The charges allege that a Shasta registration statement proposing public offering of 500,000 shares of Shasta common with Keystone as *underwriter, contains false and misleading information and omits material facts.* [Italic added.]

EXHIBIT E

[From Honolulu Advertiser, Wednesday, Feb. 3, 1965]

SEC PROBES MINE STOCK SALES HERE

The Securities and Exchange Commission is conducting an investigation here into sales of a Nevada mining company's stock to Hawaii investors to determine whether such sales violated Federal laws.

The company involved is the Silver King Mine, Inc., of Ely, Nev. An unknown amount of the stock was sold here last year.

The SEC probe was disclosed in a petition filed by the SEC in Federal court here. The petition requests the court to order a Honolulu stockholder of the Nevada firm to testify before SEC investigators here.

The Honolulan, Charles Y. Higashi, of 2918 Manoa Road, identified as both a director and stockholder of Silver King Mine, has been ordered by Federal Judge Martin Pence to appear at 10 a.m. Monday to show cause why Higashi should not be ordered to testify and produce certain documents as requested by an SEC subpoena.

The petition notes that Higashi failed to appear as requested in the SEC subpoena on January 27 before Arthur E. Pennekamp, SEC regional administrator from San Francisco, who is heading the SEC probe here.

The petition says that the SEC investigation, which began in late 1962 on the mainland, is being conducted "*to determine, among other things, whether in the offer and sale of shares of Silver King Mine, Inc., certain persons, including Kay L. Stoker, have violated or are about to violate the registration provisions * * * of the Securities Act of 1933 * * * and the antifraud provisions of the Securities Exchange Act of 1934.*"

Stoker is identified as a director, principal promoter, one of the incorporators, and a substantial stockholder of Silver King Mine.

The petition states that no registration statement has ever been filed with the SEC on any securities of Silver King Mine, yet Stoker and others have been offering and selling the stock through interstate commerce. *Such sales would be illegal, the petition added, "unless exemptions provided in the act (Securities Act of 1933) are available."*

The petition also says that the SEC probe thus far indicates that Stoker and others have made *statements to purchasers* and prospective purchasers of Silver King Mine stock *that were untrue and misleading "concerning, among other things, the value of the assets of Silver King Mines."*

The petition adds that "many of the aforementioned offers and sales of securities of Silver King Mine were made in Hawaii. Among the persons through whom such offers and sales in Hawaii were effected was Charles Y. Higashi * * *."

It also listed a Don Jenks and John H. Peterson as also being involved in sales of the stock here. (Jenks is a mainland resident; Peterson resides on Windward Oahu.)

Neither Peterson nor Higashi was available for comment last night.

The petition made no mention of how much Silver King Mine stock was sold here. *The offering and sales of the stock took place here last year before being halted by the State department of regulatory agencies. The department forced the cancellation of some of the sales, but an unknown amount is believed to have been completed.*

[From Honolulu Star-Bulletin, Feb. 3, 1965]

MAN SUBPENAED AGAIN IN CASE OF SECURITIES SALES

Federal District Court Judge Martin Pence has signed an order requiring Charles Y. Higashi, 2918 Manoa Road, to appear before him at 10 a.m. Monday.

The order was signed Monday after an application by *Arthur E. Pennekamp, an officer of the Securities and Exchange Commission*, concerning an investigation of the sale of securities of Silver King Mines, Inc., of Ely, Nev.

The application alleges that Higashi failed to appear in district court January 27 after being subpoenaed to testify in the investigation.

According to information filed with the court, Silver King Mine securities and stock have been sold in violation of the 1933 Federal Securities Act.

The Silver King stock is believed to be worth \$1,250,000. [*Italic added.*]

EXHIBIT F

[For immediate release Feb. 1, 1965]

SECURITIES AND EXCHANGE COMMISSION, SAN FRANCISCO REGIONAL OFFICE,
SAN FRANCISCO, CALIF.

(Litigation Release No. 3147)

The Securities and Exchange Commission today announced that it has filed an application in the U.S. district court in Honolulu for an order requiring Charles Y. Higashi, of Honolulu, to obey a subpoena previously served on him

by the Commission. The subpoena required him to appear and testify on January 27, 1965, before Arthur E. Pennekamp, an officer of the Commission, in connection with its investigation of the sale of securities of Silver King Mines, Inc., of Ely, Nev.

The application alleges that Mr. Higashi failed to appear on the date designated.

The Honorable Martin Pence, judge of the U.S. district court, signed an order requiring Mr. Higashi to appear before him on February 8, 1965, at 10 a.m. and show cause why an order of the court should not be issued requiring him to testify and produce certain documents as required by the original subpoena. [Italic added.]

EXHIBIT G

[From the Wall Street Journal, July 19, 1963]

REVIEW AND OUTLOOK

A QUESTION OF IRRESPONSIBILITY

One newspaper referred to it as a "scathing" indictment of the New York Stock Exchange. Another reported how the exchange's "abuses" had been assailed. A boldface headline said the exchange had been found "remiss." The radio breathlessly told breakfast listeners about the "serious inadequacies" found in the Nation's securities markets.

The source of all these damning phrases, accurately enough reported, was a 2,100-page document which Mr. William L. Cary, the Chairman of the Securities and Exchange Commission officially sent to Congress. And thus millions of people, casually scanning the headlines or hearing the drone of radio bulletins, were yesterday left with the impression that some responsible Government body had found all manner of evils in the wicked world of Wall Street.

But who wrote this document, Mr. Cary did not say. Whether he or any other of the Commissioners agreed with the document, Mr. Cary did not say. Just why he was sending it to Congress, since it contained no SEC findings or recommendations, Mr. Cary did not say.

In fact, Mr. Cary specifically said that the judgments, analyses, and recommendations are not those of the Commission. The document purports to be nothing more than a memorandum from the staff to the Commission. Tomorrow, or next day, the Commissioners may disclaim all responsibility for any particular idea or language—after, of course, all those snarl words have been emblazoned in headlines and shouted over the airwaves.

This is not the only curious thing about this anonymous document. The bill of indictment is indeed replete with those headline-catching phrases like "abuses" and "serious weaknesses." The actual bill of particulars is something else again.

We have not yet found in the document specific examples of corrupt practices by the exchange, which is certainly the meaning carried to most people by the word "abuse." It is hard to identify the allegedly serious weaknesses, unless you can equate that phrase with the possibility of improvement which always exists in any system.

Many of the document's recommendations, while debatable, are reasonable departures for discussion. Perhaps new electronic devices have made obsolete the present method of handling odd-lot transactions; there may be better ways today of ordering the role of the specialist in matching up orders and maintaining orderly trading. Perhaps the New York Stock Exchange has outgrown the "floor trader" who simply trades for his own account.

But it is something else to imply, by innuendo or otherwise, that these established methods, however open to improvement, somehow constitute serious weaknesses or abuses of investor's confidence.

For they are methods that were developed painstakingly over many years to meet the needs of security investors, and over those many years they have worked well. In the New York Stock Exchange today, whatever its defects, investors have the most efficient securities market that exists anywhere in the world.

Actually, this anonymous document concedes as much. For example, after going round and round on the controversial subject of the specialist's role, the staff study concludes that there is nothing better available to perform this function, and it agrees the system has worked well.

Unfortunately, the impression left on the casual reading public may be something else. For when someone says there have been no "widespread" abuses, or remarks that there should be policies to prevent specialists from dealing with customers at "unfair prices," the inevitable innuendo is of present abuses and unfairness.

Whether this is done by carelessness or design is immaterial. A serious study of the Nation's securities markets is no place to toss around loaded language.

It's no place either for a responsible Government body to fire off with much fanfare a report which has the coloration of being official but which is actually by underlings responsible for nothing. If there be injury, it will hardly be repaired if Mr. Carey and his fellow Commissioners tomorrow tell us they wash their hands of it.

Mr. BUSHNELL. I would like to offer in the record a copy of the cases I have referred to which are on appeal.

Senator LONG. I do not know as we'll enter them in the record, but we will accept them for committee use, and if they are necessary for the record, we shall put them in the record.

We are concerned with the charges you have made here. One of the duties of this committee, which we take seriously, is to look into the type of administrative practice and procedure that the administrative agencies indulge in. As I have indicated, a moment ago, there are quite a number of other Senators who are not on this committee who have indicated their particular interest in this matter and this type of procedure and operation by an agency. You may feel sure this will have some very careful attention.

We have invited the FCC here today to hear your statement. If they care to make any comment at this time, the committee will be glad to hear them.

You were finished?

Mr. BUSHNELL. Yes. I would like to make this request: If they do not make a comment today while I am here, would it be possible that I receive a copy of any further testimony they give in this matter?

Senator LONG. Yes; we shall see that that is done.

I want to say to the SEC men who are here to make their statements, there is a possibility that your Commission will be set down, that we shall ask you to appear for maybe a day's hearing at some future time.

Mr. Loomis, will you come forward, please?

STATEMENT OF PHILIP A. LOOMIS, JR., GENERAL COUNSEL; ACCOMPANIED BY DAVID FERBER, SOLICITOR; AND WALTER P. NORTH, ASSOCIATE GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION

Mr. LOOMIS. Thank you, Mr. Chairman.

Senator LONG. Would you introduce the men with you, please?

Mr. LOOMIS. Yes, Mr. Chairman.

On my far right is Mr. David Ferber, Solicitor of the Commission, and right next to me is Mr. Walter North, Associate General Counsel of the Commission.

Senator LONG. We would like the record to show that when we saw the statement of Mr. Bushnell, who just testified, and the nature of it, we notified your office and sent you a copy of it so that you would have an opportunity to be here this morning to clear up any points you might want to make. We want to give the SEC the opportunity to be heard at this time.

Mr. LOOMIS. The record should show that we are very grateful for the committee's courtesy and consideration in this regard. I know that your time schedule is a tight one and I do not intend to take up your time with any extensive testimony at this time.

I would first like to tender for the record the Commission's official comments on the legislation that you have before you.

Senator LONG. Is that available for the record?

Mr. LOOMIS. Yes; we wish to tender that for the record, if we may.

Senator LONG. Without objection, it will be printed in the record at this point.

Let me withdraw that ruling. Counsel just suggested that perhaps we should see that and look at it and determine later whether I want it to go in the record at this point. I believe that would be more correct.

Mr. LOOMIS. As to Mr. Bushnell's statement, we learned only yesterday evening that he was going to be a witness, and we received a copy of his statement through the courtesy of the committee a couple of hours ago. We, accordingly, have not had an opportunity to prepare any replies in any detail to his charges. We would like to ask leave of the committee to prepare a thought-out, properly designed reply to Mr. Bushnell's statement and we will, of course, provide him with a copy.

Senator LONG. That will certainly be agreeable, and we shall look forward to receiving it.

Mr. LOOMIS. I shall only say one thing about this matter of publicity. All that the Commission did in this matter was, when a public proceeding, either in court or brought before the Commission, was commenced after the end of an investigation, the Commission issued a release which did no more than summarize the copies of the public documents which had been filed in court or before the Commission, identifying the fact that these were merely charges and that the court or Commission would in due course decide them. We felt that the public has the right to know when a public proceeding commenced.

Senator LONG. Let me ask you a little more about that in detail. Is it the view of your Commission or is it your view that when you make a charge that a company is engaged in acts or practices which may operate in fraud or deceit, false and misleading statements—just to say a few of those words there, and that is the charge you make—do you have the feeling that that is proper, to release that until you have had some type of verification of it in court or otherwise?

In this particular case, I recall you withdrew it later on and the man was cleared of those charges.

Mr. LOOMIS. Well, we shall go into that question in our statement. But we do feel that—

Senator LONG. What would be the general purpose to be served for the general public interest by the releasing of that statement with that type of charge in it.

Mr. LOOMIS. When there is a public proceeding and the documents are a matter of public record and anybody can look at them—

Senator LONG. Why would you not let them look at them instead of you releasing them and calling those particular charges to their attention? What I am getting at, the newspapermen or newspaper media, or news media handle what is given to them. It is not a ques-

tion of suppressing news, and I am certain that any responsible newsman sees it.

But the thing I am concerned about, or that this committee is concerned about, is the practice of your agency and certain other agencies of making those statements, driving this wedge against the defendant or the man that you have called before you, and then apparently, as has happened in this case and many other cases which have been called to the attention of this committee, they do not amount to anything, they are discharged or they are turned loose afterward. What has the public gained by that type of charge, or what has your agency gained by it?

Mr. LOOMIS. As I say, I do not want to get into the merits of this particular case or how the charges were disposed of.

Senator LONG. I am not getting, I am not interested in the merits of it. I am just speaking generally.

Mr. LOOMIS. Speaking generally, it has been our view that the public has a right to know of the commencement of a proceeding.

Senator LONG. But you are not charged by statutes anywhere to help them though. If the reporter wants that information, he can come and get it. The point I am talking about is the active interest of an agency such as yours in trial by press by releasing that information, and then, in this particular type of case—I shall not say this one case, but in other cases, when you are not successful in it, you have done the man an irreparable injury.

Mr. LOOMIS. Of course, we are very careful to try not to commence a court or other proceeding unless we can go through with it.

Senator LONG. But you do not win all your cases, do you?

Mr. LOOMIS. No; we do not. No one does.

Incidentally, I might mention that the Department of Justice also has a policy of releasing indictments when they are made, and we conform to the policy which the Department has.

Senator LONG. Have there not been some changes in the Justice Department's view about this type of release recently?

Mr. LOOMIS. Yes, the Attorney General issued a policy directive to his staff on April 26 of this year, and I followed it up by issuing a policy directive to our staff that we should proceed in precisely the way the Justice Department proceeds.

Senator LONG. Could we have a copy of what your agency has done?

Mr. LOOMIS. That is right; I will make it available.

Senator LONG. I realize, of course, Mr. Loomis, that you are at a disadvantage due to the short notice.

Mr. LOOMIS. I realize that.

Senator LONG. I would like to ask you one more question which you may be able to answer now, and if not, you may answer it at some other time.

The fact that this man was denied the right to come before your representatives or your Commission with his attorney—it seems to me that the present law says that every party shall be accorded the right to appear in person, or accompanied by or with counsel or duly qualified representatives in any agency proceeding.

Mr. LOOMIS. That is correct.

Senator LONG. I cannot see any justification for your Commission denying the right of counsel to this man.

Mr. LOOMIS. We accord to all witnesses, whether they are subpoenaed, whether they are required to appeal or not, the right to have counsel, to be accompanied or represented by counsel. In 99 percent of the cases, they can choose any counsel they please. However, in some situations in a private investigation, we feel that to have counsel for the person being investigated also represent the witness from whom we are attempting to obtain information may impair our ability to conduct the investigation, because the counsel will thereby know everything that we learn and will be able to go back and report it to his real and principal client, the person who is under investigation. That may mean that our investigation will be frustrated. We exercise that power very carefully, and it is rare that we do exercise it.

But we did in this particular case, and the question is now before the ninth circuit, which will determine whether or not we are right.

Senator LONG. Is that statute, or is that your rule?

Mr. LOOMIS. That is our rule.

Senator LONG. Does that not fly very definitely in the face of the law that says every party shall be accorded "the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding or investigation"? Is that not an agency proceeding?

Mr. LOOMIS. I do not know whether an investigation of this type is an agency proceeding or not. I doubt it. In any event, the witness is not a party to any proceeding.

Senator LONG. But the man is there. He is being interrogated by a Government agency. He does not know at that time whether it is criminal or civil, and he is denied by your agency the right to appear with counsel at that time?

Mr. LOOMIS. No, he has a right to have counsel.

Senator LONG. You say he does in 99 percent of the cases, and the other 1 percent, he does not.

Mr. LOOMIS. No, you did not understand me. He is entitled to have counsel. We just say in this 1 percent type of case, he cannot have the same counsel as the person who is being investigated. He has to get other counsel.

Senator LONG. In other words, you are determining who he cannot have. You are not determining who he can have, but rather who he cannot have.

Mr. LOOMIS. We are not staying who he can have. He has the choice of the entire bar except for one man.

Senator LONG. But that man happened to be his lawyer, his attorney.

Mr. LOOMIS. No, actually—I do not want to debate the merits of this particular case—it was not really his lawyer. Mr. Bushnell was representing the persons we were investigating and we thought that they were his real clients rather than this witness.

Senator LONG. But he did make a request for this attorney and you refused that request?

Mr. LOOMIS. Yes, that is right.

We have, for example—it was not present in this particular situation, but it was pretty close to it—a situation where we are investigating an employee, and his employees volunteer to give us information and we take it privately. Now, if the employer's counsel come in to

represent the employee and report to the employer everything the employee says, you can be quite sure that the employee is not going to be very frank with us. That is one of the problems, and we had a similar problem in this case, because Mr. Bushnell, as his statement will indicate, disapproved of our investigation and he has advised people not to cooperate with us.

Senator LONG. Was Mr. Bushnell under investigation or charged by you?

Mr. LOOMIS. No; his client was.

Senator LONG. I still do not quite understand. Mr. Bushnell was under no charge by your agency?

Mr. LOOMIS. No, no.

Senator LONG. And you would not permit this man who was under investigation to have Mr. Bushnell as his attorney?

Mr. LOOMIS. No; the man who is under investigation has been consistently represented by Mr. Bushnell. The man who we said he could not represent was not a subject of investigation; he was a witness who we thought had information which we needed.

Senator LONG. Did Mr. Bushnell represent that man?

Mr. LOOMIS. He attempted to.

Senator LONG. That is not for you to determine. Is that not for the man himself to say, "Mr. Bushnell represents me"? Did he say that to you, or do you know?

Mr. LOOMIS. I believe he probably did.

Senator LONG. How else can a man select his attorney? That is the man you had before you, yourself?

Mr. LOOMIS. Yes; normally, as I say, almost every time we respect that decision. But in some instances, we feel we have to say to a witness, "No, you have to get some other member of the bar."

Senator LONG. I never saw or heard of Mr. Bushnell until this morning. He is a member of the bar of the State of Utah, is he not?

Mr. LOOMIS. Yes.

Senator LONG. He is a reputable lawyer, is he not?

Mr. LOOMIS. As far as I know, yes.

Mr. FENSTERWALD. Are you gentlemen familiar with section 3 of the Administrative Procedure Act, the proposal for the change which we have before us today?

Mr. LOOMIS. I am not sure. I do not know whether I can identify it by section.

Mr. FENSTERWALD. It is the so-called freedom of information section, public information section.

Mr. LOOMIS. In general, I am familiar with it.

Mr. FENSTERWALD. Section 3(e) has exceptions for information which has to be published.

Mr. LOOMIS. Yes.

Mr. FENSTERWALD. Under that, you will find a subsection, (e), which provides for a matter which has been specifically exempted from disclosure by statute. Do you see that?

Mr. LOOMIS. Yes.

Mr. FENSTERWALD. I wonder if you will comment for me on this statement:

The argument will probably also be made that the exception in section 7(e)(3) for materials specifically exempted from disclosure by statute would not permit

us to (disclose this information on the basis that it) would unfairly injure members of the public.

Does that sound familiar to you?

Mr. LOOMIS. Surely.

Mr. FENSTERWALD. Further, it says:

Thus, it might be urged that certain proceedings to determine whether to revoke the registrations of brokers or dealers must be public even though the Commission deemed it consistent with the public interest to protect the persons involved from the possibility of adverse publicity if it should ultimately be determined that the charges against them have not been substantiated.

Mr. LOOMIS. Some broker-dealer proceedings we presently conduct privately, for the reasons which you have stated. However, there is no statutory provision that says that broker-dealer proceedings must be private. Therefore, we thought that we could not contend that these proceedings were specifically exempted by statute from disclosure, because no statute does so specifically exempt them, with the result that there would be a possibility that they would have to be public.

Mr. FENSTERWALD. You do recognize this quote as coming from the SEC's own comments on this?

Mr. LOOMIS. Oh, yes.

Mr. FENSTERWALD. And you do not find anything inconsistent about that and cranking out the publicity of Mr. Bushnell's case, where there is irreparable damage to his client?

Mr. LOOMIS. In some instances, we conduct broker-dealer proceedings privately; in other instances, we conduct them publicly. The statute says in effect that the Commission has discretion in this regard. The lines of demarcation are generally, we conduct them privately in order to protect the reputation of the broker-dealer unless we feel that there is a countervailing public interest in the nature of the public's right to know with respect to the existence of this proceeding.

Sometimes we think, for example, that the customers of a broker-dealer are entitled to know that the Commission staff has found something which it thinks is seriously wrong with the firm. They would have a grievance against us if they learned about a year later that, say, we found the firm had serious financial problems or engaged in frauds on its customers. They would say, "You should have told us that before we lost our money."

There are, however, other types of broker-dealer proceedings of a more technical nature, or where we are trying to work out a problem of law or fact where there is no public interest that calls for making the proceedings public.

Mr. FENSTERWALD. I still do not understand what your practice of cranking out these press releases is, how you can make the statement in your comments that you are concerned with adverse publicity at which it will ultimately be determined that the charges against them will not be substantiated.

There is one thing in trying a man publicly, and it is another thing to crank out press releases.

Mr. LOOMIS. We have to balance the interests of the respondent in privacy with the interest of the public in having knowledge where there is a public interest, and the Commission does that on a case-by-case basis.

Senator LONG. Mr. Witness, how would the public be served by cranking out that kind of a statement about the man in a case and then delaying your decision about it for a year or more? I do not see how this would take care of the public interest.

Mr. LOOMIS. There were numerous delaying factors in this particular situation. I believe I would like to reserve the explanation of why it took so long for our comments.

Senator LONG. We shall look forward to receiving a more detailed answer from the Commission in regard to the charges made by Mr. Bushnell before we can make a decision about further hearings on this particular matter; we shall read your statement. Although I say to you frankly, I am sure the committee is very much concerned about it. I have the feeling that perhaps we will want to have some extended hearings, perhaps, on some of the practices of your particular agency. Of course, that may depend on the information we have from your agency. We want to reserve a decision of that kind.

Mr. LOOMIS. I can understand why Mr. Bushnell's statements would disturb you, and we shall endeavor to furnish you further material on it.

Senator LONG. Before we make any decision, we want to receive your statements on it, surely.

Mr. LOOMIS. If your committee has the time to make an individual inquiry with respect to our procedures, we shall welcome it, because we feel this is the way to improve the procedures of an agency, to look into them and give us the benefit of your thinking.

Senator LONG. Thank you very much. We appreciate your cooperation.

Thank you gentlemen, for being here this morning.

(The following material was received for the record:)

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, ON S. 1336, 89TH CONGRESS¹

Our study of S. 1336 has convinced us that this bill would seriously interfere with our administration of the Federal securities laws, resulting in less protection for the investing public and less assistance to persons in the regulated industry seeking to comply with these laws. Our administrative proceedings would be prolonged and snarled in redtape and our staff would be greatly hampered in its investigation of securities frauds and other violations of law. These undesirable results are not compelled by considerations of fairness. Over the years we have continually attempted to develop fair and efficient administrative procedures and we have received favorable comment upon our procedures by independent investigating bodies.² In 1960, after a study of more than a year by our staff and independent experts on administrative law, we revised our Rules of Practice with the aim of making our procedures more efficient while at the same time assuring full procedural due process for all who might

¹ Portions of these comments are identical to certain portions of the Commission's comments to the committee relating to S. 1663, 88th Cong., as introduced and as tentatively revised.

² The Commission has been described as "an outstanding example of the independent commission at its best." Task force report on regulatory commissions (app. N) prepared for the Commission on Organization of the Executive Branch of the Government (1949) 145. As long ago as 1941, the Attorney General's Committee on Administrative Procedure cited this Commission for its informal procedures designed "to obviate hardship" to private persons "from unnecessary or ill-advised action," which procedures are still followed. Administrative Procedures in Government Agencies, S. Doc. No. 8, 77th Cong., 1st sess. (1941), pp. 41-42. In a management survey of the Commission's operations conducted for the Bureau of the Budget a few years ago it was stated that the Commission was " * * * performing its mission in a thoroughly effective manner * * *" and was " * * * maintaining high personnel and performance standards * * *." Survey of Organization and Operation, Securities and Exchange Commission (1960) iv.

be affected by our actions. In response to recommendations of the Administrative Conference of the United States, this Commission has recently (1) adopted a code of behavior governing ex parte communications between persons outside the Commission and decisional employees; (2) adopted rules regarding the availability of subpoenas; and (3) established a Committee on Procedures which meets regularly and maintains a continuing study of the Commission's Rules of Practice and procedures generally. The Commission has within the past year delegated to its hearing examiners authority to render initial decisions and has made appropriate modifications in its Rules of Practice.

The difficulties presented by S. 1336 stem largely from procedures which would overjudicialize administrative proceedings and which attempt to correct by general legislation isolated problems that may exist in particular agencies without adequate recognition of the differing functions and purposes of the several agencies or, indeed, of different types of procedures required within a single agency.

We believe that the exercise by Congress of its oversight respecting the procedures of the various agencies would be more discriminating and effective if conducted on an individual, agency-by-agency, basis rather than by legislation of general applicability, such as S. 1336. We believe that Congress, working on the basis of the recommendations and studies of the permanent Administrative Conference which it has recently created, could more effectively improve procedures of each agency, including, to the extent found necessary, our own.

The Supreme Court has pointed out that procedures must necessarily differ from those of courts in "[m]odern administrative tribunals," which that Court has stated "are the outgrowth of conditions far different from those [of courts]," being "[t]o a large degree * * * a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940). The Court stated therein that within the confines of "the fundamentals of fair play," administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 143.

In our view S. 1336 would adversely affect the conduct of proceedings before the Commission and also the Commission's investigations and other enforcement activities. Many of our difficulties result from the rigid requirement of the same procedural formalities for different types of proceedings, including those for which they are not appropriate or even are not desired by any party,³ and from new procedural requirements where there appears to be no need therefor and which will result in uncertainty. In this connection it should be noted that the statutes administered by the Commission contain more than 160 provisions under which the Commission may conduct adjudicatory proceedings and more than 170 provisions under which it may conduct rulemaking proceedings.⁴ The delay in these proceedings resulting from the difficulties suggested above would be harmful to the investing public and to legitimate business interests and would tend to benefit violators of the securities laws. In addition to creating certain opportunities for dilatory tactics in law enforcement proceedings, the act contains other features which might unnecessarily impede enforcement, not only in the conduct of adjudicatory proceedings but also in connection with activities of the Commission unrelated to administrative proceedings. We discuss these criticisms in more detail below and refer also to certain other aspects of the bill which we believe would interfere unduly with the functions of this Commission.

I. S. 1336 would create delay in this Commission's proceedings by imposing procedural formalities where not appropriate and by encouraging litigation through upsetting established interpretations of procedural standards. (Sections 10(b), 7(e), 8(c)(2), 9(b), 2(c), 5(a)(5), 5(b), 2(e), 5(a)(6), 7(c), 7(d), and 10(a).)

³ This objection is tempered by the provisions for modified hearing procedures in section 5(a)(5) but, as indicated below (p. 14), certain complicating procedural formalities are present even under those provisions.

⁴ See the "Survey and Study of Administrative Organization and Practice in the Federal Agencies," by the Committee on Government Operations of the House of Representatives, 85th Cong., 1st sess. (1957), pt. 11D, pp. 1906-13, 1928-33. The 1964 amendments to the securities acts, 78 Stat. 565, deleted a few of the provisions there specified but added a considerable number of new such provisions.

A. Major categories of Commission cases

The most important cases before the Commission fall into two general classes: first, disciplinary proceedings against brokers, dealers and others; and, second, proceedings—particularly under the Investment Company Act of 1940 but to some degree under other statutes—in which the object is to apply principles of law and policy to financial structures and transactions as to which there is no substantial factual dispute, although there may be sharp differences as to the law or the policy. The bill's provisions will have an adverse effect in both types of cases.

In a disciplinary proceeding, particularly one which may lead to the revocation of a broker-dealer's registration, the respondent has every incentive to pursue delaying tactics in order that he may continue in business or defer the imposition of a sanction. He will thus insist upon observance of every procedural formality, pursue every opportunity for interlocutory or other appeal, and will particularly seek to divert the proceeding from an inquiry into his conduct to an inquiry into the Commission's observance of all procedural requirements. He will whenever possible seek to enjoin the conduct of the proceedings upon the ground that some procedural requirement has not been properly understood or observed, and will not be overly concerned with the prospect for ultimate success in such litigation if the proceeding can thereby be stalled. As pointed out below, the bill affords excessive opportunities for the pursuit of such tactics.

As to the other type of proceeding, involving law and financial policy, ordinarily the objective both of the Commission's staff and of the respondents will be to collect the necessary business and financial facts as rapidly as possible so as to lay the issue before the Commission for decision. Trial-type hearings, interlocutory appeals, and similar procedures will often be neither needed nor desired by anyone, except perhaps someone who wishes to obstruct the business transactions of others.

B. Delay in disciplinary proceedings

Certain provisions of S. 1336 would greatly facilitate delaying tactics in disciplinary proceedings. For example, section 10(b) of the bill confers upon district courts "(1) jurisdiction to review agency action reviewable under this act, except where a statute provides for judicial review in a specific court" plus "(2) jurisdiction to protect the other substantial rights of any person in an agency proceeding." In our experience the longest delays in such proceedings have been through parties' bringing actions in the district courts to enjoin the proceedings—ignoring the principle of exhaustion of administrative remedies. While the courts have almost always held that such actions could not be maintained, even unsuccessful actions of this type have resulted in extended delays in certain proceedings.⁵

Moreover, this provision appears to be unnecessary in the light of the explanation of the purpose of an identical provision in the predecessor bill to amend the Administrative Procedure Act.⁶ It would also give rise to arguments that a drastic curtailment was intended of the operation of the principles of exhaustion of administrative remedies, standing to sue and irreparable injury.

⁵For example, in *Otis & Co. v. Securities and Exchange Commission*, 176 F. 2d 34 (C.A.D.C., 1949), the court of appeals held that a part of a broker-dealer proceeding should have been enjoined, thus making necessary a petition to the Supreme Court, which reversed per curiam in a one-paragraph opinion, *Securities and Exchange Commission v. Otis & Co.*, 338 U.S. 849 (1949). Also see *Securities and Exchange Commission v. R. A. Holman & Co.*, 323 F. 2d 284 (C.A.D.C., 1963), certiorari denied, 375 U.S. 943 (1963). The proceeding which was the subject of the Otis litigation was not completed until over 6 years after it was instituted. The proceeding which was the subject of the Holman litigation has now been pending for over 4 years.

⁶See "Memorandum To Accompany Second Committee Print of S. 1663, 88th Cong.," prepared by the staff of the Subcommittee on Administrative Practice and Procedure, U.S. Senate, p. 7. It is there stated that part (2) of the provision is intended "to avoid the construction that when a statute provides review in a specific court, the district courts are without jurisdiction. Such a construction would overrule the law of *Leedom v. Kyne*, 358 U.S. 184 (1958), when such procedure is necessary." *Leedom v. Kyne* held that, notwithstanding the provision in the National Labor Relations Act for review in courts of appeals of N.L.R.B. orders, a district court had jurisdiction of a suit to vacate an N.L.R.B. order made in excess of its delegated powers and contrary to a specific prohibition in the act. It should be noted that the principle that a specified court has exclusive jurisdiction is an established general proposition of law (see, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *R. A. Holman & Co., Inc. v. Securities and Exchange Commission*, 299 F. 2d 127 (C.A.D.C., 1962), certiorari denied, 370 U.S. 911 (1962)) to which *Leedom v. Kyne* is a "limited exception" (*McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16 (1962)) for which no special statutory provision is needed (*Machinists v. General Airlines*, 372 U.S. 682, 690 n. 13 (1963)).

Section 7(e) of the bill, dealing with interlocutory appeals, permits review during the course of a proceeding where the presiding officer certifies that a review of a material question would prevent substantial prejudice to any party or would expedite the proceeding. This subsection, however, could have the effect of delaying a proceeding rather than expediting it, in view of the penultimate sentence permitting stays and of the last sentence requiring the agency or one or more of its designated members to determine the questions forthwith. If the latter provision should be interpreted to mean that the agency could not postpone the determination of the matters certified until the conclusion of the proceeding even though it believed there would be no substantial prejudice by so doing, it might be required to grant piecemeal stays of the proceeding which could well increase the overall time consumed therein.

The proposed requirement for agency appeal board procedure in section 8(c)(2) might create confusion and in some cases result in litigation.⁷ Moreover, in connection with the proposed section 8(c)(4), this provision where applicable might give rise to additional delay by reason of persons seeking two layers of agency review of the hearing examiner's decision.

Section 9(b) authorizes a reviewing court to hold that publicity issued by an agency or any member, officer or employees thereof to discredit or disparage a person under investigation or a party to an agency proceeding constitutes "a prejudicial prejudging of the issues in controversy," thereby enabling the court to set aside any agency action against such person. Despite the laudable purpose of this provision, it is difficult to estimate the extremes to which its applicability might be urged. This Commission publishes releases summarizing the allegations in litigation that it institutes. It also summarizes charges made in administrative proceedings where, for example, substantial fraud is involved or it otherwise appears that the investing public should be alerted to the situation prior to the completion of the proceedings. Releases are also published to alert injured investors to the possibility of a civil remedy prior to the running of the statute of limitations. Likewise releases may be published to alert the securities industry to the fact that the Commission has taken action with respect to the particular practices involved in proceedings. In addition, members of the press frequently seek and receive information from Commission personnel concerning pending litigation and public proceedings. The inhibitions that section 9(b) of the bill might impose on our public information policy would seem to be contrary to the public interest. That section also appears to be quite inconsistent with the freedom of information philosophy of section 3 of the bill. In any event, it is difficult to understand why public investors should be denied the protection of a Commission sanction against securities law violators even if a Commission employee has issued publicity, if such publicity could not in fact constitute prejudgment by the Commission of the issues in a proceeding before it.

C. Delay in other types of proceedings

The Commission in the past has encouraged parties to specify what procedures they desire to have followed and to waive any other requirements. In the non-disciplinary type of proceedings, where there is substantially no factual dispute, parties have generally waived requirements of a hearing examiner's decision in order to permit ultimate decisions to be made more promptly. Such waivers are especially helpful in expediting proceedings where novel and important policy questions are involved since the Commission must necessarily take up these questions in any event. The provisions of S. 1336 would compel an initial decision by a hearing examiner in all cases subject to section 7 and 8 of the act,

⁷ Sec. 8(c)(2) does not require agency appeal boards where they would be clearly unwarranted by the number of proceedings in which exceptions are filed. While we think that the "clearly unwarranted" test would be applicable to this Commission, it is possible that it might be found preferable to establish such a board rather than to engage in litigation as to whether or not such a board would be "clearly unwarranted."

It is questionable, in any event, whether the agency appeal board procedure would be applicable to most of the administrative proceedings which might result in the imposition of a sanction that are conducted by this Commission, in view of the fact that the statute authorizing this Commission to delegate certain decisional functions provides that adverse action by a hearing examiner in certain instances requires review by the Commission upon the request of the person or party adversely affected. 15 U.S.C. 78d-1(b). Such proceedings might fall within the exception in sec. 8(c)(2) of the proposed bill where "agency appellate procedures have been otherwise provided by Congress." It is by no means clear whether an appeal board procedure could be established for such proceedings.

possibly even where all the parties might be of the view that that decision should be waived.⁸

An illustration of the importance of permitting hearing officers' opinions to be eliminated by stipulation in some types of situations is revealed by the application of the Prudential Life Insurance Co. to be permitted to sell variable annuities. The Commission determined that these could not be sold except pursuant to the provisions of the Investment Company Act of 1940 and also determined which of 13 requested exemptions from otherwise applicable requirements of that act should be granted. The proceeding had been instituted on February 28, 1961, and the record consisted of 2,900 pages of transcript and exhibits. There was no dispute as to any of the underlying facts, substantially all of which came from the company's own records. The evidentiary record was closed in September 1961, but by reason of the complicated issues involved, the briefing schedule was not completed until January 1962, at which time oral argument was had. The Commission's decision was announced approximately 1 year thereafter. In arriving at its decision, in addition to the assistance of experienced lawyers in its opinion-writing office and the individual legal assistants of the Commissioners, the Commission had been aided by a special consultant, a law school professor retained to analyze the considerations that should be determinative in variable annuity cases. The Commissioners themselves had devoted many hours to the problems both in individual study and in conferences with each other. In its opinion the Commission declared that, by reason of its determinations on certain issues, it was unnecessary to decide other issues that had been argued by the parties. The decision of the Commission was affirmed by the U.S. Court of Appeals for the Third Circuit⁹ and the Supreme Court denied Prudential's petition for a writ of certiorari.¹⁰

The ultimate time elapsed from Prudential's application until final action by the Commission was approximately 2 years. Unquestionably this would have been extended for years more had a decision been required of the hearing officer and it is doubtful that the decision of any hearing officer would have served a useful purpose. This is partly because no hearing officer would have had available to him the type of assistance available to the Commission. In addition, while acting in its adjudicatory capacity in the proceeding, the Commission could and did deal administratively with aspects of the problem—i.e., by adopting an exemptive rule of general application—and announced in its opinion that it intended to do so. A hearing examiner would, of course, have been unable to do this. From the standpoint of time consumed, moreover, a hearing examiner, knowing that an appeal to the Commission would be inevitable, would undoubtedly have felt it necessary to pass upon all of the issues involved, including many difficult issues that the Commission ultimately determined were irrelevant. Any decision of a hearing officer would necessarily have been appealed to the Commission, either by the company, which ultimately sought to present the matter to the Supreme Court, or, had the hearing examiner's decision been in favor of the company, by the staff of the Commission's Corporate Regulation Division, which would have had a duty to see to it that the problems were passed upon by the Commission. In the latter event, under the proposed bill the staff would have been unable to take the matter directly to the Commission but would have had to utilize an appeal board, which presumably would have required many additional months for its decision and would have been subjected for the most part to the same handicaps as the individual examiner would have been. Had the appeal board decided adversely to Prudential, the company undoubtedly would have asked the Commission to review the decision and undoubtedly the Commission would have done so; had the appeal board decided in favor of the staff, presumably the Commission would have felt that a case of this importance must nevertheless be reviewed by it.

The actual procedure followed in the *Prudential* case achieved the result that a sponsor of S. 1336 has indicated he hoped to achieve through the predecessor

⁸ As originally introduced, the predecessor bill to S. 1336 permitted the parties to waive a decision by a hearing officer. Sec. 8(a) S. 1663, 88th Cong. (That provision was deleted in the subcommittee revision for the reason that it was "* * * inconsistent and contradictory to the concept of decisional power as vested in the presiding officer." See "Memorandum to Accompany Second Committee Print of S. 1663, 88th Cong.," prepared by the staff of the Subcommittee Administrative Practice and Procedure, U.S. Senate, p. 6.

⁹ 326 F. 2d 383 (C.A. 3, 1964).

¹⁰ 377 U.S. 953 (1964).

bill—elimination of “the idea that there must be two decisions * * *.”¹¹ There was just one decision prior to review by the courts. Under the bill, however, by reason of the fact that two decisions would have been required and possibly three before the case would have been ripe for court review, the matter might now be still before the Commission, with the long road of judicial review ahead.

While, as indicated above, the *Prudential* case is not the usual type of proceeding now coming before the Commission, some cases under the Investment Company Act, and occasional cases still arising under the Public Utility Holding Company Act, having equally complicated records and comparable policy questions, continue to recur. There is no reason why decisions therein should be unduly delayed by procedures designed for problems presented by a different type of case. In this connection reference should also be made to the proposed change in the definition of rulemaking in section 2(c) of S. 1336, which eliminates therefrom proceedings of particular applicability. Most of the cases of this type coming before the Commission have come within that definition and, accordingly, were not subject to the separation-of-functions requirements of section 5(c) of the present Administrative Procedure Act. Since speed may be of the essence with respect to certain proposed transactions, applicants have sometimes preferred that the staff of the interested division assist the Commission in the preparation of its opinion. Even if waivers were permitted under S. 1336, however, the proposed absolute requirement of separation of functions in these cases may furnish a weapon for obstruction to persons seeking to prevent agency authorization of legitimate transactions sought by other parties.

D. Restricted value of proposed modified hearing procedure

Certain of the difficulties discussed above with respect to S. 1336 could presumably be avoided through the use of the provisions of section 5(a)(5) of the tentative revision, entitled “Modified Hearing Procedure.” This section permits an agency to adopt “abridged procedures which shall be on the record and be reasonably calculated to promptly, adequately, and fairly inform the agency and the parties as to the issues, facts, and arguments involved.” The abridged procedures allowable under this section are “for use by consent of the parties in such proceedings as the agency may designate.” These provisions reflect a philosophy with which, as has been indicated, we fully agree, i.e., that, subject to requirements of procedural due process, agencies should be free to formulate procedures most likely to result in prompt and just determinations. The value of the modified hearing procedure, however, is severely restricted by the facts that: (1) the separation-of-functions requirements of section 5(a)(6) apparently are applicable; (2) this section would not permit elimination of double or triple decisions that would be required in the *Prudential*-type case, since it does not purport to authorize modification of the provisions of section 8; (3) parties most interested in delay would not consent to procedures which would expedite Commission determinations.

E. Language changes threatening to upset established interpretations

Even where language changes may not be intended to change existing law, they may be the basis for arguments that significant revisions were intended. See, e.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), where the Supreme Court held that the test of “substantial evidence on the whole record” used in the Administrative Procedure Act must mean something different from the “substantial evidence” test previously employed by the courts in reviewing agency action. The bill contains a substantial number of amendments that leave a question whether existing law is intended to be changed and might provide a basis for appeal where it is sought to delay, for example, the ultimate revocation by this Commission of the registration of a broker-dealer.

One such area in which difficulties could result from the bill involves adjudications that need not be made on a record but to which section 5(b) of the bill presumably relates. It might be argued that this includes such Commission determinations as whether to accelerate the effectiveness of a registration statement for the sale of securities to the public. This argument would require hearings in such situations together with various other procedures that, as a practical matter, would severely interfere with the marketing of new issues of securities.

¹¹ Senator Edward V. Long, “Administrative Proceedings: Their Time and Cost Can Be Cut Down,” 49 A.B.A.J. 833, 836 (1963), regarding S. 1663, 88th Cong.

Additional examples of such language changes in the bill are set forth in the margin.¹²

II. S. 1336 contains provisions that, in addition to facilitating delay would otherwise be advantageous to those seeking to obstruct the Commission's investigations into their activities to the detriment of the public interest. (Secs. 6(a), 8(c)(2), 6(d), and 3(b)(C).)

Many of the provisions of the bill would provide additional devices for frustrating the Commission's effective enforcement of the securities laws. In addition to those discussed above which would facilitate delay, certain provisions could give other major advantages to law violators seeking to escape detection, exposure, or prosecution. Among the foremost of these is section 6(a) which appears to accord every "party" in an investigation the right to appear in person and with counsel. We do not know to whom this provision would apply or in what circumstances, but we are concerned that it might be urged that subjects of our private investigation are entitled to be present at the taking of other persons' testimony. Investigations by this Commission have been analogized to those of a grand jury¹³ and normally could not be effectively conducted if suspected violators had the right to participate in investigative proceedings to uncover the nature of their activities.

Another unnecessary advantage given by the bill to suspected law violators, which seems to be contrary to the general purposes of the bill, is contained in section 8(c)(2). That provision apparently would permit private parties but not the staff of an agency to seek direct agency review of a hearing officer's decision, bypassing the appeal board. We fail to perceive why the policy reason for denying direct agency review to the staff, whatever it may be, is not equally compelling where private parties seek review.

Section 6(d) of the bill, which would give to persons who submit data or evidence in the course of our investigations a copy or transcript thereof without qualification, is similar to that which was proposed in an earlier version of the Administrative Procedure Act. We criticized that initial proposal since we felt that the furnishing of transcripts of testimony should depend upon whether production would be used to defeat the congressional policy set forth in the statutes authorizing the investigation. Our comments were as follows:

"It has been our practice to be liberal in giving transcripts of testimony taken in investigations. However, we have on some occasions found it necessary to refuse requests for transcripts where there was reason to fear that the witness would make it available for the purpose of coaching other witnesses still to be examined or of revealing to a prospective defendant in a criminal proceeding just what testimony the Government has.

"It is a time-honored safeguard against perjury and conspiracy among witnesses to exclude other witnesses from a courtroom, or hearing room, while a particular witness is testifying, and of course, witnesses are always examined in secret in grand jury proceedings. Where transcripts are made available to witnesses there is no way of guarding against their being made available to the persons whose activities are the principal subject of investigation.

* * * * *

"In cases where the investigation involves examination of employees of the

¹² While the existing definition of "licensing" includes the "conditioning of a license," sec. 2(e) deletes that clause and adds that clause "the prescription or requirement of terms, conditions, or standards of conduct for named licensees thereunder."

Sec. 5(a)(6) continues the existing ban on certain agency employees being responsible for or participating in decisionmaking but expands the category of such employees from those who have investigating or prosecuting functions to those who have "investigating, prosecuting, or advocating" functions.

Proposed sec. 7(c) declares that agencies shall provide for the exclusion in their proceedings of "irrelevant, immaterial, or unduly cumulative or repetitious evidence" in place of the present provision for exclusion of "irrelevant, immaterial, or unduly repetitious evidence."

To the existing provision that parties shall be given opportunity to controvert facts of which an agency takes official notice, sec. 7(d) adds a declaration that "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency."

The description in sec. 10(a) of persons who have standing to seek judicial review would be changed from any person "suffering legal wrong because of an agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute" to any person "adversely affected in fact by any reviewable agency action."

¹³ See *Wooley v. United States*, 97 F. 2d 258, 262 (C.A. 9, 1938); *In re Securities and Exchange Commission*, 84 F. 2d 316, 318 (C.A. 2, 1936); *Consolidated Mines v. Securities and Exchange Commission*, 97 F. 2d 704 (C.A. 9, 1938); cf. *Perkins v. Endicott-Johnson Corp.*, 128 F. 2d 208, 214 (C.A. 2, 1942), *aff'd* 317 U.S. 501 (1943); *President v. Skeen*, 118 F. 2d 58, 59 (C.A. 5, 1941).

suspected law violator, the employees may be under considerable pressure from the employer, who may demand that they request ostensibly on their own account, and turn over to it transcripts of their testimony. If a witness subject to such intimidation is entitled to a transcript of his testimony as a matter of law, he may be unwilling to testify fully and truthfully.

"A large proportion of the investigatory work of this Commission is directed to uncovering of fraud in connection with the interstate sale of securities, and in this specialized field the Commission, as the courts have recognized, performs a function very similar to that of a grand jury. If the Commission could not safeguard the secrecy of its investigatory procedures, this would substantially impair the usefulness of administrative investigation in this field. It would similarly impair the legislative investigations made by the Commission in connection with rules and recommended legislation." [Footnote omitted.]

In addition, section 3(b)(C) of S. 1336 would require the Commission to make public its "staff manuals and instructions to staff that affect any member of the public * * *." While we are unable to determine the meaning or scope of this provision, we fear its possible effect on our investigative and other enforcement activities. We agree that the public should have access to such materials as will facilitate compliance with the law and transactions with the agency. But disclosure of investigative techniques set out in staff training manuals, for example, would virtually provide a blueprint for evading the law to prospective violators. Furthermore, such disclosure could interfere seriously with effective communication by the Commission with the staff. The prospect that instructions to the staff would be public would greatly impair efficient and sensible directions to the staff by requiring detailed and formal statements designed to avoid offending the most sensitive persons as well as to minimize the risk of attempts to enjoin staff activity for not conforming to instructions.

III. Other provisions of S. 1336 would interfere with proper administration of the securities laws by this Commission to the detriment of the public interest. (Secs. 3, 6(e), 6(k), and 8(c).)

In addition to our problems respecting the decision of cases and the conduct of investigations by the Commission, the bill creates other difficulties. The most important in this category are the provisions of the proposed section 3 which would require that all agency records, with certain limited exceptions, be made available for inspection by any person.

We are attaching a copy of a comment on H.R. 5012, 89th Congress, which we have recently provided to the House of Representatives Committee on Government Operations. The pertinent provisions of that bill are substantially identical to those provisions of sections 3(c) and (e) of S. 1336. As pointed out in that comment, we fear that it would be argued that the various exceptions from the general disclosure requirements would not be sufficiently broad to permit confidential treatment of some types of information that we believe should not be made generally public. Thus, it would probably be argued that the exception in section 3(e)(4) for "trade secrets and commercial or financial information obtained from the public and privileged or confidential" would not be broad enough to avoid disclosure of information submitted by persons seeking our advice and assistance to facilitate compliance with the statutes we administer. Businessmen frequently consult the Commission concerning proposed important business transactions; premature disclosure of such contemplated transactions could affect the markets for the securities of the companies involved and could afford an opportunity for overreaching the investing public to those persons who first gained access to the information. The argument would probably also be made that the exception in section 3(e)(3) for material "specifically exempted from disclosure by statute" would not permit us to avoid disclosure of Commission action where disclosure would unfairly injure members of the public. Thus it might be urged that certain proceedings to determine whether to revoke the registrations of brokers and dealers must be public even though the Commission deemed it consistent with the public interest to protect the persons involved from the possibility of adverse publicity if it should ultimately be determined that charges against them have not been substantiated. It should be noted that the American Bar Association has recently indicated its view that such Commission proceedings should normally be nonpublic. See resolution IV, February 17, 1964, house of delegates, American Bar Association. The argument might also be advanced that the exception in section 3(e)(5) for "interagency or intraagency memorandums or letters dealing solely with

matters of law or policy," would be insufficient to avoid disclosure of such documents dealing with law or policy in the context of specific facts. A great deal of redtape could ensue from efforts to keep policy and factual discussions separate in internal communications. There could result serious interference with free communication between Government officials with respect to the most efficacious manner of administering the law.

Section 6(e) of the bill would require an agency, unless otherwise provided by statute, to issue a subpoena upon request of any party. This Commission has recently revised its rules of practice to provide that, while subpoenas will normally be issued upon the request of any party to a proceeding, where it appears that the subpoena might be unreasonable, oppressive, excessive in scope, or unduly burdensome, the issuing official may require the applicant to make a showing of the general relevance and reasonable scope of the subpoena. (See rule 14(b), rules of practice, 17 CFR 201.14(b), Securities Act Rel. No. 4640.) Where such a showing cannot be made, we do not think a person subpoenaed should be put to the expense of hiring counsel to move to quash. The bill, however, would withdraw completely from the agency all control over issuance of subpoenas.

Section 6(e) would also require agencies to issue subpoenas authorized by law to any party to a rulemaking proceeding upon a showing of general relevance and reasonable scope of the evidence sought. This provision would seem to enable private persons to convert any agency rulemaking proceeding into an investigation or "special study" of other private persons' activities. We do not know what purpose this provision is intended to serve or what situations it is designed to remedy. Unless it is limited to those rulemaking proceedings that must be on the record, the provision seems entirely unwarranted.

Section 6(k) of the bill appears to require agencies to make determinations on the merits of all requests for declaratory orders and provides that such determinations are final agency action for purposes of judicial review. It is difficult to understand why an agency should be under an obligation to render an opinion on every question presented to it by any person no matter how meaningless, superfluous or inappropriate the question might be. In addition, as pointed out in the attached comment on H.R. 5012, the Commission's staff provides numerous interpretations, no-action letters, and other forms of advice on a more or less informal basis to businessmen to facilitate their compliance with the law in contemplated business transactions. To convert such interpretations into judicially reviewable declaratory orders would be greatly to reduce and to delay the flow of advice from the Commission. Moreover, section 6(k) could enable a private person to bring the Commission into court even though normally no case or controversy would exist. We do not believe that the Commission's administration of the securities laws should be subject to such interference.

Finally, we do not believe that the Commission's control over its proceedings should be as limited as is suggested by the provisions of section 8(c). For example, it would seem clear that the Commission should be able to reverse a hearing officer's findings of fact that are contrary to the weight of the evidence even though they are not "clearly erroneous." But it appears that section 8(c)(1)(B) of the bill would not permit this. So long as the Commission has the ultimate responsibility for its proceedings, it should have the power to make its own findings of fact where appropriate.

In these comments there has been no attempt to be exhaustive regarding the problems that might be created by the adoption of S. 1336. We think the illustrations should be sufficient to make clear that procedural provisions not specifically directed to deficiencies in this agency's procedures would interfere with legitimate business and impair the ability of this Commission to act in the public interest.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE COMMITTEE
ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES, ON H.R. 5012,
89TH CONGRESS

The provisions of H.R. 5012 are intended "[t]o make sure that the public gets the information it is entitled to have about public business * * *" ¹ by amending section 161 of the Revised Statutes of the United States, 5 U.S.C. 22, commonly known as the Federal housekeeping statute. To accomplish this purpose the

¹ See remarks of Congressman Fascell when introducing H.R. 5013, an identical bill. 111 Congressional Record 2857 (1965).

bill would require that all agency records, with certain limited exceptions, be made available for inspection by any person.

This Commission agrees that unnecessary secrecy in the operation of the Government should be eliminated and that Government agencies should attempt to facilitate the securing of information by members of the public having a legitimate interest therein. Indeed, the enactment of the statutes administered by this Commission was in large part motivated by the desirability of making information available to members of the public which might be pertinent to their investment decisions. Accordingly, the vast bulk of material contained in this Commission's files is public and the Commission makes every effort to have it readily available to the press and to individual members of the public.² The Commission attempts to comply not only with the letter of section 3 of the Administrative Procedure Act, dealing with public information, but also with the spirit of that section. Rule 25(a) of the Commission's rules of practice provides that all information contained in documents filed with the Commission is public unless otherwise provided by statute or rule or directed by the Commission. In addition to complying with the publication provisions of section 3 of the Administrative Procedure Act, the Commission seeks to assure wide dissemination of its rule proposals, rules, opinion, and interpretations adopted for the guidance of affected persons by furnishing copies of this material to the press, making it available for public inspection at the Commission's offices and sending copies to numerous persons on mailing lists which the Commission maintains. These mailing lists included persons who are directly subject to regulation by the statutes we administer as well as those who have requested certain classes of material from the Commission. The latter category alone includes more than 35,000 names.

On the other hand, the Commission treats certain types of matters as non-public, including documents afforded confidential treatment pursuant to schedule A, paragraph 30 of the Securities Act of 1933, section 24 of the Securities Exchange Act of 1934, section 22(b) of the Holding Company Act of 1935, section 45(a) of the Investment Company Act of 1940, and section 210 of the Investment Advisers Act of 1940, and proceedings in connection therewith, material obtained in any nonpublic proceeding, interagency and intraagency correspondence, memorandums, and working papers, documents relating to internal matters, preliminary copies of proxy material, correspondence with the public, and classified material.

The major difficulties that would be created for this Commission by enactment of H.R. 5012 would flow from possible arguments that various of the exceptions from the general disclosure requirements are not sufficiently broad to permit confidential treatment of some types of information that we believe should not be made generally public.

We are of the view that there are important considerations why certain material in the Commission's files should not be subject to general public scrutiny, as where disclosure of the material would impair the advice and assistance we render to persons seeking to comply with the statutes we administer, where it would unfairly injure members of the public, or where it would interfere with free communication between Government officials with respect to the most efficacious manner of administering the law. Certain of these considerations are recognized in the legislative history of the Administrative Procedure Act, which points to the problem of publicity which might "reflect adversely upon any person, organization, product, or commodity" prior to "actual and final adjudication" by an agency (H. Rept. 1980, 79th Cong., 2d sess. (1946), p. 49). The importance of these considerations may vary in different situations. Thus, information sought in a congressional investigation or pertinent to the determination of a lawsuit might properly be made available despite countervailing considerations which would be sufficient to refuse to make the information available to casual inquirers.

We would emphasize that, as to a large part of the material in the Commission's files which is not made public, the primary reason for privacy is to protect the rights and interests of private persons having business before the Commission. The statutes administered by the Commission have an impact on a wide variety and great number of business transactions and arrangements; conse-

² The breadth of the material available to the public is demonstrated by the list which the Commission has prepared and issued to the public entitled "Compilation of Documentary Materials Available in the SEC," a copy of which is attached.

quently, businessmen very often must determine the effect of these statutes upon proposed transactions and arrangements and the steps necessary to be taken in planning and executing them so that there will be no delays resulting from questions that might otherwise be raised as to full compliance with the securities laws. To enable these matters to be resolved properly, full details of proposed transactions such as mergers, acquisitions, and financing plans are given to and discussed with the Commission's staff, often substantially in advance of the consummation of the transactions. Businessmen expect, and we believe have a right to expect, that their confidence in disclosing these matters will be respected; otherwise the administration of the Federal securities laws would be greatly complicated and the ability of American and international business organizations to plan and execute important transactions within time schedules required by economic circumstances would be impaired. These transactions may be of international importance and sometimes directly involve foreign governments. Without these informal discussions by which business problems are resolved in a businesslike way, administration of the securities laws would be greatly impaired and, indeed, it is doubtful that these laws could be effectively administered. The Commission has repeatedly been commended for evolving such informal procedures for advising persons seeking to comply with the law. Professor Loss has stated:³

"This practice—which a task force of the second Hoover Commission reported as having been 'most effectively used' by the SEC⁴—is an essential and popular service with the bar and the securities industry. Thousands of such opinions are given each year."

Privacy is essential to this process. Businessmen should not be compelled to give premature publicity to proposed business transactions which they would otherwise keep strictly confidential for the protection of their business, simply because, as a practical matter, it is necessary that they consult the Commission in advance. Moreover, premature and unplanned disclosure of contemplated business transactions which are discussed with the Commission could affect the markets for the securities of the companies involved⁵ and afford an opportunity to overreach the investing public to those persons who first gained access to the information.

Similarly it would be impossible as a practical matter for the Commission to enforce its proxy rules if it were unable to keep preliminary proxy material nonpublic. The Commission's proxy rules, which relate to corporate elections and corporate action, requiring the vote of security holders and which are applicable to all corporations listed on national securities exchanges as well as to numerous other companies, provide that material to be sent to stockholders shall be filed first in preliminary form with this Commission. The examining staff make certain suggestions so that the material will not be in any way misleading and it is only after the participants have had an opportunity to make the changes suggested by the staff that the definitive material is sent out to shareholders. By reason of the nonpublic nature of the preliminary material we have been able with a minimum of litigation to see to it that American investors have had fairly presented to them the matters upon which they must vote. Were the preliminary material public and susceptible to being reprinted in the press, there would be no opportunity for staff processing of the material and the Commission's only remedy would be to seek injunctive relief in the courts. That alternative, besides being time consuming and expensive, can rarely provide full relief and may require postponement of corporate meetings and generally disrupt the affairs of the business community.

Accordingly, while we believe that the foregoing types of information, as well as the staff's work product in connection therewith, are intended to be included in exemption (4) of the bill for matters that are "trade secrets and commercial or financial information obtained from the public and privileged or confidential," we urge that this be made clear.

Other material in the Commission's files is nonpublic primarily to protect persons against the possibility of adverse publicity if it should ultimately be determined that charges against them have not been substantiated. In the

³ Loss, "Securities Regulation" (1961), p. 1895.

⁴ Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure (1955) 189.

⁵ See "Report of Special Study of the Securities Markets of the Securities and Exchange Commission," H. Doc. No. 95, pt. 3, 88th Cong., 1st sess. (1963), pp. 70-93.

event that charges should not be proved in such cases, not even the Commission's opinion would be made public. We are concerned about possible arguments that such material is not "specifically exempted from disclosure by statute" (exception (3)) or otherwise exempted. Where the Commission institutes proceedings pursuant to rule 2(e) of its rules of practice to disqualify a practitioner before it, the proceedings are nonpublic. With respect to proceedings for the revocation or denial of registration of brokers and dealers in securities or of investment advisers, section 22 of the Securities Exchange Act of 1934 and section 212 of the Investment Advisers Act of 1940 have been interpreted to permit private proceedings for they say that hearings ordered by the Commission thereunder "may be public."⁶

Whether the Commission makes these revocation or denial proceedings public depends upon considerations present in the particular situations. Thus, broker and dealer denial or revocation proceedings may be made public where they are based upon facts established in public records, as for example, where proceedings are based upon an injunction, a criminal conviction, or a prior determination by the Commission in an order or decision which has become public that violations were committed by a particular person. If the Commission has previously determined in a revocation or denial proceeding that a particular individual willfully violated the Securities Act or the Securities Exchange Act, a subsequent proceeding arising out of an application for registration by that person or a proceeding involving a registrant controlled by or controlling such person and based upon the prior finding as to that person, would normally be public. The proceedings may be made public because substantial charges of fraud are involved or it otherwise appears that the investing public should be alerted to the situation prior to the completion of the proceedings. Another reason for ordering public proceedings may be to alert injured investors to the possibility of a civil remedy prior to the running of the statute of limitations. Likewise, proceedings may be made public to alert the securities industry to the fact that the Commission has taken action with respect to the particular practices to be involved in the proceedings. It should be noted that where the Commission directs that a proceeding be nonpublic the privacy can, of course, be waived by the subject of the proceeding.

The American Bar Association has indicated its view that such Commission proceedings should be made public only on an even more limited basis and should normally be nonpublic. It has urged the Commission " * * to provide that disciplinary proceedings involving brokers, dealers or other persons engaged in the securities business will be conducted in private and without publicity as to their pendency or the facts developed therein * * *" except where the Commission has determined in an independent private proceeding that the disciplinary proceeding should be conducted publicly. (See Resolution IV, February 17, 1964, House of Delegates, American Bar Association.)

We are also concerned that it might be argued that exception (5) for "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy" is not applicable if such documents deal with law or policy in the context of specific facts. This argument would convert such work product of the professional staff of the Commission, and of the Commissioners themselves, into public documents. We do not see what purpose would be served by giving the general public access to such material or to such other memorandums as those recording conferences among the Commissioners, between the Commission and the staff, or between representatives of this and those of other agencies, such as the Department of Justice, relating to specific factual situations. We can see no reason why such memorandums exchanged between Commissioners and the staff should be treated differently from those between Federal judges and their assistants.

The proposed amendments also would authorize district courts to order the production of information improperly withheld from any person. We assume no change is intended in the normal requirement of exhaustion of administrative remedies, for surely a refusal by the staff where Commission review is available but not invoked should not support interference by a district court.

We also assume that the provision entitling a person to a district court trial de novo of the propriety of an agency's withholding of requested material is not to be construed to defeat confidential treatment where properly given. Thus, we

⁶ See also sec. 19 of the Public Utility Holding Company Act of 1935, sec. 320 of the Trust Indenture Act of 1939, and sec. 41 of the Investment Company Act of 1940.

would suppose that any examination of the information sought would consist of an in camera inspection by the judge.

Finally, we suggest that subsection (a) of the bill be amended by inserting the words "and Agency" immediately after "Department" in the first line thereof (line 5, p. 1 of the bill) and inserting the words "or Agency" immediately after "Department" in the third line thereof (line 7, p. 1). This suggestion is made on the assumption that subsection (c) is intended to permit agencies as well as departments to maintain the confidentiality of material in the exempted categories. The present structure of the bill may give rise to arguments that the authority for nondisclosure provided in subsection (c) relates only to governmental bodies to which subsection (a) applies.

Should the foregoing views not be adopted, the Commission would feel constrained to oppose the bill in its present form.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, IN REPLY TO STATEMENT OF DAN S. BUSHNELL, ESQ.

Mr. Bushnell's statement of May 14, 1965, to the subcommittee represents his version of certain incidents which occurred in the course of an effort by the Commission to develop the facts concerning the securities transactions of his clients, Mr. Kay L. Stoker and various corporations controlled by Mr. Stoker, with a view to determining whether or not the Securities Act and the Securities Exchange Act had been violated, and to the extent of violations found, to take the enforcement action required by those statutes. The Commission is responsible for the effective enforcement of the acts which it administers. The situation presented by Mr. Stoker and his companies confronted the Commission with a serious problem in discharging these responsibilities. The facts themselves were quite complex, involving as they did possible violations of various provisions of both the Securities Act and the Securities Exchange Act in transactions extending all the way from Pennsylvania to Hawaii in the securities of at least two issuers controlled by Mr. Stoker and broker-dealer firms created or controlled by him. The difficulties were compounded by the fact that rather than cooperating with the Commission in developing the facts, the net effect of Mr. Bushnell's activities has been to delay and obstruct the investigation. He did this in a variety of legal proceedings hereinafter enumerated. He also urged security holders of Shasta Minerals & Chemical Co. (Shasta), one of the corporations under investigation, not to cooperate with the Commission. In addition, he represented not only the subjects of the investigation but also insisted upon representing practically all the witnesses called by the Commission, thereby familiarizing himself with whatever was developed in the investigation he was trying to prevent. The difficulties thus presented were further intensified by the fact that Mr. Bushnell's participation is more than that of a lawyer representing a client. He is also a part of the management of one of the firms under investigation.

While some aspects of the matters involved are still pending, the Commission, notwithstanding the difficulties encountered, has been able to obtain its essential objectives in the cases that have been concluded. Those cases have been terminated by a settlement agreed to by Mr. Bushnell under which the broker-dealers involved had their registrations revoked, thus putting them out of business, findings were made which had the effect of removing Mr. Stoker from the securities business and the sale to the public of Shasta stock by means of a deficient registration statement was effectively prevented. This enforcement effort has, however, consumed almost 4 years and it is not over yet. While the Commission assumes that this subcommittee is not particularly interested in the merits of the particular cases, i.e., the extent to which Mr. Bushnell's clients violated the securities laws, Mr. Bushnell's complaints must nevertheless be considered in the context of an enforcement problem with which the Commission has been confronted, and with which it had to deal, despite the obstacles thrown in its way by Mr. Bushnell.

Mr. Bushnell's complaints, in effect, boil down to three principal matters: First, the Commission should not have informed the public of public proceedings involving his clients; second, the Commission should not have exercised its statutory authority to investigate the activities of his clients and, insofar as it did investigate, should, in effect, have allowed him to participate in the investigation

and to become aware of everything the Commission learned; and third, the courts should have prevented the Commission from exercising its investigatory power. He suggests changes in S. 1336 which would, in effect, enable him to accomplish these objectives, without making any effort to demonstrate that such objectives would be consistent with the Commission's duties to protect investors and the public interest. Discussion of these matters requires a brief reference to the administrative proceedings and court actions to which Mr. Bushnell refers.

Starting in 1961 there have been seven such proceedings, as follows:

(1) *A broker-dealer revocation proceeding before the Commission against Keystone Securities Corp., in which its president, Mr. M. Russell Ballard, Jr., was charged as a cause.*¹ Mr. Bushnell, as counsel for Keystone and Ballard, submitted a settlement proposal which recited that they "declare and represent that they entered into this stipulation, agreement, and consent as a voluntary act on their part." Pursuant to their own settlement offer the Commission entered an order revoking the registration of Keystone as a broker-dealer and finding Ballard to be a "cause" of the revocation. (Securities Exchange Act Release No. 7095, attached hereto.)

(2) *A stop order proceeding before the Commission instituted to prevent the registration statement covering Shasta stock from becoming effective.* Again on the basis of a settlement offer negotiated by Mr. Bushnell, as attorney on behalf of Shasta, the Commission discontinued this proceeding upon Shasta's agreement to withdraw the registration statement and its assurance that it no longer had any intention to sell the stock covered by the statement. (Securities Act Release No. 4741, attached hereto.)

(3) *A broker-dealer revocation proceeding against Cascade Corp. in which Mr. Stoker was charged as a "cause."* In the settlement referred to in (2) immediately above, Cascade and Mr. Stoker, through Mr. Bushnell as their counsel, consented to a revocation of Cascade's registration for willful violation of the reporting requirements of the Securities Exchange Act and consented to Mr. Stoker being found to be a "cause" of the revocation. While their offer, which the Commission accepted, did not include a consent to findings under the anti-fraud provisions of the securities laws, it did contain a consent to the Commission's entering findings and an opinion and order revoking Cascade's broker-dealer registration and finding Mr. Stoker to be a "cause" thereof. The Commission entered findings and an opinion and order in accordance therewith. (Securities Act Release No. 4741, attached hereto.)

(4) *A Federal court suit in the District of Utah brought by the Commission to compel compliance with its subpoena, which requested only that Shasta make available to the Commission an up-to-date list of its stockholders, a list which it was required to maintain by the laws of the State in which it was incorporated.* After extensive and in many instances vicious charges reflecting upon the good faith and integrity of the Commission's staff and asserting harassment and persecution of Mr. Stoker—all of which charges were later dropped with no proof presented to substantiate them—Shasta, through Mr. Bushnell as its counsel, stipulated to and did produce its stockholder list for the use of the Commission and the court proceeding which was thereby rendered moot was dismissed by stipulation and order.

(5) *A Federal court suit in the District of Hawaii brought by the Commission to compel Mr. Don Jenks to honor a Commission subpoena requesting his testimony in relation to his involvement, if any, in the sale of unregistered Silver King Mines, Inc., stock, another corporation controlled by Mr. Stoker.* The district court ordered Mr. Jenks to comply with the subpoena and he has appealed to the Court of Appeals for the Ninth Circuit where the case is now pending.

(6) *A similar suit in the District of Hawaii against Mr. Charles Y. Higashi.* The Commission brought an action to enforce a subpoena directing Mr. Higashi to testify in relation to his involvement if any in the sale of unregistered Silver King stock. When Mr. Bushnell appeared for Mr. Higashi the Commission determined not to permit him to do so in view of the fact that he was represent-

¹ Being named a "cause" of disciplinary action ordered by the Commission is a statutory concept established by the Securities Exchange Act of 1934. In the case of an order revoking a broker-dealer registration a person named as a "cause" cannot be a member of or employed by a registered national securities association except upon approval or direction of the Commission based on a public interest finding. (Sec. 15A(b)(4), 15 U.S.C. 78o-3(b)(4).) This is, of course, a virtual bar from the major portion of the securities business.

ing the subjects of the investigation and had represented various other witnesses.

The district court ordered compliance by Mr. Higashi but on condition that he be permitted to be represented by Mr. Bushnell in view of the fact that Mr. Higashi is a director of Silver King. The Commission has appealed this decision to the Court of Appeals for the Ninth Circuit where it is now pending.

(7) *A Federal court suit in the District of Utah to enjoin the Commission "from instigating publicity involving K. L. Stoker, or any company with which he is associated prior to substantiation or adjudication, or determination of the validity, if any, of the charges made against him or said companies."* The time for the Commission to answer or otherwise plead has not yet expired.

PUBLICITY

At the outset it should be pointed out that the Commission did not announce proceedings with a blare of publicity and later quietly withdrew them. Releases were issued by the Commission when it instituted public proceedings. Mr. Bushnell assumes that these releases were issued for the purpose of defaming his clients or "to prevent alleged illegal conduct." Such is not the case. The purpose of the releases was to announce the existence of public proceedings in which investors and others had a legitimate interest. These releases presented no more than factual and unvarnished summaries of what was involved in the public proceedings. Moreover, it does not appear even from the clippings supplied by Mr. Bushnell that any excessive or extraordinary amount of publicity was given to any of the matters of which he complains.

The Securities Act requires that all hearings be public.² Consequently the Shasta stop order proceeding, which was brought under that act, had to be public. The Securities Exchange Act states that proceedings "may be public."³ The Commission conducts proceedings publicly under that act where the charges are grave or where there has been extensive public trading or where any of the allegations are already a matter of public record.⁴ As pointed out by Professor Loss (Loss, 2 Securities Regulations 1334 (2d ed., 1961)), from whose text Mr. Bushnell quotes on several occasions:

"One reason for public proceedings is that witnesses may come in as a result of the public notice. Another is that the public is immediately put on guard. Notwithstanding the presumption of innocence, this seems justifiable in view of the care of the Commission exercises in instituting proceedings, the length of time it sometimes takes to carry them through and the very high percentage of proceedings which result in revocation or some finding of willful violation. Still another reason for a public hearing is that it may make information available as a result of which injured customers may decide to institute private actions against the broker-dealer. (This is a particularly important consideration in view of the short statutes of limitations under the SEC acts.)"

In every case the Commission weighs the possibility of injury, as a result of making its charges public, against the need to protect the public from engaging in securities transactions without relevant information or on the basis of false or incomplete information. Just this week the Supreme Court noted that there is a "general policy favoring disclosure of administrative agency proceedings."⁵

In the light of the foregoing and since many of the charges made in the proceedings under the Securities Exchange Act against Keystone and Cascade had already been made a matter of public record in the stop order proceeding involving Shasta, the Commission would have been subjected to legitimate criticism had the former proceedings not been made public.

While the administrative proceedings were public, the Commission's investigations have been private and none of its investigative activities in relation to Mr. Stoker or his companies has been made public except where it has been necessary to seek court enforcement of Commission subpoenas which witnesses represented by Mr. Bushnell have refused to honor.

Mr. Bushnell objects to certain language in the Commission's pleadings, including references to "fraud" and "false and misleading information," which

² Sec. 21 of the Securities Act of 1933, 15 U.S.C. 77u.

³ Sec. 22 of the Securities Exchange Act of 1934, 15 U.S.C. 78v.

⁴ *In the Matter of J. H. Goddard & Co., Inc., et al.*, Securities Exchange Act Release No. 7321 (May 22, 1964).

⁵ *Federal Communications Commission v. Schreiber*, — U.S. — (No. 482, October term, 1964).

later found its way into press accounts of related actions. These words are contained in sections of the act allegedly violated, and it is often appropriate that they be set forth in the legal documents charging statutory violations, as well as in objective summaries of those documents. In the light of the congressional policy expressed in the securities laws that facts be made known in a field where nondisclosure or misinformation could lead to fraud or to rumors which would have destructive effects on individual investors and the public interest as a whole, it is important that charges be accurately drawn and that descriptions of charges be accurate.

As pointed out above, certain of the proceedings against Mr. Stoker and his corporations were terminated by a compromise settlement. During Mr. Bushnell's testimony the impression was left that while the Commission had issued releases with respect to the institution of these proceedings nothing was made public with respect to the termination. This is false. As we have seen, the compromise settlement accomplished the Commission's enforcement objectives. Moreover, the terms of the settlement were announced through the customary procedure of issuing the Commission's findings, opinion, and order as a release.⁶ It is true that there was no accompanying comment, but this was in accord with the repeated requests of Mr. Bushnell. He wrote under date of November 7, 1964, in part as follows:

"We have previously discussed and again reiterate our position that no specific publicity will be given to the issuance of this order or that it will not be a matter of a special news release, but rather it will be handled in the routine manner and will be available to the press only as a routine public entry."⁷

There are serious difficulties with the suggestion made at the hearings that the Commission could make the proceedings public in the sense that interested persons who might happen to learn that they are in progress could look into the matter but that no announcement should be made. Proceedings under the Securities Act involve the question of whether or not material facts about an issue of securities have been misrepresented or omitted. Persons who knew of the proceedings, and thus learned that the securities might not be what they were represented to be, would have an opportunity to overreach those investors who did not know, often in violation of the securities laws themselves. The Commission obviously should not be in the position of an accessory before the fact to violations of the statutes which it administers. In the case of broker-dealers proceedings, it would be unfair if some but not all customers and others having transactions with the broker-dealers involved knew that the staff of the Commission was charging that there was something seriously wrong in the operation of the firm.

Mr. Bushnell's testimony is studded with numerous quotations purportedly criticizing the Commission's publicity practices. His most extensive quotations are from the remarks of the Honorable A. Sherman Christensen made from the bench at an early stage of the Shasta subpoena enforcement litigation. Mr. Bushnell cites, however, only the first chapter in a long story which ended with Judge Christensen getting considerably out of patience with the tactics employed by Shasta in its efforts to avoid compliance with the Commission's subpoena which, after all, requested only access to a list of stockholders. At an early stage of the case the Commission elected to stand on the sworn statements contained in its original complaint rather than to traverse the extensive charges of alleged harassment and persecution which it regarded as legally irrelevant to the issue before the court. Commission counsel was at this point doing nothing more than any lawyer does who demurs or moves to dismiss. Judge Christensen was under the impression, however, that the Commission would file a formal response to these charges but by reason of a misunderstanding between the Commission's Salt Lake City branch office and its Washington office the Commission had not done so. As the case progressed, however, and counsel for Shasta persistently demanded access to all of the Commission's nonpublic investigative files dealing in any way with Shasta or Mr. Stoker or any related interests over a long period of years and demanded the right to take the depositions of members of the Commission and numerous persons on its staff, Judge Christensen intimated strongly that he then felt that the defendant was the one who was indulging in harassing tactics. In fact he stated from the bench on the last day of the hearing on July 27, 1964, when the Commission offered to submit to

⁶ See Securities Release No. 4741 attached hereto.

⁷ Letter to the Commission's Office of General Counsel from Dan S. Bushnell.

the Court for in camera inspection all of its nonpublic papers and documents in its investigative files which Shasta was then demanding be produced:

"I'm not anxious to assume the burden of going over a vast array of information here. On the other hand, I think that Mr. Bushnell probably is—by the very breadth of his demand—may be inviting the same sort of a thing the other way.

"I would prefer to have a little sharper issue raised on the matters that on the one hand are really necessary, or deemed necessary by Mr. Bushnell, not by way of harassment or shotgun approach, but on the basis of established cause. * * *

* * * * *
 "Well, I'll just tell you, Mr. Bushnell, what I told counsel for the Commission, beforehand, that you're both putting undue emphasis on one immaterial matter, until you make it very material with your broad positions. In other words, the Commission started out by saying that: 'We don't have to say anything. We're just going ahead and get stockholders' list, and that's it.'

"And now you say: 'Well, they've got to say everything. We're going to find out their mental processes.'"

* * * * *
 "But by reason of your broad assertion now, it seems to me you're just as far off base as the Commission was in the first instance. * * *"

Finally, it should be noted that, after examining in camera something in excess of 100 items taken from the Commission's investigative files on Shasta and related interests, Judge Christensen denied Shasta's demand that these items be produced and ruled that there was "neither necessity nor justification for the demanded production." He also held that "the questioned depositions shall not be taken for the purpose sought." (See corrected memorandum decision filed September 10, 1964.)

Another illustration of Mr. Bushnell's half-truths is his quotation from language from Professor Loss to the effect that the Commission continues to summarize in releases charges made "when it initiates a revocation proceeding, or when a complaint for injunction is filed or an indictment is returned." Following the language quoted by Mr. Bushnell, Professor Loss states:

"The Commission obviously believes that its duty to inform the public requires such a policy. And it may well be right. * * *"⁸

Finally, Mr. Bushnell's quotations from other authorities purportedly criticizing the Commission's publicity practices have nothing to do with the announcement of public proceedings, but relate either to questions of possible prejudgment or to the fact that the 1963 "Special Study of the Securities Market" was a report first announced through a report to the Commission by its special study group rather than through a report by the Commission.

We know of no court decision which criticizes the Commission for announcing the commencement of a public proceeding, which is the whole thrust of Mr. Bushnell's complaint. In a few instances courts have commented upon the language used in such announcements as appearing to indicate possible prejudgment by the Commission.⁹ The wording of Commission releases of this type has since been altered to make it doubly clear that the matters therein stated as possible violations represent merely charges advanced by the staff and not findings made by the Commission.

The one newspaper article on which Mr. Bushnell lays the greatest stress (his exhibit G) was occasioned by the reaction of a Wall Street Journal writer to the "Report on the Special Study of Securities Markets" which was made pursuant to congressional direction. This, of course, has nothing to do with publicity given to public proceedings which are instituted by the Commission.

⁸ Mr. Bushnell also cited Professor Loss as an authority in support of Mr. Bushnell's recommendation that settlements be proposed to the Commission by the Commission's staff and the attorney for the person offering settlement. Again Mr. Bushnell quotes out of context, for the subject Professor Loss is discussing at the point relied upon by Mr. Bushnell relates to the failure of the Commission to provide a formal procedure for obtaining Commission review of interpretations rendered by the staff and has nothing to do with the submission of settlement offers. See 3 Loss, "Securities Regulation" (2d ed. 1962), 1896.

⁹ In this connection, see *Gilligan, Will & Co. v. Securities and Exchange Commission*, 267 F. 2d 461 (C.A. 2, 1939), and *Securities and Exchange Commission v. Harrison*, 80 F. Supp. 226 (D.C.D.C., 1949), cited by Mr. Bushnell at pp. 12-13 of his statement.

INVESTIGATIONS

Congress recognized that the Commission could not effectively enforce and administer the securities laws without broad powers of investigation. This is particularly true in view of the fact that, unlike many other types of crimes, it is often impossible to determine whether a securities offering involves fraudulent practices, i.e., whether a crime has been committed at all, without careful and thorough investigation into all the background of the situation. Numerous witnesses must be located and many and complex documents examined in order to uncover the essential facts which differentiate a securities fraud from a legitimate offering.¹⁰ Congress accordingly gave the Commission broad investigative powers to administer oaths, subpoena witnesses, require the production of documents and in general get at the facts. This process has been likened to an investigation before a grand jury.¹¹

Since investigation is a necessary prelude to any type of enforcement action, it is essential that the Commission's investigations be permitted to go forward efficiently and promptly if the public interest is to be protected before the damage to the public has been done. Further, fairness to persons who may be subject to enforcement proceedings requires the staff to make every effort to be as sure as possible of the facts before recommending the institution of a proceeding, and this again requires that investigations be prompt and searching.

It is equally true and equally important that the rights of persons under investigation or of witnesses examined in investigations shall be fully respected. What concerns the Commission is the possibility of any change in the law that would permit the subjects of an investigation to impede its progress by intimidating witnesses or in any other manner persuading witnesses to refuse to cooperate fully by providing the whole truth. It is precisely to prevent such activities that no one except a witness and the prosecuting officials are permitted to appear before a grand jury.

The Commission has for many years accorded witnesses in its investigations privileges that are not available to witnesses before a grand jury. For example, the Commission has always permitted a witness to be represented by counsel, whether or not subpoenaed. This practice predates the Administrative Procedure Act, which provides that subpoenaed witnesses may be represented by counsel in an agency investigation. Unlike the situation before a grand jury, a witness in a Commission investigation may normally obtain a copy of his testimony and, as provided in the Administrative Procedure Act, he may in any event inspect his testimony. As we pointed out at page 18 of our original comments, the Administrative Procedure Act specifically provides, "that in a non-public investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony" because otherwise there could be situations where the testimony would be used by the subject of the investigation to persuade other witnesses to color their testimony or even to commit perjury.

Even in public trials witnesses who are subsequently to testify are frequently excluded from the courtroom while other witnesses are testifying in order to prevent one witness' testimony from being affected by that of another, which would make the ascertainment of truth more difficult. It is of equal importance that a related practice of not permitting counsel for the subject of an investigation to represent other witnesses be applied in investigations. It is to the use of this method of securing the truth that Mr. Bushnell objects. We submit, however, that the Commission in applying this practice to its investigations bends over backwards so as not to harass persons under investigation or witnesses in investigations. Mr. Bushnell objects specifically to the Commission's reservation of (1) the right in appropriate cases not to permit witnesses to be represented by the same attorney who is representing the subject of the investigation, and (2) the right in appropriate cases not to permit witnesses to obtain a copy of their testimony.

¹⁰ The complexity that may be involved in securities frauds is indicated by a recent criminal case involving violations of the Securities Act, where the trial which resulted in convictions covered a period of 11 months. *United States v. Dardi*, 330 F. 2d 316 (C.A. 2, 1964), certiorari denied, 379 U.S. 845 (1964).

¹¹ See *Wooley v. United States*, 97 F. 2d 258, 262 (C.A. 9, 1938); *In re Securities and Exchange Commission*, 84 F. 2d 316, 318 (C.A. 2, 1936); *Consolidated Mines v. Securities and Exchange Commission*, 97 F. 2d 704 (C.A. 9, 1938); cf. *Perkins v. Endicott-Johnson Corp.*, 128 F. 2d 208, 214 (C.A. 2, 1942), affirmed 317 U.S. 501 (1943); *President v. Skeen*, 118 F. 2d 58, 59 (C.A. 5, 1941).

As to the representation of more than one witness by an attorney, while the Commission's investigative rules provide that this generally is not to be permitted, the Commission has authorized the officers in charge of investigations to make exceptions and, indeed, has instructed that where requested such an exception is to be granted unless a high official of the Commission has first been consulted.

As to a witness obtaining a copy of his testimony, the Commission itself passes upon every denial and the witness may, in any event, examine the transcript of his testimony. Moreover, witnesses to an investigation may sometimes welcome these restrictions. Where, for example, a witness may be employed by the subject of an investigation, the fact that he can tell his employer that he not permitted to obtain a copy of the transcript of his testimony or that he may not use his employer's attorney may protect him from reprisal. On the other hand, where a witness would be inclined to shade the truth, or to commit perjury, he might escape detection more easily when he has seen the testimony of others or where an attorney is present with him who represents the subject of the investigation and who was present when other witnesses testified.

With respect to the subject of an investigation, when or if charges are formally brought against him in an administrative proceeding or in a court proceeding he will have full opportunity to hear those who testify against him and to cross-examine them. To permit him to participate in a private investigation, however, either directly or by having his attorney present when other witnesses are testifying, could well defeat the purpose of the investigation of uncovering the truth. Not only would the subject of the investigation be in a position to intimidate witnesses or otherwise persuade them to be uncooperative, he might also, by noting the direction in which the investigation is moving, be in a position to conceal or destroy evidence that would otherwise be available.

The Court of Appeals for the Second Circuit has recently pointed out that secrecy is "necessary in an on-going probe 'so that others under investigation and other prospective witnesses might not be warned of what had been asked and answered and so aided in thwarting the inquiry.'"¹²

In the Commission's investigation involving Silver King and Shasta, companies of which Mr. Kay L. Stoker is president, director and promoter, Mr. Bushnell has represented not only Mr. Stoker and both companies but also six other individuals and one other company. It was not until a letter (attached hereto) had been sent to security holders of Shasta urging them not to cooperate with the Commission, which Mr. Bushnell has subsequently admitted he had assisted in preparing, that the Commission took the position that Mr. Bushnell could not be present at the examination of additional witnesses in the current investigation of Silver King in the guise of acting as their counsel. Whether this is permitted under existing laws is an issue now before the Court of Appeals for the Ninth Circuit.

Mr. Bushnell offers to the subcommittee a suggestion that investigations should be limited to 6 months, subject only to an appropriate showing that further time is needed on a case-by-case basis. In a field in which illegal activities are as intricate and as widely scattered geographically as they often are in securities cases, such a limitation would be wholly impractical and in the absence of frequent and repeated extensions, the sheer mechanics of which would in themselves be unduly time consuming, would critically impair the enforcement work of the Commission. This is not to say, however, that the Commission does not always attempt to dispose of matters with reasonable promptness.

The problems faced by the Commission in the conduct of its investigations have been recognized by the courts. The Honorable William B. Herlands, U.S. district judge for the southern district of New York, stated in the course of the trial of *United States v. Garfield*, 61 CR 671 (S.D.N.Y., 1963), *affirmed sub nom. United States v. Dardi*, footnote 10, *supra*:

"It took years of unremitting labor in the face of all kinds of investigative difficulties to develop the facts that were presented to the jury, and if the case took 11 months to present the evidence one can only imagine how long it took to dig up the evidence.

"I therefore want the Securities and Exchange Commission to know that its efforts have been recognized, and that the Securities and Exchange Commission and its facilities and personnel should be implemented and strengthened so that

¹² *In re Bonanno*. — F. 2d — (C.A. 2, No. 29583, Apr. 30, 1965), citing *United States v. Tramunti*. — F. 2d — (C.A. 2, Apr. 5, 1965).

they could carry on with even greater effectiveness the task of protecting the securities markets and the investing public from frauds and swindles and other sophisticated types of chicanery."

POSITION OF THE COURTS

Mr. Bushnell refers to "indulgences granted by the courts" to agencies like this Commission. The suggestion that the courts should have prevented the Commission's investigations of his clients is wholly without merit. Mr. Bushnell's lack of success in court reflects merely the fact that the courts are unwilling to hinder the Commission in the discharge of its responsibilities, and that Mr. Bushnell was never able to come up with any evidence in support of his charges of misconduct by the staff of the Commission. The courts properly do not engage in fishing expeditions into the mental processes of the members of the Commission, particularly when they are discharging their quasi-judicial responsibilities.

Mr. Bushnell suggests that the courts should have absolute discretion to decline to enforce an agency subpoena. While the Commission does not suggest that the Federal courts are without power to decline enforcement of its subpoenas upon a proper showing, if Mr. Bushnell's suggestion were accepted, the investigative power granted by Congress could be frustrated, and there would be transferred to the courts the administrative power to determine whether or not suspected violation of the securities and other laws should or should not be investigated. This proposal is of doubtful constitutionality and of even more doubtful wisdom.

[Securities Exchange Act Release No. 7095]

UNITED STATES OF AMERICA BEFORE THE SECURITIES AND
EXCHANGE COMMISSION, JULY 8, 1963

IN THE MATTER OF KEYSTONE SECURITIES CORP.,
816 SOUTH MAIN STREET, SALT LAKE CITY, UTAH

FILE NO. 8-9684

Securities Exchange Act of 1934—Sections 15(b) and 15A(b)(4)

FINDINGS, OPINION, AND ORDER REVOKING BROKER-DEALER REGISTRATION

These are proceeding pursuant to Sections 15(b) and 15A(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether to revoke the registration as a broker and dealer of Keystone Securities Corp. ("registrant") and whether M. Russell Ballard, Jr. president, a director and principal stockholder of registrant, is a cause of any order of revocation which may be entered.

The order for proceedings alleged, among other things, that registrant, aided and abetted by Ballard, willfully violated Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-8 thereunder in that they filed as a document supplemental to registrant's application for registration a financial statement which falsely stated that registrant had \$2,500 cash on deposit as of June 7, 1961, and willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that they failed, during the period from approximately July 12, 1961 to approximately November 16, 1961, to make and keep current books and records as required by said Rule. The order also alleged that on or about April 24, July 31 and October 24, 1961, registrant and Ballard willfully violated Sections 7 and 10 of the Securities Act of 1933 ("Securities Act") in that they aided and abetted Shasta Minerals and Chemical Company ("Shasta") in making false and misleading statements, and failing to make required statements, in a registration statement and amendments thereto filed by Shasta pursuant to the Securities Act regarding, among other things, prior sales of Shasta stock in violation of Section 17 of the Securities Act, financial statements and financial condition and prior activities of Shasta, and the relationships of Shasta and its officers, directors, and promoters with registrant and Ballard.

A hearing and posthearing procedures were waived, and respondents, without admitting or denying the allegations of the order, stipulated that we may find

that registrant with or aided and abetted by Ballard willfully violated the above provisions of the Acts and rules thereunder as alleged, but that charges of violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and rules thereunder also alleged in the order for proceedings be dismissed; and they consented to revocation of registrant's registration as a broker-dealer and a finding that Ballard is a cause thereof.

Upon the basis of the allegations in the order for proceedings and the stipulation and consent, we find that registrant and Ballard willfully violated Sections 7 and 10 of the Securities Act; that registrant, aided and abetted by Ballard, willfully violated Sections 15(b) and 17(a) of the Exchange Act and Rules 17 CFR 240.15b-8 and 17a-3 thereunder as alleged in the order for proceedings, that it is in the public interest to revoke registrant's registration as a broker-dealer; and that Ballard is a cause thereof.

Accordingly, IT IS ORDERED, that the registration as a broker and dealer of Keystone Securities Corp. be, and it hereby is, revoked, and it is found that Mr. Russell Ballard, Jr., is a cause of this order.

By the Commission (Chairman CARY and Commissioners WOODSIDE, FREAR, and WHITNEY), Commissioner COHEN not participating.

(Entered on the date first noted above.)

ORVAL L. DUBOIS,
Secretary.

[Securities Act Release No. 4741]

[Securities Exchange Act Release No. 7472]

UNITED STATES OF AMERICA BEFORE THE SECURITIES AND
EXCHANGE COMMISSION, NOVEMBER 24, 1964

IN THE MATTER OF SHASTA MINERALS & CHEMICAL COMPANY

FILE NO. 2-18004

Securities Act of 1933—section 8(d)

IN THE MATTER OF CASCADE CORPORATION

FILE NO. 8-9659

Securities Exchange Act of 1934¹—Sections 15(b) and 15A(b)(4)

FINDINGS, OPINION AND ORDER PERMITTING WITHDRAWAL OF REGISTRATION STATEMENT AND REVOCATING BROKER-DEALER REGISTRATION

These are consolidated proceedings to determine (1) whether, pursuant to Section 8(d) of the Securities Act of 1933, a stop order should issue suspending the effectiveness of a registration statement filed by Shasta Minerals & Chemical Company ("Shasta") on April 24, 1961 with respect to a proposed offering of 500,000 shares of its common stock, 20¢ par value, at \$2.50 per share; and (2) whether, pursuant to Sections 15(b) and 15A(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act"), the registration as a broker and dealer of Cascade Corporation ("Cascade") should be revoked and Kay L. Stoker, president, a director and beneficial owner of 10% or more of the stock of Cascade and also president of Shasta, should be found the cause of an order of revocation if entered.

Shasta, Cascade and Stoker have submitted an offer of settlement. Under the terms of the offer, Shasta agrees to withdraw its registration statement. It further agrees to furnish to the Commission its stockholders list which is the subject of subpoena enforcement proceedings pending in an investigation of Shasta.¹ Cascade and Stoker consent to a finding that Cascade, aided and abetted by Stoker, willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-5 thereunder in that it failed to file the required reports of its financial condition for 1961, the year in which it became registered as a broker and dealer, and 1962 and 1963. They further agree, without admitting the

¹ *S.E.C. v. Shasta Minerals & Chemical Company*, Civil Action No. C194-62, D. Utah.

violations charged in the original order for proceedings with respect to Cascade, that such order shall be deemed amended to include a charge of the above violations. In addition, Cascade consents to revocation of its broker-dealer registration, and Stoker consents to a finding that he is a cause of such revocation.

We have carefully considered the record and the terms of the offer of settlement, and have determined to accept such offer. Shasta's registration statement never became effective and it appears that no securities were sold pursuant thereto. We think that withdrawal of the registration statement may be permitted and that the stop order proceedings should accordingly be discontinued. Any further securities offering by the company will, of course, have to comply with the Securities Act. Shasta's agreement to furnish its stockholders list will make unnecessary the continuation of the subpoena enforcement proceedings and expedite the investigation.

We find that Cascade, aided and abetted by Stoker, willfully violated the Exchange Act as specified in the offer of settlement, and we conclude that it is in the public interest to revoke its broker-dealer registration and that Stoker is a cause of such revocation.

Accordingly, It Is ORDERED that the registration statement of Shasta Minerals & Chemical Company be, and it hereby is, withdrawn, that the stop order proceedings be, and they hereby are, discontinued, and that the registration as a broker-dealer of Cascade Corporation be, and it hereby is, revoked, and it is found that Kay L. Stoker is a cause of such revocation.

By the Commission (Commissioners WOODSIDE, OWENS, BUDGE, and WHEAT),
Chairman COHEN not participating.

ORVAL L. DuBOIS,
Secretary.

SHASTA MINERALS & CHEMICAL COMPANY,
826 South Main Street, Salt Lake City, Utah, 84101,
December 9, 1964.

DEAR STOCKHOLDER:

As you were advised some three years ago the Company was in the process of registering for sale with the Securities and Exchange Commission 500,000 shares of stock at \$2.50 a share. Just prior to such registration becoming effective in November of 1961, the S.E.C. instigated stop order proceedings in connection with said registration. Since that time and as a result of these proceedings the Company, for all practical purposes, has been prohibited from making any reports to its stockholders. Serious charges were made against the Company and its president and these matters were thoroughly investigated at the time of a hearing held in San Diego the latter part of November and the first part of December, 1961. Argument on these charges was made before the Commission on July 31, 1962, and since that time the matter has been kept under advisement by the Commission without any decision having been made. During all the time that the Commission held this under advisement we have been virtually prohibited from making further reports to you as our stockholders.

We are now happy to report, however, that the stop-order proceedings have been vacated and the charges against the Company and its president have been withdrawn. As part of the settlement with the S.E.C. a current list of all of the stockholders of Shasta was given to the Commission. This causes us to believe that a questionnaire may be sent out to the Shasta stockholders, or S.E.C. representatives may attempt to interview some of the Shasta stockholders. As a result of our experience with the Securities and Exchange Commission for the last three years, we are convinced that it is not for the best interest and welfare of the Company or its stockholders to cooperate with the S.E.C. The attorney for Shasta has advised us that the stockholders are not required to answer these questionnaires, nor as they required to grant an interview or answer any questions asked them by S.E.C. representatives. Further, he advises that the stockholders should not answer the questionnaire or answer any questions unless they are represented at the time by legal counsel. If any stockholder has any questions concerning this matter, or if they receive any questionnaires or are contacted by any representatives of the S.E.C., you may call the company collect to discuss what procedure should be followed at that time.

In view of the lapse of time since the Registration Statement was filed and because of three favorable transactions negotiated by the Company, it is now felt that it is not necessary or desirable to proceed at this time with the proposed

Registration and public sale of stock. The Registration Statement and proposed offering have therefore been withdrawn.

During the time that the foregoing litigation has been carried on, the Company has negotiated three major transactions which have greatly strengthened the financial position of the Company. The Company has continued with its contract of purchase of the properties in Shasta County California, reducing the unpaid portion of the purchase contract from \$120,000.00 to \$45,000.00 and has commitments sufficient to enable it to meet the balance of the payments on that contract. The Company located and acquired approximately 200 mining claims in the White Pine Mining District near the old town of Hamilton, Nevada, which claims have been sold by Shasta under favorable terms. A more detailed report concerning this sale will be made at a later date. The contract for the sale of surface rights and land developments in the Shasta area is still in force and effect and funds are continuing to be received by Shasta pursuant to the terms of that contract.

The major transaction of current interest to the stockholders, however, involves the property in the Ward Mining District, 18 miles south of Ely, Nevada. The Company acquired 10 patented claims in this area for nominal consideration. Shasta, on March 29th, 1962, took an option to acquire a leasehold interest involving 20 patented claims and 11 unpatented claims in the same area. In May of 1962 a Nevada Corporation, known as Silver King Mines, Inc., was formed by some of the officers and stockholders of Shasta and Silver King then purchased from Shasta these claims and option involving the property in the Ward Mining District. The terms of purchase involved \$250,000.00 cash and 175,000 shares of stock of Silver King. As a result of the large stockownership and the interlocking Board of Directors, it may be assumed that Silver King is a subsidiary of Shasta. Under the terms of this contract \$150,000.00 has been paid to Shasta. Silver King conducted an exploratory program by which it was able to establish the existence of sufficient ore to warrant and justify the construction of a 250 ton-per-day mill, which mill has now been placed into operation. It is the opinion of the officers and directors of Shasta that the Silver King stock which Shasta owns is now reasonably worth in excess of \$1,250,000.00.

You can now expect to receive periodic reports from your Company.

THE MANAGEMENT.

REPLY TO THE MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION,
BY DAN S. BUSHNELL

The answering memorandum submitted by the Securities and Exchange Commission doesn't objectively answer, on the merits, the problems of publicity, unreasonable delays, and duplicitous proceedings. Since the Commission, by ignoring such issues, apparently has no answer on the merits, it has resorted to the familiar procedure, under such circumstances, of attempting to discredit the person making the assertions against it.

The memorandum of the Securities and Exchange Commission completely omits any answer for the following:

1. A public necessity for the publicity involving the San Diego hearing.
2. A public necessity for the publicity involving the Keystone matter.
3. A public necessity for the publicity involving the Hawaiian proceedings.
4. That the use of publicity by the staff was not in violation of the rules of the Securities and Exchange Commission.
5. That the use of publicity by the staff was not a violation of the canon of ethics for members of the bar, more particularly in connection with the Hawaiian proceedings.
6. Any justification for the unreasonable delay in processing the registration statement of Shasta.
7. Why no decision was rendered involving the San Diego hearing during the 2½-year period that the matter was under advisement.
8. Why parties could not present to the Commission, through their counsel, offers of settlement or requests for private hearings rather than have the staff present the matter to the Commission.
9. Any justification why the Commission should be permitted to simultaneously harass a party with a private and a public proceeding involving exactly the same issues and evidence.

10. That there is an inadequate remedy at law for arbitrary and oppressive use of publicity.

11. That irreparable injury has not been occasioned by the unwarranted use of publicity in the cases mentioned above.

Since the SEC has chosen to ignore the foregoing issues, it must be assumed that it has no answer. Those items which the legal staff has chosen to discuss are not accurate or objective, as is demonstrated by numerous statements in their answer such as the following:

1. "Putting them out of business." The parties were never actually in business and had only qualified as broker-dealers at the suggestion of the SEC.

2. "Removing Mr. Stoker from the securities business." It hasn't been established that Mr. Stoker was ever in the securities business.

3. "Sale to the public of Shasta stock by means of a deficient registration statement." It has never been established that there was a deficient registration statement.

4. "The extent which Mr. Bushnell's clients violated the securities laws." It has not been established that there have been any violations.

5. The news releases were "factual and unvarnished summaries." The facts have not been ruled upon by any deciding authority. Why were the news releases issued in the first place?

6. "There was no excessive or extraordinary amount of publicity." Whether it's excessive or extraordinary in the mind of the Securities and Exchange Commission, to the injured party the suffering and irreparable harm is irrefutable.

7. "In every case the Commission weighs the possibility of injury." There is no discussion or showing of what factors, if any, were weighed in issuing the releases in the three cases discussed herein. In fact, any public necessity for any releases whatsoever, has been completely ignored in the answer of the Commission.

7.5. "Witnesses may come in as a result of the public notice." Before one is accused and blackened in the press, on the radio, and TV, the evidence and witnesses should already be known.

8. "The Commission would have been subjected to legitimate criticism" had it not made the public releases. This concern about legitimate criticism for not making public releases is a paradoxical sham in view of its lack of concern over legitimate criticism for issuing such releases.

9. That is is appropriate to use the words "fraud, and false and misleading" because they are contained in the statute. Unless the Commission can sustain such charges, the questionable news releases should not be based thereon.

10. Its indifferent and incredible position before Judge Christensen was based on a "misunderstanding" between the Washington and Salt Lake City offices. No such reason was given to the court and the record will not support any basis for a misunderstanding of the commitment made to the court.

11. The naive assertions made by the Commission that it is without responsibility, since it makes doubly clear the distinction that "possible violations represent merely charges advanced by the staff and not findings made by the Commission" is unrealistic. There is no consolation here for the accused, nor any vindication of the Commission, when these charges are not substantiated and the accused has been loathsome branded as a cheat and a fraud by the publicity instigated by the Commission.

12. The ironical assertion that the Commission, "efficiently and promptly" conducted its investigations. No justification or even any explanation has been made as to the unreasonable delays experienced in the cases discussed herein.

13. That the staff makes every effort to "be as sure as possible of the facts," also that the "rights of persons under investigation are fully respected." These are preposterous paradoxical statements, when the Commission is not willing to discuss the specific facts of the cases and show how those facts can be reconciled with such self-indulgent claims of propriety.

14. The presumptuous analogy of an SEC investigation with that of a grand jury. The presence of a prosecuting attorney, a presiding judge, and findings by a jury are all lacking in the investigation and procedures of the Commission. The staff members make the investigation and formulate the

charges and then decided on the course of action to be taken without any showing of a probable cause to any independent reviewing authority. The only analogy is that the damaging effect of the charges of the SEC, is comparable to the potential damage from legitimate publicity arising from a grand jury indictment.

15. That the Commission "bends over backward so as not to harass persons under investigation." A statement of insufferable arrogance in view of the facts in these cases.

16. Self-annulling, inconsistent positions that the Commission "acts efficiently and promptly" but that the proposed 6-month limitation on investigation, without a showing of good cause for continuing, would critically impair the enforcement work of the Commission.

The attempt to disparage and discredit the accuser further demonstrates the lack of objectivity and responsibility which should have been shown to a U.S. Senate subcommittee. Briefly, the unreliability of such assertions is as follows:

1. Lack of cooperation by the undersigned. The records in the hearing and the depositions will not support such a claim. The making available of witnesses, books and records, exhibits, inspections of properties and technical data, is voluminous evidence to the contrary of such an assertion. The reliance upon legal defenses, sustained by the courts, cannot be tortured into a substantiation of a claim of lack of cooperation.

2. That the undersigned is not just a lawyer representing a client, but is part of management. This is a true statement for the last 4 months, but is untrue for the 4 years preceding that date when substantially all of these proceedings took place.

3. That two of the three primary complaints of the undersigned were to prevent the Commission from carrying forward its investigation activities. The written and oral statements submitted by the undersigned to the subcommittee will not substantiate this claim. The objections are to the manner and means used by the Commission in carrying on its investigations. The elimination of unwarranted publicity and unreasonable delays does not support the claim that investigations should be prevented.

4. That witnesses represented by Mr. Bushnell refused to honor Commission's subpoenas. The memorandum of the Commission admits that six other witnesses represented by Mr. Bushnell have given testimony. The refusal culminating in the litigation in the Tenth Circuit Court resulted in the affirmation by that court of the legal grounds for such refusal. The other legal proceeding in Hawaii resulted from the Commission's refusal to take the testimony of the director represented by Mr. Bushnell.

5. Mr. Bushnell's lack of success in court. A statement of questionable significance or relevance, but again inaccurate. There have been only two court cases involving the parties. In the first one, the Tenth Circuit Court of Appeals found against the Commission. In the second one, the trial judge in Hawaii on the primary case ruled against the Commission, which is now appealing from that decision. Another case was incidentally consolidated with the Hawaiian proceedings upon which the Commission received a favorable ruling.

6. Quotations from Judge Christensen that the undersigned was overly aggressive in attempting to procure oral and written testimony from the Commission and its files. The undersigned admits that he certainly was attempting to procure such testimony pursuant to the decision from the Tenth Circuit Court of Appeals. The fact that the trial court would not make such testimony or evidence available in spite of the decision of the court of appeals, just emphasizes the assertions made before the Senate subcommittee that an accused cannot sustain the burden of proof to show that news releases were issued by the Commission to disparage and discredit. Such a showing, if it could be made, would be too late. The burden of proof must be placed upon the Commission so strongly that it operates as a deterrent against the issuance of such news releases in the first instance.

7. Inability to support charges of misconduct by the staff of the Commission. Evidence supporting these charges is already before the Senate subcommittee in affidavit form corroborated by supporting letters and documents contained in the exhibit "Record on Appeal," *Shasta Minerals & Chemicals Co. v. Securities and Exchange Commission*. In accordance with the suggestion made by Chairman Long, that a separate hearing involving these charges might be indicated, the undersigned would more than welcome the opportunity to submit the evidence concerning not only the alarming practices of the Commission with re-

gard to publicity, unreasonable delays, duplicity actions, flagrant and arrogant attitudes before the courts, but also evidence of threats, intimidations, entrapment, and the usurpation of authority and power beyond that specified by Congress.

In spite of the foregoing charges and countercharges, the facts still remain that people have been stigmatized by unwarranted publicity instigated by the Commission. There has been no showing, not even an attempt to show, why in the proceedings in Hawaii, any publicity whatsoever was indicated. The only issue was whether a director could be represented by company counsel. Under such a proceeding, where is the slightest need or necessity to advise the public of alleged illegal sales involving fraud and misleading statements?

Likewise, there was no showing, or attempt to show, any public necessity or need warranting the flagrant publicity involving the *Keystone* case. The broker-dealer firm came into existence as a result of a suggestion from the Commission. During a period of several months it only had approximately 2 dozen transactions and then had filed its request to withdraw from the securities business. Now the Commission boasts that it put this company out of the securities business, thus ignoring the real issue of whether there was any justification for such an accomplishment and the means used to accomplish such objective. There is no listing of the "factors weighed," nor could there be any, by the Commission justifying the initial publicity and the intimidation implicit in the Commission's continued insistence that any hearing on the vicarious charges made against that broker would have to be public.

Also, the Commission failed to discuss any specific reasons or justifications for the publicity involving the San Diego hearing. The company for 6 months had been attempting to comply with any and all suggestions and requirements of the Commission to complete its registration of its stock. No stock had been sold by the company during this period of time, nor was there any indication that it intended to do so. Even after the hearing, and all of the adverse publicity, the Commission did not make a decision on the charges made by the staff, since it held the matter under advisement for approximately 2½ years and never made a decision on those charges. Again, where was there any justification for the dismaying publicity instigated by the staff at the commencement of the hearing? Even though a hearing is public, it does not necessarily follow that there must be an outburst of publicity as suggested and practiced by the Commission.

Mr. Loomis, General Counsel for the Commission, specifically told Chairman Long that he would, in the written reply, explain the reason for the unreasonable delays involved in these cases. Just as the Commission did not honor its commitments to the court, it has not honored this statement before this subcommittee.

As pointed out by Mr. Fensterwald, there is a basic inconsistency in the position taken by the Commission against the provisions of the proposed Senate bill pertaining to the requirements for a public hearing, and the position of the Commission demonstrated in the three cases mentioned above, as well as the position taken by the Commission in its memorandum. The Commission, in its written statement concerning this legislation, advocates that it should be permitted to have private hearings so that it might protect people from harmless publicity until charges have been substantiated. The incongruity of that assertion with the handling of these cases by the Commission is indisputable.

The failure of the Commission to recognize what it has done, and what it can do, by its alarming publicity practices is most dismaying. The fact that the Commission can give no justification for such practices in these cases is even more frustrating in view of their presumptuous claims of propriety.

But even more appalling is the statement that the Commission had "obtained its essential objectives" of putting the broker-dealers "out of business"; all of this without ever having substantiated any of the charges or claims made against the companies. That it was done by coercion and intimidation, resulting from unwarranted use of adverse publicity, seems to give the Commission no hesitation. That it may not be the function or purpose of the Commission to unjustifiably put people "out of business" seems of no concern to the Commission. That the companies came into existence as a result of suggestions from the Commission, and were not in fact actually in business when they were pounced upon by the Commission to accomplish its incredible objectives, is a good example of bureaucratic irresponsibility and entrapment. Equally distressing is the Commission's obvious indifference to the fact, that if the charges made by it were well founded it was not justified in crucifying the participants by stigmatizing publicity in the first instance. No mention is made in its answer as to

why it agreed to settle the cases on "face saving technicalities." Its complete attempt in the answer, is to insinuate that since the cases were settled there was an implied admission of culpability on the part of the persons accused. However, the real facts are to the contrary. The Commission in each instance abandoned its original position after publicising its vilifying charges and accepted a minimal offer of settlement and then prepared its self-serving, ex parte findings and decisions. All of which is consistent with the statement of Judge Christensen that he had too many cases "where there is a big blaze of publicity on the commencement of action by the Commission; and then when the facts begin to be explored, the Commission comes in and asks for dismissals and reduces charges." It is alarming, dismaying, and even shocking that the U.S. Securities and Exchange Commission boasts that they have accomplished their purpose of putting people out of business without any regard to the manner and the means used to accomplish such impeachable objectivities.

It is respectfully submitted that legislation be enacted of sufficient strength to deter if not prohibit the instigation of publicity by administrative agencies where there is no independent reviewing authority to establish the existence of "probable cause" for the charges made. The opportunity to use such awesome power renders insignificant and other legitimate sanctions which Congress may have authorized. The awful threat of being branded as a liar and a cheat in the press before such charges are proved or disproved robs the individual of his fundamental right to challenge the actions of such administrative agencies. Although this paramount problem of publicity so dominates this discussion, an overhauling of the Administrative Procedure Act with reference to unreasonable delays, subpoena enforcement, time limitations on investigations, the right to be heard and represented by counsel, the right to procure copies of testimony, all should be studiously considered by this subcommittee and the entire Congress of the United States.

Respectfully submitted.

DAN S. BUSHNELL.

Senator LONG. Our next witness is Mr. Dale W. Hardin, manager, Transportation and Communication Department, U.S. Chamber of Commerce.

Before Mr. Hardin comes up, I would like to suggest to our witnesses that we are getting dangerously close on the time factor. We shall be happy to print their statements in full, and if you will summarize them very briefly we shall be glad to print them for you.

STATEMENT OF DALE W. HARDIN, MANAGER, TRANSPORTATION AND COMMUNICATION DEPARTMENT, CHAMBER OF COMMERCE OF THE UNITED STATES; ACCOMPANIED BY VERNE R. SULLIVAN, ASSISTANT MANAGER, TRANSPORTATION AND COMMUNICATION DEPARTMENT, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. HARDIN. Thank you, Mr. Chairman. With me today is Mr. Verne R. Sullivan, assistant manager of the transportation and communication department. I am Dale W. Hardin, manager of the Transportation and Communication Department of the Chamber of Commerce of the United States.

The transportation and communication committee, through its subcommittee on communications, initiated the national chamber's position on this bill. It is a 62-man committee, composed of representatives of all modes of transportation and communication, including magazine and newspaper publishers, radio and television broadcasters, and the general business public.

The committee has studied the testimony taken last year on S. 1666 and it has discussed the proposal at some length as well as making inquiries as to its effect on some segments of the business community.

S. 1160, as we understand it, would (1) require publication in the Federal Register of certain information concerning organization and procedures, rules, and general policies of Federal agencies; (2) direct that all final opinions and orders, statements of policy and interpretation, and staff manuals be made available for public inspection and copying; (3) require every agency to make all its records promptly available to any person; (4) identify eight specific categories of sensitive information which are to be protected from disclosure; (5) permit persons seeking government information to file suit in a U.S. district court to have an agency produce records improperly withheld; and (6) give the district courts power to punish agency officials for contempt if they refuse to disclose the records.

In other words, the bill would provide the right of access by the public to all nonsensitive areas of government information.

A free flow of information from and concerning all branches of government at all levels is a right of the public and is essential to our democratic society. The freedom of the Nation depends on an electorate well informed by a free press, as guaranteed by the Constitution. It is a responsibility of government to protect and preserve this constitutional guarantee by a policy of full disclosure of information. Except for matters clearly affecting national security or otherwise covered by statute, all business of government should be fully disclosed to the public and the burden of proof must rest with government in every instance to justify withholding any information.

This is a set of principles adopted by the membership vote at our annual meeting in April 1964 and reaffirmed by the board of directors as recently as February of this year.

The national chamber has not, so far as I know, been wrongfully denied any information it has sought. However, in the interest of assuring the free flow of information so necessary if we are to have a well-informed public, we believe that broad, but effective, guidelines must be laid down. Certainly, the examples cited by some witnesses before this committee are inexcusable. The injury that may derive from the denial to the public of legitimate information is of more importance than any purpose that might be served by withholding information for such reasons as concealing embarrassing mistakes or irregularities.

We inquired of several trade associations that are members of the national chamber and whose members are required to file reports with various Government agencies, as to whether the enactment of this measure would, in their judgment, afford adequate protection with respect to information given the Government by business. Responses were that they did not believe that it would prejudice the protection afforded to business and trade secrets or properly confidential matters.

We believe S. 1160 will help to make more effective the principles approved by the national chamber's members, and we are therefore glad to endorse it and to urge its enactment.

Mr. Chairman, we appreciate this opportunity to express our views on this proposal. If there are any questions, I would be glad to try to answer them for you.

Senator LONG. Thank you, Mr. Hardin. Your statement in support of the bill has been very helpful to us.

Mr. Fensterwald?

Mr. FENSTERWALD. I do not have a question. I would just like to make a comment that I think this statement and the actions that lie behind it are one of the most helpful signs we have had, because one of the arguments that has been launched against this bill by almost every agency in town is that we would be giving away business secrets to the great detriment of the business community. As the bill was drafted, we do not think that is true and we are glad to have your support on that particular point.

Mr. HARDIN. Neither did our members, Mr. Chairman.

Senator LONG. Thank you very much, Mr. Hardin.

(The prepared statement of Mr. Hardin, and a letter received later, are as follows:)

TESTIMONY OF DALE W. HARDIN FOR THE CHAMBER OF COMMERCE OF THE
UNITED STATES ON S. 1160

I am Dale W. Hardin, manager of the transportation and communication department of the Chamber of Commerce of the United States. With me today is Verne R. Sullivan, assistant manager of the transportation and communication department. We are appearing in support of S. 1160.

The transportation and communication committee, through its subcommittee on communications, initiated the national chamber's position on this bill. It is a 62-man committee, composed of representatives of all modes of transportation and communication, including magazine and newspaper publishers, radio and television broadcasters, and the general business public.

The committee has studied the testimony taken last year on S. 1666 and it has discussed the proposal at some length as well as making inquiries as to its effect on some segments of the business community.

S. 1160, as we understand it, would (1) require publication in the Federal Register of certain information concerning organization and procedures, rules, and general policies of Federal agencies; (2) direct that all final opinions and orders, statements of policy and interpretations, and staff manuals be made available for public inspection and copying; (3) require every agency to make all its records promptly available to any person; (4) identify eight specific categories of sensitive information which are to be protected from disclosure; (5) permit persons seeking Government information to file suit in a U.S. district court to have an agency produce records improperly withheld; and (6) give the district courts power to punish agency officials for contempt if they refuse to disclose the records.

In other words, the bill would provide the right of access by the public to all nonsensitive areas of Government information.

A free flow of information from and concerning all branches of Government at all levels is a right of the public and is essential to our democratic society. The freedom of the Nation depends on an electorate will informed by a free press, as guaranteed by the Constitution. It is a responsibility of Government to protect and preserve this constitutional guarantee by a policy of full disclosure of information. Except for matters clearly affecting national security or otherwise covered by statute, all business of Government should be fully disclosed to the public and the burden of proof must rest with Government in every instance to justify withholding any information.

This is a set of principles adopted by a membership vote at our annual meeting in April 1964, and reaffirmed by the board of directors as recently as February of this year.

The national chamber has not, so far as I know, been wrongfully denied any information it has sought. However, in the interest of assuring the free flow of information so necessary if we are to have a well-informed public, we believe that broad, but effective, guidelines must be laid down. Certainly the examples cited by some witnesses before this committee are inexcusable. The injury that may derive from the denial to the public of legitimate information is of more importance than any purpose that might be served by withholding information for such reasons as concealing embarrassing mistakes or irregularities.

We inquired of several trade associations that are members of the national chamber and whose members are required to file reports with various Govern-

ment agencies, as to whether the enactment of this measure would, in their judgment, afford adequate protection with respect to information given the Government by business. Responses were that they did not believe that it would prejudice the protection afforded to business and trade secrets or properly confidential matters.

We believe S. 1160 will help to make more effective the principles approved by the national chamber's members, and we are therefore glad to endorse it and to urge its enactment.

Mr. Chairman, we appreciate this opportunity to express our views on this proposal. If there are any questions, I would be glad to try to answer them for you.

CHAMBER OF COMMERCE OF THE UNITED STATES,
Washington, D.C., May 27, 1965.

Mr. BERNARD FENSTERWALD,
Chief Counsel, Subcommittee on Administrative Practices and Procedure, Senate
Judiciary Committee, Washington, D.C.

DEAR MR. FENSTERWALD: At the time of my testimony before the subcommittee on S. 1160, I stated that we inquired of several trade associations that are members of the national chamber and whose members are required to file reports with various Government agencies, as to whether the enactment of this measure would, in their judgment, afford adequate protection with respect to information given the Government by business. I further stated that responses were that they did not believe that it would prejudice the protection afforded to business and trade secrets or properly confidential matters.

Yesterday I received information from one of the trade associations that is a member of the national chamber, stating that there is a specific problem in connection with the reports of personal injuries to employees which must be filed by the railroads with the Interstate Commerce Commission. I am informed that some unconscionable members of the legal profession, when afforded the opportunity to obtain copies of these accident reports, use them in the solicitation of personal injury cases, although this is in contravention of the code of legal ethics, and is certainly contrary to the dignity of the profession they represent. There is some strong feeling that the measure should contain language that would exempt accident reports that must be filed by regulated industries so that the misuse of such reports might be prevented.

This information is transmitted to you in order that the record may be entirely clear, especially in the light of the additional information I now have which was not available to me at the time of my appearance before the subcommittee.

Very truly yours,

DALE W. HARDIN.

Senator LONG. Our next witness is Mr. William C. Levy, president, Federal Trial Examiners Conference.

**STATEMENT OF WILLIAM C. LEVY, PRESIDENT, FEDERAL TRIAL
EXAMINERS CONFERENCE; ACCOMPANIED BY MERRITT RUHLEN,
CHAIRMAN, ADMINISTRATIVE LAW COMMITTEE**

Senator LONG. Mr. Levy is an old friend of the committee and our staff. He has been very helpful to us in the past and we are very grateful to him.

I am very happy to have you before our committee.

Mr. LEVY. Thank you, Mr. Chairman.

I would like to introduce my colleague, Merritt Ruhlen, chairman of our administrative law committee.

Senator LONG. Mr. Ruhlen is also an old friend of the committee staff. We are happy to have both of you here this morning.

Mr. LEVY. I would like to state to the committee how happy I was to hear the representative of the Justice department this morning emphasize the importance of the administrative conference bill. This

bill (Public Law 88-499) as you know, was sponsored by this committee and enacted in August of last year. More than 8 months have passed without a permanent chairman being appointed, which is a matter of concern to our conference. We have written to the Chairman Macy of the Civil Service Commission, urging that the first full-time permanent chairman be appointed as soon as possible so that the machinery of the conference can be organized and the gap which presently exists in the implementation of the act can be filled, and we hope that action will be taken soon.

The Federal Trial Examiners Conference appreciates again the opportunity to appear again before this distinguished subcommittee which has pursued the review, updating, and improvement of the administrative process with such vigor and diligence. As you know, our conference consists of hearing examiners throughout the Federal establishment who owe their existence to the Administrative Procedure Act and who are vitally concerned in the work of the subcommittee and in the proposed legislation. We appreciate the consideration given our earlier suggestions and note that some of these suggestions have been utilized in the present revision, S. 1336. We are also grateful to the subcommittee counsel, Mr. Fensterwald and Mr. Kennedy, for their continuing courtesy and cooperation with our conference, and their willingness to explain the provisions of the bill and its objectives.

I previously introduced Mr. Merritt Ruhlen, of the Civil Aeronautics Board, and he has prepared a detailed analysis of S. 1336 with comments and suggestions for change which I do not intend to summarize or repeat. Rather, it is my purpose today to emphasize those aspects of S. 1336 which are of major concern to hearing examiners and consequently to our conference. These include proposed provisions authorizing the conduct of certain formal hearings by individuals who are not section 11 Administrative Procedure Act hearing examiners, the modified hearing procedures, and the mandatory appeal board provisions.

Under the present provisions of the Administrative Procedure Act as it was enacted in 1946, a section 11 hearing examiner must preside wherever the law requires a trial-type hearing. This is true whether the hearing is classified as adjudicatory or rulemaking. The act thus insures that the hearing will be conducted by an individual whose impartiality, integrity, experience, and competence have been established independently by the Civil Service Commission. As you know, an elaborate procedure has been established and improved over the years by the Commission to recruit and retain a corps of qualified individuals so as to maintain public confidence in the fairness of formal administrative proceedings.

Section 4(c) (2) of the proposed bill permits a formal hearing in a rulemaking proceeding to be conducted by "any responsible officer of the agency." Presumably, this would authorize any staff employee designated by the agency to preside in a rulemaking proceeding even though he was not qualified as a section 11 Administrative Procedure Act hearing examiner and the hearing involved with the taking of evidence, cross-examination, and the usual problems of admissibility and procedure incident to a trial-type hearing. Such "responsible officer" could be a bureau chief or any assistant who might be professionally

qualified as an engineer, accountant, economist, or personnel director but wholly unskilled in conducting hearings.

We believe the agencies will continue to use section 11 APA hearing examiners. The necessity for objective analysis of evidence, knowledge of how to avoid procedural traps and delays, fair findings of fact, and public confidence is just as important in rulemaking as it is in adjudicatory proceedings. To the public and the participants an evidentiary hearing is much the same whether it is denominated as adjudicatory or rulemaking. Moreover, having built up the hearing examiner corps to its present level of efficiency and competence, it would be costly and wasteful not to use this available resource for its primary role—the conduct of all formal trial-type hearings.

Similarly, the limitation in section 4(c) (2) to a recommended decision by the presiding officer in a rulemaking proceeding serves no useful purpose. We are not aware of any complaint that initial, rather than recommended, decisions have restricted the formulation of agency policy and we note that the Securities and Exchange Commission recently (17 C.F.R. 201, Aug. 1, 1964) amended its rules to provide for initial decisions by its hearing examiners, as do all other regulatory agencies.

For the same reasons, we are concerned about the language in section 5(a) (5) which authorizes the conduct of abridged proceedings by "agency personnel of appropriate ability." No need for presiding officers who have not been screened and schooled as hearing examiners has been shown. We welcome the development of modified hearing procedures which are now used in many agencies but see no need to expand the authority to conduct such abridged proceedings to agency personnel other than section 11 APA hearing examiners. The officer who conducts and decides the abridged proceeding must be skilled in the same way as the officer who conducts and decides the other agency hearings.

The parties should not be asked to consent to such a procedure. No public benefit will be served by authorizing an unskilled category of presiding officers. The creation of such a group can only weaken the present role of hearing examiners. It conflicts with other provisions designed to expedite and simplify administrative proceedings by emphasizing the hearing examiner's responsibility.

Finally, the mandatory appeal board provisions of section 8 will inevitably delay proceedings by inserting an additional step between the examiner's initial decision and the agency's final decision. We again urge consideration of the appeal and review procedure in use at the Civil Aeronautics Board which makes the examiner's decision subject to a certiorari-type review and is explained in some detail in Mr. Ruhlen's memorandum (p. 10). This procedure has proved effective and fair. We propose that any authority to establish appeal boards be made discretionary so that agencies could experiment with such boards and retain them only if they prove their worth.

Similarly, issuance of a conference report or order in section 5(a) (3) dealing with prehearing conferences, should be permissive rather than mandatory. We recommend that all efforts to incorporate in administrative procedure the provisions of the Supreme Court rules for the guidance of district courts be left sufficiently flexible to meet the peculiar needs and requirements of each of the agencies.

On behalf of Mr. Ruhlen and the hearing examiners of our Conference, I wish to thank the distinguished Senators and their staff for this opportunity to present our views. Whatever your final report, we are satisfied that these hearings and the other hearings you have been conducting represent a major contribution to our mutual goal of advancing and improving the administrative process.

Before I conclude, I would like to refer to Mr. Ruhlen—I believe he has a few words he would like to say to the committee.

Senator LONG. The committee will be happy to hear him.

Mr. RUHLEN. I join with Mr. Levy's statement. I would, however, like to express one word of warning. The beauty of the administrative process is that it permits each agency to adopt procedures specifically adapted to its problems. This needed flexibility is promoted by the proposed revision which authorizes and promotes the use of many devices and procedures for facilitating administrative proceedings such as prehearing conferences, written testimony, depositions, and discovery, declaratory orders, and prepared studies. However, I urge you not to hamper the agencies and examiners in the use of these instruments by applying restraints which limit flexibility. Tying certain procedures to the rules of civil procedure or the practice of the U.S. district courts, making appeal boards mandatory with limited exceptions, and limiting the authority of the agencies and the parties to provide whatever modified procedures to which they agree, will unnecessarily prevent the most efficient use of the administrative process and the devices you have given us.

I urge you to remove such restrictions and leave such matters to the discretion of the agencies, the examiners, and the corps. You should not carry the worship of the god uniformity too far or it will defeat your objectives.

Thank you.

Senator LONG. Thank you, gentlemen, very much. Your statements have been very helpful. You have been very helpful to the committee on many other occasions. We are grateful to you for your statements and your comments.

(The prepared statement of the Federal Trial Examiners Conference is as follows:)

THE FEDERAL TRIAL EXAMINERS CONFERENCE,
Washington, D.C.

To: William C. Levy, president, Federal Trial Examiners Conference.

From: Merritt Ruhlen, chairman, Administrative Law Committee.

Subject: S. 1336.

Attached for your consideration is a detailed analysis of S. 1336 by the Administrative Law Committee with comments and suggestions for changes. These comments deal primarily with these aspects of administrative procedure with which the hearing examiner is familiar and which would affect the conduct of formal proceedings while in the hands of the hearing officer.

1. Section 4(a), page 8, "Informal consultation prior to notice," and section 4(g), page 10, "Petitions," should be reworded to read as follows:

"4(a) Petitions and informal consultation.

"Every agency shall afford any person the right to petition for the issuance of a rule at any time. Prior to notice of proposed rulemaking, and either with or without public announcement, an agency may afford an opportunity to interested persons to submit suggestions with respect to proposed rules."

(a) Section 4(g) is not necessary, as every person has the right to petition the Government or any of its agencies for anything he wants at any time. If

Congress wishes to state this specifically, it can do so in the first sentence of 4(a) above. The reference in 4(g) to amendment, exception from, or repeal of a rule is prolix as these actions are included by definition in rule 2(c) as rulemaking.

2. Section 4(c), "Procedures," (2), pages 8 & 9, should be reworded to read as follows:

"Where rules are required by the Constitution or by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of subsection (c) (1)."

If the law requires a hearing in a rulemaking proceeding the interested parties are entitled to the same procedural safeguards as are made available to the parties at a hearing in an adjudicatory proceeding. The act, at present, provides such protection and no reason has been advanced for the suggested change. The subcommittee proposal would authorize officers not qualified as hearing examiners pursuant to section 11 of the act to preside at rulemaking hearings, but would not permit initial decisions by the presiding officer.

Sections 7 and 8 were designed to protect the interests of all parties and at the same time provide procedures for expediting formal administrative hearings. The Congress, the executive department, and the bar association have decided that the persons hearing administrative cases should be highly qualified experienced officers who have submitted to a rigid examination before being authorized to hold hearings.

If for the protection of the rights of the public and the Government, it is necessary to have such highly qualified personnel to hold adjudicatory hearings, they should be used in all formal hearings required by the Constitution or statute. The necessity for objective analysis of evidence and fair findings of fact is just as important in rulemaking proceedings as it is in adjudicatory proceedings.

Furthermore, there is no justification for permitting only a recommended decision by the presiding officer in a rulemaking proceeding when initial decisions by the presiding officer are permitted in adjudicatory proceedings. If a section 11 hearing officer is required for a rulemaking hearing, there would be no necessity to limiting him to a recommended decision.

3. Section 5(a) (1), page 11, should be amended to read as follows:

"Notice: Persons entitled to notice of an agency proceeding shall be timely informed of the nature of the proceeding and of the legal authority and jurisdiction under which the proceeding is to be held. Persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted and issues to be tried and the time and place of all hearings. In fixing the times and places for hearing, due regard should be had for the convenience of the parties or their representatives."

This subsection has been reworded to provide for one type of notice for an agency proceeding and a different type for an agency hearing. Notice of an agency proceeding need only inform interested persons of the nature of the proceeding and the agency's jurisdiction. If it is a nonhearing proceeding, the interested parties, if they receive notice of the proceeding, can easily investigate what factual and legal questions are raised. If it is a proceeding involving a hearing, the matters of fact and law involved and the time and place of hearing frequently cannot be determined prior to the initiation of the proceeding. The notice of hearing should, of course, apprise the public and all interested persons of the issues raised and the time and place of hearing.

4. Section 5(a) (2) page 11, "Pleading and other papers," should be amended by striking the second sentence therefrom. This sentence requires, to the extent practicable, that rules with reference to pleadings should conform to the rules of civil procedure or the rules of criminal procedure for the U.S. district courts.

The problems and the operations of the agencies frequently have little similarity to those of the district courts. To impose a requirement that an agency's rules with reference to pleadings should conform to the extent practicable with the rules of the district courts will only complicate the work of the agencies and increase their administrative problems. To fully protect itself from the mischief created by the proposed conformity requirement, each agency might have to consider each of the rules of the district courts and before departing therefrom, demonstrate why such conformance was impracticable. Such procedure would require a substantial amount of time and work and would accomplish nothing. The diverse nature of proceedings in the various agencies and the advantages arising from simplified procedures makes it necessary for the rules of each

agency to be adapted to its special problems. In the absence of agency rules, the Federal rules may be used but in many situations the Federal rules may not be adaptable to administrative proceedings.

5. Section 5(a)(3) page 11, should be amended to read as follows:

"Prehearing conferences: Every agency shall, by rule, provide for prehearing conferences for use in each proceedings as the agency or the presiding officer may designate. Such conferences shall be conducted by the presiding officer who at any appropriate time may require (a) the production and service of relevant matter upon all parties; (b) oral or written statements of the positions of the parties and of the facts and issues; (c) the taking of depositions; and (d) oral arguments or the filing of briefs. At the conclusion of the prehearing conference, the the presiding officer may issue a report or order setting forth the action taken at the conference, amendments allowed to the pleadings, any agreements made by the parties, and specifying other requirements and procedures to be followed in the conduct of the proceeding."

Prehearing conferences should be used in any way possible to clarify, modify, or limit the issues and to establish the simplest, fairest, and most expeditious procedures for the conduct of the proceeding. It should not be limited to questions of determining the facts and issues. Questions of the evidence to be submitted, who shall submit the evidence, the time and place of hearing, the preparation of studies and other miscellaneous matters may need to be considered at the prehearing conference. Specifying the purposes of the conference in the act limits the effectiveness of such a conference. This sentence should be omitted.

The material commencing with "At the conclusion" on line 8, page 12, and continuing through the end of the paragraph has been modified. The proposed change gives the presiding officer more latitude in controlling a conference and in reporting the action taken. Issuance of a conference report or order should be permissive rather than mandatory. If issuance of a report or order would not serve a useful purpose, a requirement for one would delay the proceeding unnecessarily. The proposed change also makes it clear that the presiding officer may make rulings defining the issues. The agreement of the parties should not be necessary for such action. The presiding officer has such powers at the hearing, and he should not be deprived of them at the conference.

6. Section 5(a)(4) page 12, "Regular hearing procedures," should be modified to read as follows:

"Where informal proceedings have not been designated by the agency and consented to by the parties, or to the extent that the controversy has not been settled or adjusted, there shall be a hearing or decision upon notice in conformity with sections 7 and 8."

Section 5(a)(5) provides that modified hearing procedures cannot be used unless parties consent. This change merely makes 5(a)(4) conform to 5(a)(5). (The wording has been changed to conform to the proposal herein to change 5(a)(5).)

7. Section 5(a)(5), "Modified hearing procedures," appearing on pages 12 and 13, should be modified to read as follows:

"Informal proceedings: Agencies may adopt and follow such informal procedures as are agreeable to the parties." This substantially conforms to the more elaborate phrasing set forth in the proposed 5(a)5. The agencies and the parties should be permitted to follow whatever procedures to which they can agree. Establishing any technical requirements for informal procedures or proceedings will hamper rather than simplify the disposition of cases that can be disposed of by procedures agreeable to all parties.

8. Section 5(a)(6), "Separation of functions," (B), appearing on page 13, should be reworded to read as follows:

"B. Save to the extent required for the disposition of ex parte matters as authorized by law, no presiding officer or member of any agency shall consult or advise with any person or agency on any fact in issue unless upon notice and opportunity for all parties to participate, except that nothing in this subsection shall preclude conversation with agency personnel who have not participated in the preparation or presentation of that or a factually related proceeding."

Administrative proceedings frequently involve complex and technical questions concerning which the assistance of technically qualified personnel is beneficial. Presiding officers should not be prevented from availing themselves of such assistance so long as it does not come from an interested party or a person

who has participated in the proceeding. Furthermore, presiding officers, whether judges, examiners, or agency members will be assisted by discussing matters with their conferees. The proposed draft is worse than Committee Print No. 2 of April 20, 1964. The April 20 print permitted consultation with agency personnel specifically assigned for such purpose, provided that they had not participated in the preparation or the presentation of that, or a factually related proceeding. The new proposal eliminates all technical assistants.

9. Section 5(e) page 14, should be amended to read as follows:

"(c) Settlement: Agencies shall by rule establish procedures for the adjustment or settlement of controversies."

The parties should be given an opportunity to settle controversies and the agencies should provide procedures for this purpose but the statute should not be so detailed as to permit its use by parties to delay the proceeding. Requiring that the parties be given an opportunity to submit and have considered offer of settlement before hearing, would permit parties to delay proceedings for protracted periods. No showing has been made that such a provision is desirable.

10. Section 6(h), "Depositions and discovery," page 32, lines 4 through 9, should be modified to read as follows:

"Every agency shall by rule establish deposition and discovery procedures."

The proposed modification would permit each agency to establish deposition and discovery procedures particularly adapted to meet its specific needs and problems. The proposed change does not provide that witnesses may be compelled to testify in discovery proceedings by the use of subpoenas. Such a provision may be inferred from the section pertaining to the use of subpoenas.

To request the parties and the agencies to investigate and determine the policies of the district courts in civil proceedings would complicate and confuse the practices before the agencies. Simply providing that agencies shall establish deposition and discovery procedures provide the necessary protection for all parties and does not interfere with the agencies' discretion to adopt rules peculiarly adapted to its individual problems.

11. Section 7(b), page 21, lines 9 and 10, "Hearing powers," should be amended by striking the phrase "by consent of the parties" appearing on lines 9 and 10, page 21. The examiner should have the authority to simplify issues when necessary whether the parties agree or not. Settlement, obviously, cannot be arranged without the consent of the parties.

12. Section 7(b), "Hearing powers," should be amended by striking "authorized by agency rule" from line 16, page 21. No purpose would be served by making this provision subject to agency rule. The presiding officer should be authorized to take any proper legal action to maintain order.

13. Section 7(e), "Interlocutory appeals," page 22, should be amended by striking the sentence beginning on line 22 and substituting the following:

"No interlocutory appeal shall be permitted without the consent of the presiding officer." Permitting such an appeal without the presiding officer's consent, negates the first sentence of this section which directs a presiding officer to allow an appeal only under certain circumstances. To permit the parties to request review of the presiding officer's denial of an appeal is, in effect, permitting the appeal. It would delay the proceeding and impose upon the agency the burden of deciding minor procedural matters with which it was not acquainted. This would not deprive the parties of any rights, as interlocutory rulings are always reviewable when the agency reviews the decision on the merits.

14. The subcommittee in section 8(c), pages 24 through 26, proposes a proceeding to review the decision of the presiding officer.

This section was apparently intended to expedite agency action and to permit agency members to devote the necessary time to planning and the adoption of policies designed to accomplish the agency's purposes without depriving the agency of the right and the authority to establish and change policy and to make the final determination in any proceeding in which such action is necessary.

Unfortunately, the subcommittee's proposal does not do this. On the contrary, it will tend to delay proceedings, to eliminate review by the policymaking body, and to make appeals to the agency subject to the whim of any private party.

The proposed procedure will delay proceedings by inserting an additional step between the examiner's decision and the agency. This requires two steps with the possibility of a third, as contrasted with present procedures in some agencies which require only one step with the possibility of a second.

The proposal provides that review shall be by an appeal board unless a private party requests review by the agency. This would mean that any private party, regardless of the extent of his interest, could obtain agency review as a matter of right while the agency's staff or another governmental agency could not.

The proposal limits the matters upon which an agency can review the action of an appeal board; for example, the agency would not be permitted to review factual findings.

Although the proposed review procedure would inhibit rather than assist attainment of the goal desired, there is a procedure available and in use in at least one agency which will achieve the desired results. Simply making the decision of the presiding officer final subject to a certiorari type review by the agency has the following advantages:

- (1) The officer who hears the evidence makes the factual finding.
- (2) Decision whether to review is by the agency.
- (3) Review of each decision is by the agency.
- (4) The decisional burden on the agency is minimized by eliminating the need for extensive or deep review of a substantial percentage of initial decisions.
- (5) The agency may review any case, to the extent necessary, for any reason.
- (6) The burden on the parties and the agency staff is minimized by the elimination of the review step in many cases.

This type of review has been provided at the Civil Aeronautics Board for the last 2½ years and is working successfully. A summary of this procedure and how it works is attached as appendix A. The following draft establishes such a procedure and should be substituted for the review and appeal procedure suggested by the subcommittee.

Section 8(c). "Appeal and review," pages 42-45, should be modified to read as follows:

"1. Review: Any party may ask review of the decision of the presiding officer by serving upon the agency and all other parties, within such reasonable period after being served with the decision, as prescribed by the agency or the presiding officer, a petition for discretionary review and the reasons therefor which shall state specifically and concisely the manner in which (A) a prejudicial procedural error was committed; (B) a finding of material fact was erroneous; (C) a necessary legal conclusion is contrary to law or to the duly promulgated rules or decisions of the agency; or (D) there is a novel question of policy involved. Where objections are based on the record, the portions of the record relied on shall be identified by detailed citations. Except for good cause shown, no questions of any fact, law, or policy which were not presented to the presiding officer will be considered. Within such a reasonable period as may be prescribed by the agency or the presiding officer, any party may file and serve an answer in opposition to such petition or petitions.

"A petition for reconsideration of an agency order declining review will be entertained only when the order exercises, in part, the agency's right of review, and such petition shall be limited to the single question of whether any issue designated for review and any issue not so designated in so inseparably inter-related that the former cannot be reviewed independently or that the latter cannot be made effective before the final decision of the agency in the reviewed proceeding.

"The agency will exercise its right of review upon petition or upon its own initiative when one less than the majority of the agency vote in favor of review. The agency will issue a final order upon such review without further proceedings on any or all the issues where it finds that matters raised do not warrant further proceedings.

"Where the agency desires further proceedings, the agency will issue an order for review which will:

"(i) Specify the issues to which review will be limited. Such issues shall constitute one or more of the issues raised in a petition for review and/or matters which the agency desires to review on its own initiative. Only those issues specified in such order will be considered by the agency.

"(ii) Specify those portions of the presiding officer's decision, if any, which are to be stayed as well as the effective date of the remaining portions thereof.

"(iii) Designate the parties to the review proceedings.

"2. Record: The record for review shall include all matters constituting the record upon which the decision of the presiding officer was based unless limited by rule or order (1) to matter relevant to the questions raised by the petitions

for review or (2) to any other questions raised by the agency, and shall include any evidence taken upon appeal."

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I have no questions. Would again like to join with you in thanking these gentlemen. They and their organization have been helpful in the past, and I know will be helpful in the future.

Mr. LEVY. Thank you, Senator Long and Mr. Fensterwald.

Senator LONG. Mr. William C. Hart is our next witness. Mr. Hart is chairman of the Rules of Practice and Procedure Committee of the Federal Power Bar Association, is our next witness.

We shall be happy to hear from you, Mr. Hart, at this time.

STATEMENT OF WILLIAM C. HART, CHAIRMAN, RULES OF PRACTICE AND PROCEDURE COMMITTEE, FEDERAL POWER BAR ASSOCIATION, WASHINGTON, D.C.; ACCOMPANIED BY LOUIS FLAX, WASHINGTON, D.C.

Mr. HART. Thank you, Mr. Chairman.

Senator LONG. If you would introduce the gentleman with you please?

Mr. HART. Thank you, Mr. Chairman. I have only an oral statement which seeks to highlight our position on this bill.

I would like to say that Mr. Louis Flax, attorney, of Washington, D.C., is appearing with me.

Senator LONG. We are glad to have you, Mr. Flax.

Mr. HART. Your honor, we represent the Federal Power Bar Association on this matter. The Federal Power Bar Association is approximately 20 years old. It has served regularly and at some depth in working together with the Federal Power Commission, especially on its rules, regulations, and other matters affecting procedure before the Federal Power Commission. We have never, to my knowledge, appeared before Congress, for the reason that our membership as of now, for instance, consists of 629 lawyers who practice quite regularly before the Federal Power Commission. They represent all segments of the industry; therefore, their views are quite diverse. It is extremely difficult to get a concensus on almost anything from them. I think, therefore, and I suggest that the mere fact that Mr. Flax and I are here suggests that this is the first time in 20 years that our association has felt so strongly about a bill affecting anything to do with the Federal Power Commission that we have appeared here. I am speaking only to Federal Power Commission coverage under this bill.

If I might first give you a bird's-eye view of our position, it is that we think the bill is, first, unnecessary. As we understand it, it is designed to streamline, expedite agency procedure. It is our firm opinion that while this is a worthy objective, it is lagging behind the facts, at least of the Federal Power Commission. Right now, there is no real backlog situation as far as, certainly, gas pipeline matters go, or electric matters. While there are some problems, considerable problems on producer regulation, that is not a question resolvable by this bill, obviously.

Basically, we also oppose the across-the-board nature of the bill. It seems to us contrary to the basic purpose of the APA, which is and

has been to provide minimum requirements for fair administration. This tends to maximize them, in our opinion.

We also have severe questions about whether it is not consistent with or in need of reconciliation with the Natural Gas Act on many specific accounts.

More specifically, we oppose section 8 in its entirety. We also oppose section 5(a)(2), which would require agencies "to the extent practical" to set up rules comparable to the rules for civil procedure for the district courts. We are particularly interested in the separation of functions provision. We think that warrants, really, further study, and we also would urge the committee to consider the question of policy formulations which deal with matters such as rates and certificates as to which parties have a statutory right to a hearing. We urge the committee to consider whether these types of policy formulations or rulemaking should not be specifically subject to section 7-type hearings.

More specifically, on section 8, we feel that section 8 would, well, I guess there is little question that it would transfer considerable power and authority from the individual commissioners who bear the statutory responsibility for administering the Natural Gas Act. It would transfer that responsibility primarily to the hearing examiners and secondarily, to appeal boards through whom an examiner's decision would funnel, and after it left the appeal board, more of the Commission's actual power would be left there, we feel.

This would happen, as I say, primarily by giving considerable increased finality to the examiner's decisions, specifically the deletion of the omission of the hearing examiner's decision. We think this is very questionable. We see little advantage to it and we can see considerable adverse effects, particularly since it is an across-the-board proposition.

Mr. FENSTERWALD. Could I interrupt just 1 second?

Mr. HART. Certainly.

Mr. FENSTERWALD. Are you talking to S. 1336?

Mr. HART. Yes, sir.

Mr. FENSTERWALD. Because we have not eliminated any initial decisions, and we have not funneled opinions up to the appeals board. We have sent them to the appeals board or to the agency, but not to both.

Mr. HART. I think you misunderstand me. You have eliminated the present right of the agencies to omit the examiner's decision.

Mr. FENSTERWALD. In normal cases, yes.

Mr. HART. In cases of adjudication.

Mr. FENSTERWALD. Yes.

Mr. HART. We think that is very questionable. You have also provided for the creation of appeal boards which, while discretionary in the language, as a practical matter, as I hope to demonstrate, are virtually mandatory. Once the examiner's decision goes to the appeal board, then, on review of that appeal board's decision, the Commission, we feel, has less scope than it now has; considerably less.

Mr. FENSTERWALD. If this bill is adopted, very few decisions which are taken to the appeal board will go to the agency. The purpose of the appeal board is to give the agency more time to deal with policy matters and less time to wrestle with factual questions.

Mr. HART. I realize that that is its laudable objective, Mr. Fensterwald, but we do not think that will be its result as a practical matter.

Mr. FENSTERWALD. Would you be in favor if that were the result? Are you satisfied, for example, with the rulemaking of the Federal Power Commission, as either made or not made?

Mr. HART. As I indicated in my introduction, we are not satisfied with the policy formulations which affect substantive rights.

Mr. FENSTERWALD. If they have 11,000 adjudications a year on the agenda, I do not see how they would have time to do anything else but adjudicate.

Mr. HART. As I mentioned earlier, in all respect, sir, I think there is a lag in this seeming assumption by the committee that there is a great backlog over there. I do not think there is. It seems to me as far as pipeline work, that certainly is not, and electrical work. What problems there are from the workload come from producer regulation. That is not a matter susceptible to cure by the APA.

Mr. FENSTERWALD. Correct me if I am wrong, but did not they get rid of this backlog not by adjudicating these cases, but by settling them?

Mr. HART. Largely.

Mr. FENSTERWALD. Any agency can get rid of all of its backlog this way. The question is whether they can effectively handle the load of cases without this. We are not going to get into the question of whether they have a backlog of 20,000 cases, or however many thousand they may have. They are just going to say, we have a backlog, and settle them.

Mr. HART. I think the present procedure encourages the use of settlement. Just because they are settled does not mean that it is bad—not to me, anyway.

Mr. FENSTERWALD. It does not mean it is bad, but it is bad if the only way you can get rid of a huge backlog of cases is to take huge blocks of them and say, the only way we can get out of this quagmire is to settle these cases.

Mr. HART. I think another way of looking at that, sir, is that right now, for the last few years, the Commission has not had this backlog. I think that is generally recognized, and still, there are not more cases, more section 7 cases over there.

But as far as I know, there has been no complaint, or serious complaint, or reason for it to my knowledge, with the section 7 hearings over there.

As I say, I think the Commission right now has them under reasonable control.

Mr. FENSTERWALD. I am glad to hear that.

Mr. HART. I hope to come to your question about reserving the Commissioners for policy considerations. We are all for that, but there is a question whether this bill would really do it.

Mr. FENSTERWALD. I understand the differences of opinion. I just wanted to be sure that we are talking about the same thing.

Mr. HART. I might add that our association is not always so closely alined with the Federal Power Commission.

Well, as I say, the deletion of the right to omit the examiner's decision stereotypes the whole thing, from our viewpoint. It makes it too rigid, too inflexible, and disregards the pretty sound, I think, word of caution which the Supreme Court indicated in the *Colo-*

rado Interstate case (350 U.S.) which was before it in the early 1950's, where it made a very sharp distinction between the types of proceedings which you have before examiners in different commissions.

In the NLRB, you have a certain type of proceeding where the demeanor of the witness is much more significant, for instance, than it would be before the Federal Power Commission, where you have a much more statistical type of record, usually. The Supreme Court noted this quite sharply in the *Colorado Interstate* case. This decision to eliminate across the board the examiners' decisions, we think, would fly in the face of this.

Secondarily, another means by which authority is transferred from the Commissioners to the examiners—this bill specified grounds for exceptions from examiners' decisions, one of which is you may take exception to "clearly erroneous conclusions of fact."

Now, this "clearly" is erroneous. That is an added burden on the Commission. Right now, the grounds on law, the comparable grounds for excepting to a conclusion of law does not have the word "clearly" in it. It is simply an erroneous conclusion of law. It is simply that just as the omission of the examiner's decision runs right up against the *Colorado Interstate* philosophy, so this "clearly erroneous" finding as to matters of fact, we submit, runs up against the *Universal Camera* case (340 U.S. 474), which really is concerned in this very question. The Supreme Court, speaking through Justice Frankfurter, says in substance, granted that our examiners are there to resolve the facts, identify the facts, and granted, we should pay attention to them, obviously, and pay serious attention to them, that does not mean their findings of fact are inviolate. Otherwise, the Commission could not perform its basic statutory function.

Again, that is one of our major objections to section 3.

Mr. FENSTERWALD. That was suggested by the administrative conference to some of the Members of Congress, the "clearly erroneous."

Mr. HART. Wherever it came from, I question it on those grounds.

A third source by which authority, present statutory authority, is transferred from the Federal Power Commission to the examiners is the limitation on the Commission's exceptions; that is, concerning exceptions, the Commission may not consider anything not contained, any objection not already contained in the exceptions. That is in section 8(c)(1) and this again seems to us unduly to restrict the Commission.

Again, in section 8(c)(3), the bill says in substance that except in a case where the Commission or the agency might deny an application to avoid the appeals board procedure, except in that case, the Commission shall give full findings on each exception involved, full findings and reasoning on each exception involved. However, if it does deny that application to avoid the appeals board route, then it just does it forthwith, and as a result, the applicants, the parties' exemptions are summarily denied.

Now, this obviously makes it much easier for the Commission if it is pressed for any reason to just deny the application forthwith

than to give the full reasons. Again, in effect, that tends to build up finality of examiners' decisions beyond the point where we think it is sound.

There are two avenues, really, by which this bill would detract from the Commission's present regulatory powers. The first is the transfer of power or the delegation of power to the hearing examiners. The second, we submit, is through this means of creating appeal boards. Once the appeal boards are created, it seems to us as a practical matter—the words do not actually say so—as a practical matter, the use of those appeal boards will be virtually mandatory. As a result, I shall try to amplify that a little later—

Senator LONG. Mr. Hart, off the record just a minute.

(Discussion off the record.)

Mr. HART. Along the lines of further reduction of Federal Power Commission authority by transfer to the appeals board, we are convinced that as a matter of fact, that procedure would be mandatory. Once it is in effect, then a review of an appeal board decision is allowable only on the grounds of policy of law, and then only in the agency's discretion. This obviously further limits the committee's ability to carry out its functions.

The end result of all this diminution of the agency's present authority, we feel, is that first of all, policy could not be hammered out in the context of a particular case, which we think really is better than doing it on an a priori basis, which we think this bill would lead to. By hammering it out in a particular case, we do have the end result of a practical test of how sound it is in a practical matter. We suspect it might not be there on an a priori basis.

Second, we think there is going to be definite delay through this procedure by the inability to omit the examiner's decision, by the fact that the Commission on review must remand the examiner's decision for further examination in further proceeding, and then it must go through the step of the appeal board.

We also question the composition of the appeal board, in that they would be made up of hearing examiners and commissioners. The hearing examiners are a closely knit group, understandably, with common problems, common interests, and we question the feasibility of having the examiners on these appeal boards. We also question the feasibility of having the Commissioners sit in judgment on one of their group. We feel the appeal board would be mandatory because of the risk of summary denial of an application to avoid them.

Also, I think the use of them would be mandatory for additional reasons I really cannot go into here because of time limitations.

This procedure also would basically limit the Commission's ability to tailor its decisions to particular facts. We do not think that is too sound, particularly in view of *Colorado Interstate*, above, and in view of the Universal Camera Act, a Supreme Court case which said substantially the same thing.

Finally, we question whether this bill would not run afoul of the Natural Gas Act, which imposes affirmative duties on the Commissioners to do certain things. This, it seems to us, would restrict that duty specifically. It would restrict its duty in section 5 of the Natural Gas Act and section 7 to impose specific conditions and terms on certificates. It has less leeway to do so, it seems to us, here.

In section 15 of the Natural Gas Act, which empowers the Commission to set up its own rules and procedures, and in section 16, which gives a general flexibility to carry out its own general duties, and also section 19(b) of the Natural Gas Act which says in part that the findings of the Commission shall be conclusive—findings of the Commission shall be conclusive.

We question whether S. 1366 does not violate that.

Another item I would like to get into is separation of functions. We support the deletion in this bill of the present exemption of rate and certificate cases in separation of functions limitations. We think the bill is good in that respect. We also think the bill is good in that it redefines ratemaking as adjudication, or it seems to. We urge that you make that more specific. You now define adjudication to include, for example, licensing. We suggest you add ratemaking so that there is no question about that. Otherwise separation of functions might not be applicable to rate matters, as you know, because separation of functions is applicable only in adjudication.

The present bill maintains that there should not be any application of the separation of functions limitation to agency members. We question this. There is no pat solution. But we suggest that a sound rationale would be for you gentlemen to come up with some language which would have the effect of enabling the Commission to continue to have access to staff expertise, objective staff expertise, but not to be able to rely on or to be subjected to staff advocacy. We think that is a sharp difference which any realistic study should cope with.

Senator LONG. Mr. Hart, I must call time on you now. We shall be happy to have a written statement from you and the record will be open for several days, and it will be very helpful to the committee if you would submit one for us. We are certainly aware of your interest in this subject and your interest is shared by the committee; we are interested in having your views on this matter. You gentlemen are out in the field and can perhaps see what is desired better than we in some cases. We shall be happy to receive your written statement if you care to submit it.

Mr. HART. Thank you, Mr. Chairman.

(The statement of the Federal Power Bar Association is as follows:)

STATEMENT ON BEHALF OF THE FEDERAL POWER BAR ASSOCIATION ON S. 1336

The Federal Power Bar Association is made up of 629 attorneys who practice before the Federal Power Commission. It is approximately 20 years old. While it has occasionally made suggestions to the Federal Power Commission concerning the latter's rules, regulations, and other matters affecting the Commission's procedures, S. 1336, with its drastic overhaul of the Administrative Procedure Act ("APA," or "the act"), is the first bill about which our association has felt so strongly united that it has stated its position thereon to a congressional committee.

Mr. William C. Hart, chairman of the association's special committee on rules of practice and procedure, on May 14, 1965, orally stated to the subcommittee our general position on S. 1336 (transcript pp. 349-361), with particular reference to its impact on practice and procedure before the Federal Power Commission. In accordance with Chairman Long's invitation at page 361 of the transcript, we submit this written statement.

At the outset, we make two general observations: (1) we believe drastic legislation of this nature is unnecessary. There is no gas pipeline or electric power backlog before the Federal Power Commission. There are considerable problems

concerning producer regulation, but they are not resolvable by this or any bill amending the Administrative Procedure Act. We accordingly believe the drastic changes provided in S. 1336, particularly section 8, are not responsive to the current situation; (2) we believe the detailed across-the-board nature of the bill, again with particular reference to section 8, is basically incompatible with sound and fair procedural administration, and with the dissimilar functions of the various agencies. It goes far beyond the original objective of the Administrative Procedure Act to provide only "minimum requirements of fair administrative procedure" (Senate committee report on S. 7, Nov. 19, 1945, p. 31). The approach recommended by the Justice Department and the Federal Power Commission seem to us more productive—i.e., the emphasis should be on inadequacies of particular sections of the act, rather than on a master plan providing detailed procedural requirements for all Federal agencies, without regard to their differing functions and workload. Moreover, the newly authorized Administrative Conference of the United States, when organized, should be given an opportunity to make suggestions on this subject.

The specific sections of the bill covered herein are: Section 8 (providing for a new decisional process), which we oppose in its entirety, and section 5(a)(6) (separation of functions), which we feel warrants further study. We also urge that certain policy formulations should be specifically subject to section 7 hearings, separation of functions and judicial review. These provisions are discussed below:

I. SECTION 8

We oppose section 8 in its entirety. Its undoubted effect is substantially to reduce the authority of the individual Federal Power Commissioners to carry out their statutory responsibilities under the Natural Gas Act. It does this by subdelegating much of that responsibility to the hearing examiners, and by providing for the virtually mandatory creation of appeal boards, through which an examiner's decision would funnel, but from which the grounds for review by the full Commission would be substantially limited. We believe this loss of responsibility by the individual Commissioners would be less likely to produce S. 1336's objective of better FPC policy determinations than it would fragmented, unpredictable, impractical, and frequently delayed policy determinations, with attendant adverse effect on individual justice.

A. Subdelegation of powers to examiners

The subdelegation of present powers to examiners comes about by four specific changes in section 8 of S. 1336: (i) deleting the right to omit the examiner's decision in cases of adjudication; (ii) providing that only "clearly" erroneous conclusions of fact constitute a ground for an exception to an examiner's decision; (iii) limiting appeals to questions raised in the exceptions; and (iv) requiring full findings with reasonings on each exception unless they are denied in toto, in which case no findings are necessary, thus making it much easier for the Commission to affirm rather than reverse an examiner's decision.

(i) *Deletion of right to omit examiner's decision.*—Under section 8(a) of S. 1336, once the Commission has assigned an adjudication matter to a hearing examiner for hearing, the present power of the Commission to omit an examiner's decision is deleted. There has been no abuse of the FPC's present right to omit an examiner's decision where required in the public interest. To require its deletion across the board, where the power has, as here, not been abused, reflects a rigidity of approach, fairly typical of the bill and seemingly irreconcilable with the long-recognized need for flexibility in the administrative process.

In *Colorado Interstate Gas Co. v. FPC*, 209 F. 2d 717, 722-723 (10 Cir. 1953), reversed on other grounds, 348 U.S. 492 (1955), for instance, in affirming the Commission's omission of the intermediate decision procedure, the court recognized that in a rate proceeding before the Federal Power Commission credibility is not an issue where conflict arises in specialized fields calling for the opinion of experts. On the other hand, it is conceivable that certain proceedings before the NLRB, the FTC, and the FCC, deal with matters wherein the demeanor of the witness is ordinarily more significant than it is before the Federal Power Commission, which deals with a much more statistical type of record. We fail to see any advantage from thus lumping all agencies together on this point, and can readily see unnecessary delay and inflexibility as likely adverse effects.

(ii) *Exceptions limited to "clearly" erroneous conclusions of fact.*—Section 8(c)(1) of the bill, in specifying five broad grounds of exceptions to an ex-

aminer's decision, permits exceptions on findings or conclusions of material fact only where such findings and conclusions are "clearly" erroneous. This makes examiners' findings almost conclusive.

While we support the concept of independent hearing examiners embodied in section 11 of the act, we do not believe factual findings of such examiners should be exalted to the point where it is onerous for agency members to inquire into, and where they believe it reasonably necessary, to reverse them. Justice Frankfurter's analysis in *Universal Camera v. N.L.R.B.*, 340 U.S. 474, puts the question in its proper perspective:

"We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree" (496).

"However halting its progress, the trend in litigation is toward a *rational inquiry into truth*, in which the tribunal considers everything logically probative of some matter requiring to be proved" (497). [Emphasis added.]

We also find it hard to reconcile this provision with section 19(b) of the Natural Gas Act, which provides in part that: "The finding of the *Commission* as to the facts, if supported by substantial evidence, shall be conclusive." [Emphasis added.] If the factual findings of the *Commission* are to be conclusive, is it not inconsistent to limit the Commission's freedom to inquire into those facts?

(iii) *Limitation of appeal to questions raised by exceptions.*—The provision that "The appeal shall be limited to the questions raised by the exceptions" (secs. 8(c)(1)), further restricts the Commission's power to inquire into the truth. It blunts the Commission's concern for the whole picture, and judicializes the administrative procedure to the point where the substantive public interest in complete agency determinations is subordinated to technical niceties. The present power of the Commission to look beyond both the examiner's decisions and the exceptions, to the whole record, is a sound safety valve. Both the natural gas and electric power industries are increasingly dynamic, and they require regulation which recognizes that fact. Artificial limitations on the Commission's power to look at the whole problem is untuned to this real need.

(iv) *Easier to affirm than revise an examiner's decision.*—Section 8(c)(3) of the bill provides that except in a case where the agency might deny an application to it to hear exceptions directly (in which case the exceptions "shall" be deemed summarily denied), the Commission "shall" give full rulings and reasons on each material exception. This obviously makes it easier for the Commission to deny the application forthwith than to open up an examiner's decision to change just one part thereof. It further increases the finality of an examiner's decision at the expense of flexible decisionmaking.

B. Appeal board procedure

1. *Additional loss of Commissioners' authority.*—In addition to the Commissioners' loss of authority to examiners, creation and use of appeal boards would further dilute the Commissioners' present authority. Section 8(c)(4) provides that review by the full agency of a decision by an appeal board on exceptions to an examiner's decision may be had only in the agency's discretion, and then only upon the grounds of law or policy. Notwithstanding such limited grounds for review (question of law or policy) the Commission, if it exercises such review, "shall have all the power it would have if it were initially deciding the proceeding," except that the agency must remand any issue of fact which it may raise to the presiding officer for further proceedings. Thus, on review, either the Commission's authority to inquire into the truth of a particular matter shall be narrowed, or the Commission would be inclined to stretch the terms "law" or "policy" to include other grounds. We doubt either alternative would make for fair or sound regulation. Moreover, the above requirement that the Commission remand newly raised questions of fact to the examiner further limits its present authority.

2. *Mandatory aspects of appeal boards.*—While creation of these appeal boards is, in theory, left somewhat in each agency's discretion, as a practical matter such discretion seems largely illusory. Under section 8(c)(2) each agency "shall" establish such appeal boards except to the extent that such establishment "is clearly unwarranted by the number of proceedings in which exceptions are filed." This seems to mean that such appeal boards "shall" be established unless an agency has so few exceptions pending that there is no press on the Commissioners. It follows that where an agency does have a significant num-

ber of exceptions pending, it would be under pressure to create these appeal boards.

Moreover, once appeal boards are created, their use would also tend to be mandatory. As indicated above, a person filing exceptions does have the option, theoretically, of applying to the full Commission to hear the exceptions directly. However, if the Commission denies such application, "it shall be deemed to have considered and denied each exception and affirmed the decision of the presiding officer" (sec. 8(c)(2)). Thus, the applicant who seeks to expedite a decision by avoiding an appeals board determination runs the severe risk of summary denial of his exceptions. This risk is bound to discourage parties from filing such applications, relegating them to the appeal board route.

Moreover, when an applicant thus falls back on the appeal board route, we doubt it will actually lighten the load of the Commission in return for the delay created as an added step in the chain of review. We think that in important cases the disappointed litigant will not be satisfied with the determination of a subordinate review body, but will prefer to carry the matter further to the full Commission. Additionally, although ostensibly the Commission need accept review only in its discretion, it is unlikely that the Commission would refuse to review an important appeal board order. Unlike a Supreme Court refusal to grant certiorari, a Commission refusal to grant review becomes Commission affirmance of the appeal board, which affirmance is then subject to review by the courts. The Commission as a creation of Congress bears direct responsibility to Congress for its actions, and we doubt the courts would accept a refusal to review an appeal board determination as a proper discharge of an affirmative statutory obligation imposed on the agency itself.

3. *Composition of appeal boards.*—The composition of the appeal boards also seems unsound. Section 8(c)(2) provides that the personnel on them "shall be agency members, hearing examiners, or both." The examiners' corps are often closely knit with common problems and interests; we question the feasibility of having them sit on these appeal boards in judgment of their peers. Similarly, we question the feasibility of having the Commissioners sit in judgment of each other, and of having appeal board determinations likely to vary according to which Commissioners happen to be assigned to a particular appeal board.

C. End result of section 8

Aside from the foregoing specific deficiencies of the means by which section 8 would, in effect, subdelegate much of an agency member's statutory responsibility, to examiners and appeal boards, their cumulative adverse effect is substantial:

1. *Policy in vacuo.*—The bill's objective of freeing agency members to devote more time to the larger questions of policy and law sounds better in theory than we believe it would be in practice. We doubt that the end result would be improved policy decisions. All policy, including that affecting major economic interests, should be subjected to a check of the practical end result. This is one of the basic advantages of a system wherein policy is hammered out in the context of a particular case. We consider such a system superior to deciding policy on an a priori basis, without an end result check on the concrete facts, an arrangement likely to emerge under this bill. Divorced from the facts, policy a priori can rapidly become policy in vacuo. We are most fearful the needed vitality of agency decisional process would be replaced by a "by the book" sterile process.

2. *Fragmented policy.*—S. 1336 also poses a real danger of fragmented policy decisions. In his testimony to this subcommittee on S. 1663, the predecessor of the instant S. 1336, Chairman Swidler of the Federal Power Commission realistically described the likely result of thus increasing the finality of examiners' decisions:

"Neither the regulatory process nor the industries subject to Commission regulation would be benefited by procedures calculated to exalt the separate determination of our 18 hearing examiners, and to restrict the Commission itself to a largely supervisory role." (P. 70, transcript, July 21-23, 1964, Senate Subcommittee on Administrative Practice and Procedure, S. 1663.)

The appeal boards would be an additional source of fragmented policy. The chance selection of certain Commissioners to serve on appeal boards could easily affect the outcome of the case. Federal Power Commissioners have historically been chosen with diverse backgrounds. It accordingly seems more logical to have them act collectively, where their individual predilections tend to balance out.

than to act individually on different appeal boards, where their individual predilections might be controlling.

3. *Delay*.—Delay is also likely to be increased under this bill by the inability to omit the examiner's decision, by the requirement that on review the Commission must remand issues of fact which it deems material to the presiding officer for further proceedings, and by the added step introduced into the agency appellate procedure by the appeal boards.

4. *Inflexibility*.—Section 8 would be particularly adverse in that it would result in inflexibility in the Commission's decisional process. Such inflexibility would flow from the proposed deletion of the present power to omit examiners' decisions, from the curtailed freedom of inquiry as to facts and as to any objection not specified in an exception, and from the virtually mandatory creation and use of the appeal boards.

II. SECTION 5 (A) (6)—SEPARATION OF FUNCTIONS

A. *Applicability to rate and certificate proceedings*

While we are generally opposed to S. 1336, we approve the proposed deletion of the APA's exemption of rate and certificate cases from the separation of functions limitations. The rate and certificate sections of the Natural Gas Act are without question the "heart of the Natural Gas Act"—*Atlantic Refining Company v. PSC*, 360 U.S. 378 (sec. II of Opinion), and the most controversial proceedings thereunder.

However, since only "adjudication" cases are subject to section 5 and thus to the separation of functions limitation therein, it is also essential, in order to make the separation of functions limitation applicable to rate and certificate cases, to change the definition of ratemaking from "rulemaking" to "adjudication." Section 2(d) of S. 1336 seems to do this, but not specifically, and not without some ambiguity. The bill does specifically define "adjudication" to include "licensing." We urge that "ratemaking" be added to the matters specifically included in adjudication, so there can be no question about the separation of functions limitation being applicable to rate and certificate proceedings.

B. *Applicability to agency members*

The actual effectiveness of a separation of functions provision depends upon the extent to which it is applicable to hearing examiners and to agency members. Under both the act and S. 1336, the separation of functions limitations are applicable to examiners, but not to agency members. Whether, and if so to what extent, they should be applicable to agency members is a highly controversial and yet fundamental question, going to the very essence of fair procedure. On the one hand, agencies need the informed expertise of their staff; on the other, it is unfair to private litigants to permit personally involved staff members to argue their side of the case *ex parte* to agency members.

We believe the problem should be faced. While offering no specific statutory language, we believe a sound rationale which the subcommittee could adopt is that it is appropriate for agency members to have access to objective staff expertise, but not advocacy by staff personnel who have participated in the preparation or trial of a controverted case.

III. POLICY FORMULATIONS ON MATTERS FOR WHICH HEARINGS ARE REQUIRED BY STATUTE

A party's entitlement to a section 7 hearing in a rulemaking policy formulation affecting substantive rights has been put in question by a recent case involving the FPC. The FPC—based on informal rulemaking proceedings under section 4 of the APA—issued a regulation proscribing certain types of rate escalation clauses in producers' contracts; later, without hearing, it rejected a producer's certificate application containing such a proscribed rate provision. The Supreme Court upheld this procedure—in *FPC v. Texaco, Inc., et al.*—377 U.S. 33 (1963), on the broad grounds that:

"The statutory requirement for a hearing under section 7¹ does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." (P. 39.)

¹The context indicates the reference is to sec. 7 of the Natural Gas Act.

The court seems to have been motivated by the desire not to require the FPC to regulate producers on a case-by-case basis, which it feared would "prolong and cripple" the processes of regulation (p. 44). We do not contend that the Commission should have been required to try each such producer case separately; we are concerned, however, that nowhere in the whole process was there an adjudicative hearing on the merits of the substantive proposal. Absent the instant regulation, Texaco would have been entitled to a section 7 hearing on the merits of its certificate application, and we think that right should not be lost simply because many parties have similar rate provisions. The prolonged case-by-case approach can be avoided, where appropriate, by holding a consolidated hearing, but it should be subject to the basic rights provided in section 7. If a Commission can easily avoid the requirements of adjudicated hearings by informal rulemaking, abuse of the informal rulemaking procedure is obviously a real threat to fair administrative procedure, as well as the organic regulatory statutes.

The court suggested Texaco could have, and impliedly should have, applied for a waiver from the regulation. But, even if a waiver application had been entertained, and there is no assurance it would have been, it does not follow that the hearing would have been a section 7 Administrative Procedure Act hearing. We, accordingly, believe the Administrative Procedure Act should be amended to require that a policy formulation on an issue for which an organic statute contemplates an adversary hearing shall be subject to section 7 hearings and attendant safeguards, except in the case of reviewable policy formulations which codify established Commission policy determined in adjudicated proceedings.

CONCLUSION

On balance, the proposed procedures of S. 1336 would so judicialize the hearing and decisional processes before the Federal Power Commission as to cause inordinate delay and inflexibility in the regulation of the important matters committed to the jurisdiction of that Commission. The proposed legislation with its emphasis on examiners and review boards adds new tiers of decisional responsibility and review in reaching a final agency decision. We respectfully submit that this contributes to delay, rather than the elimination of delay.

We recognize and applaud the sincere efforts of the subcommittee and its staff to improve the practice and procedure before the Administrative agencies. As representatives of active practitioners before the Federal Power Commission we would be remiss, however, if we failed to note our view that the across-the-board approach, whatever its merit for some agencies, would do immeasurably more harm than good in the case of the Federal Power Commission.

Respectfully submitted.

WILLIAM C. HART,

Chairman of Rules of Practice and Procedure Committee of Federal Power Bar Association.

Senator LONG. Mr. Charles A. Robinson, National Rural Electric Cooperative Association?

Mr. Robinson does not seem to be here.

Our next witness is Mr. Starr Thomas, general counsel of the Santa Fe Railroad. Mr. Thomas is representing the Association of American Railroads.

STATEMENT OF STARR THOMAS, GENERAL COUNSEL, SANTA FE RAILROAD, IN BEHALF OF ASSOCIATION OF AMERICAN RAILROADS

Senator LONG. Mr. Thomas, my friend, Bill Dalton, sent me a memorandum this morning that you were going to be here, and I am delighted to welcome you.

Mr. THOMAS. Thank you very much, Mr. Chairman.

Senator LONG. Mr. Thomas, you see the problem we are having on time. Will you be able to brief your statement?

Mr. THOMAS. I must apologize, Mr. Chairman, I do not have a written statement, but I have some things to say that have been said by others. I think I can save your time by simply referring to their comments on a couple of points. I have one point I want to make very specifically. I hope I can do it in 5 minutes.

Senator LONG. Then if you would like to file a written statement in the record at the close of your testimony or within the next few days, the committee will be happy to have it.

Off the record.

(Discussion off the record.)

Mr. THOMAS. I want to direct my remarks particularly to section 3(c) of S. 1336, the provision which requires the agency to make its records, all of its records, available to anyone of the public on request. We have a specific problem that affects the railroad industry in that context, and it is not apparently covered by any of the exemptions in section 3(e). The railroads are required to file reports of personal injuries to their employees with the Interstate Commerce Commission. They are called "T" reports. These reports cover almost all injuries of any consequence at all. Several years ago, we found that they were being used by runners, who obtained the information, distributed it throughout the country to lawyers who were soliciting personal injury cases, in direct violation of all codes of legal ethics and of many State laws.

The Commission realized that this was not a proper use of this information, which was intended to help the Commission in its duties with respect to safety of operations, and the Commission first tried to solve the problem by eliminating the name and address of the injured person from its required reports. There was still enough information on these reports to make them useful to runners, however, and they were used.

Finally, the Commission adopted a rule which made those reports available to the public only upon application, and the application had to show that they were to be used for the purpose of obtaining information to be presented before Federal or other governmental bodies, or that they would be used for a purpose which would contribute to the promotion of safety in railroad operations. Since that rule was adopted in 1957, we have had no more problems with the use of these reports in the solicitation of personal injury suits.

Now, I find, as I say, no language in the exemption provisions of 3(e) that seems to take care of this particular problem, which is one I respectfully urge should be taken care of. It is a definitely improper use of the required report.

I am not very happy with some language which I am going to suggest, but it at least will get the idea across, I hope. I would advocate an exemption which would read something like this: "Accident reports filed by regulated industries which contain information useful to those engaged in the solicitation of personal injury suits"—something along that line, it seems to me, ought to be adopted to prevent the misuse of those reports.

Aside from that specific comment, I shall just say generally that I want to endorse what Commissioner Walrath of the Interstate Commerce Commission said about the value of permitting the omission of the recommended report in these rate investigation cases, where the

rate is suspended for the 7-month period. That has worked well. I do not know that anyone in the bar has been critical of it. I have never heard any such criticism of it. I think the regulated industry and the people who oppose its efforts to reduce rates or publish new rates have all gone along with it and it has worked well.

I want to say the same thing about the modified procedure method, which is now used by the Commission, with or without the consent of the parties. That, too, has enabled them to handle these things with dispatch.

The railroad industry is a very strictly regulated industry, but it is not a protected monopoly. It is in a very competitive field, competing with other forms of transportation which are regulated less, or some not at all. It is terribly costly to have undue delay in any kind of regulatory proceeding where we cannot make an ordinary business decision, such as pricing or ratemaking, without first getting a decision from the regulatory agency. So we are anxious to avoid any kind of delay in these administrative proceedings.

We are afraid that some of the provisions in this bill will lead to that end. Basically, we would prefer to see something worked out through the administrative conference rather than this omnibus approach that is found in S. 1336. I shall not say more, because I know you have heard all the arguments on both sides of that issue. We really stand on the side of change only when it is necessary, because when the language of the statute is changed, when the provisions as here for judicial review are broadened, there is a real danger that we are going to be in the courts, and able and astute lawyers will find ways of finding error in the Commission's appellate review of the examiner's recommended decisions. In all sorts of ways, we feel we are going to be in the courts for a number of years, and it all means delay, and that hurts badly.

Thank you very much.

Senator LONG. Thank you, Mr. Thomas. We do appreciate your courtesy in being here, and we appreciate your promptness in your statement.

If the American Bar Association representatives have some other comments they want to make, please submit them at a later date, and they will be included in the record.

Mr. BENJAMIN. That is about what I was going to suggest, Mr. Chairman.

Senator LONG. If it is agreeable, we would appreciate it if you would put your statements in writing. The record will be open for some time. We appreciate your being here, you and Professor Davis and all of you. You have been very helpful to us. We are certainly grateful to you for your presence here.

We have had a very faithful and hard-working reporter this morning. She has worked for about 4 hours straight.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., June 4, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure of the
Committee on the Judiciary, Senate Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: At the end of the last of 3 days of hearings, on May 14, you were so kind as to authorize me to submit further comment in writing, which I am now glad to do.

Mr. Kenneth Culp Davis made on the afternoon of May 13 critical comment on several points in my prepared statement and my testimony for the American Bar Association that morning. I should like to answer these briefly, since I think it important that the association's position should not be misunderstood.

First, Mr. Davis, commenting on our suggestion to strike the words "or investigation" at the end of the second sentence of section 6(a) of S. 1336, said that to follow our suggestion "would mean that an administrative agency can interrogate an individual in an investigation and deny him the right to be accompanied by, represented, and advised by counsel."

This criticism is without foundation. The right of "any person appearing voluntarily or involuntarily before any agency or representative thereof in the course of an investigation * * * to be accompanied, represented, and advised by counsel * * *" is accorded by the first sentence of section 6(a), which the American Bar Association approves. Our suggestion relates to the second sentence, dealing as follows with the rights of "parties":

"Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding or investigation."

We suggest striking "or investigation" simply because, under the definitions in sections 2(b) and 2(g), there can be no "party" to an investigation. (The suggested change would (as my prepared statement, at page 16, made clear) deprive no person under investigation of any rights; it would merely correct a drafting error.

With respect to the American Bar Association's position that any proceeding for an exception from a rule should at least usually be by an adjudicatory procedure (my prepared statement, pp. 3-5), Mr. Davis seems to imply that the question on such an application would only rarely be a question of fact. This is, I think, clearly mistaken. How can anyone ask to be excepted from the operation of a rule without a factual showing that differences in his position from that of others subject to the rule call for different treatment?

In commenting on our position that the definition in section 2(d) of an adjudicatory proceeding as one "to determine the rights, obligations, and privileges" of named parties is not sufficiently inclusive (my prepared statement, p. 5), Mr. Davis said that I gave "no illustration of something that is excluded." In fact my prepared statement proceeded: "Reference to section 2(f) (which defines 'sanction and relief') will suggest many other words that should be included" (and added that "we think that any attempt at an inclusive definition * * * is too risky").

Mr. Davis criticizes me for giving no reason for the American Bar Association's suggestion that the first sentence of section 6(e), providing for the automatic issuance of subpoenas upon request of any party to an adjudication, should be limited to formal adjudication under section 5(a). I am glad to repair that omission. I note first that this is a change from section 6(c) of the 1946 act, which authorizes the agency to require from the applicant for a subpoena "a statement or showing of general relevance and reasonable scope of the evidence sought." The change effected by S. 1336 is, we think, valuable (and was in fact suggested by the recent Administrative Conference of the United States); but to apply the new provision to informal adjudication might well swamp the agencies. It would, for example, require that an officer charged with issuance of permits to build a fire in a national park be prepared to issue subpoenas on request to an applicant for such a permit.

With regard to section 10(a), dealing with "standing," Mr. Davis refers to what he calls my "egregious statement that the courts do not use the language 'in fact' at least * * * so far as the American Bar Association knows." What I had said in my prepared statement was that we had "concluded that the addition of the words 'in fact' may do more harm than good, never having been used (so far as we know) by the courts, and being in our view imprecise in meaning." I have, since the hearing, reviewed the cases Mr. Davis cited in his testimony and reviewed also what he has written on this subject in his administrative law treatise, and it is clear to me that the position taken in my prepared statement is correct; that the words "in fact" have not been used by the courts as words of art; and that to retain them in section 10(a) of S. 1336 might do more harm than good.

This is not the place for extended discussion, but I think that brief comment on the case on which Mr. Davis principally relied in his testimony, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), is appropriate. The entire discus-

sion of "standing" in *Bantam Books* is in a footnote on pages 64-65. The only sentence in which the words "in fact" appear is the second of the following introductory sentences:

"Appellants' standing has not been, nor could it be, successfully questioned. The appellants have in fact suffered a palpable injury as a result of the acts alleged to violate Federal law, and at the same time their injury has been a legal injury."

The words "in fact" are used as a passing adverbial phrase, the equivalent of "indeed" and probably, in Webster's first sense, as denoting emphasis. Certainly they are not used here as words of art. This is emphasized by the immediate reference to Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 151-152, and further by a later sentence in the footnote: "* * * if this were a private action, it would present a claim, plainly justiciable, of unlawful interference in advantageous business relations."

In my prepared statement and my testimony on May 13, I did not deal with the provision of section 7(c) of S. 1336 regarding evidence (which in general follows the like provision of S. 1663, 88th Congress), this being one of the subjects that I thought could for brevity be left (without specific reference) to what I had written and testified last year. Since, however, Mr. Davis in his present testimony refers to the American Bar Association position on this subject, I think I should refer the subcommittee explicitly to my testimony at the July 1964 hearings (pp. 62, 286).

I might add with respect to the argument advanced elsewhere by Mr. Davis and others that there are no ascertainable rules of evidence in civil cases in the Federal courts, that the Chief Justice of the United States, following action by the Judicial Conference of the United States, in March of this year appointed an advisory committee under the chairmanship of Albert E. Jenner, Jr., Esq., of Chicago, to prepare rules of evidence to govern civil actions (and others) in the Federal courts. This followed study for several years by a committee of the Judicial Conference of the question whether such action was desirable. It is, therefore, to be anticipated that before too long rules of evidence for the Federal courts will have been formulated and officially adopted.

In his final reference to the American Bar Association, Mr. Davis discusses our position with regard to the introductory language of section 10. In my prepared statement of May 13 I wrote (p. 22):

"The change effected by S. 1336 in the introductory clause of section 10 with respect to unreviewable agency discretion we find entirely satisfactory."

It is enough to refer in addition to the record of the July 1964 hearings at pages 62 and 283.

Mr. Davis' testimony concluded with a long list of items that "a good bill" would deal with, thus in my view unfortunately disparaging S. 1336 and depreciating what it would in fact accomplish. Of Mr. Davis' many suggestions, I mention only two by way of example. The suggestion that "a good bill would deal with the question of when a hearing ought to be required" seems to me to ignore the basic limitation on what general procedural legislation can deal with; there is no possible way of solving this question by a statutory provision applicable across the board to all agencies. With regard to the suggestion that a good bill would deal in some way with the doctrine of "ripeness for review," I refer to my article in 26 *Law and Contemporary Problems* 203 at page 232, where I concluded that that doctrine was not "capable of statutory formulation even in suggestive form," but concluded also that a proper statutory treatment of "standing" might suggest to the courts greater liberality also in finding "ripeness" than they have always shown.

Respectfully,

ROBERT M. BENJAMIN,

Chairman, American Bar Association Special Committee on Code of Federal Administrative Procedure.

Senator LONG. The Committee will now adjourn subject to the call of the Chair.

ADMINISTRATIVE PROCEDURE ACT

FRIDAY, MAY 21, 1965

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE, COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 3216, New Senate Office Building, Senator Quentin N. Burdick presiding.

Present: Senator Burdick.

Also present: Bernard Fensterwald, Jr., chief counsel; G. H. Homme, assistant counsel; and Cornelius B. Kennedy, minority counsel.

Senator BURDICK. We will call Mr. Robinson first.

STATEMENT OF CHARLES A. ROBINSON, JR., STAFF ENGINEER AND STAFF COUNSEL, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; ACCOMPANIED BY ROBERT D. PARTRIDGE, LEGISLATIVE REPRESENTATIVE; AND ROBERT O. MARRITZ, STAFF ENGINEER

Mr. ROBINSON. Mr. Chairman, my name is Charles Robinson. I am the staff engineer and staff counsel of the National Rural Electric Cooperative Association. First we wish to express our appreciation to the acting chairman this morning for affording us an opportunity to appear on S. 1336, which we deem to be of very high importance to our membership. The membership of our association is some 973 REA-financed rural electric systems which operate in 46 States. These systems depend completely on the Rural Electrification Administration for the funds with which they construct their systems.

The rural electrification loan program has been over the years a controversial program. It has furnished an element of competition in the electric utility business, and for that reason the electric utility companies which are privately owned have used every available resource, every available forum, and every available proceeding in which to attempt to destroy the rural electrification program. And to the extent that the legislation S. 1336 would modify the rules of law under which the REA Administrator conducts his program, we are vitally concerned with the legislation.

There are three particular aspects of S. 1336 upon which we would like to comment this morning. The first of these is that of judicial review of agency action which is embodied in section 10 of S. 1336.

The law as it now stands provides that—

except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The proposed change as embodied in S. 1336 reads:

Except so far as statutes preclude judicial review or judicial review of agency discretion is precluded by law—

Any person adversely affected in fact by any reviewable agency action shall have standing and be entitled to judicial review thereof.

In our opinion the two words "in fact" are the key language in the new section. The deletion of "adversely affected or aggrieved by such action" and the substitution therefor of the language "adversely affected in fact"—this we believe is a very substantial change, and is a change which broadens the scope of judicial review and will broaden the type of corporation of person that will be entitled to achieve judicial review of agency action.

I do not want to go into a long history of constitutional law this morning, but to understand the position of the REA Administrator it is necessary to go back at least to the *Tennessee Electric Power* case which was decided in 1939 before the present act was passed.

That was the attempt by the power companies in the TVA area to have declared unconstitutional the power operations of the TVA and the program by which the Public Works Administration was loaning funds to municipalities in the Tennessee Valley for the purpose of constructing municipal electric systems.

The case was heard in the trial court on the merits. There was no dismissal in the trial court based on the standing or nonstanding of the plaintiffs, but the trial lasted for some 2 months. After a thorough trial and after complete hearings on all of the issues, the trial court dismissed the case on the merits, holding that the activities of TVA, as they related to the building of transmission lines and marketing electric power, were constitutional.

The case was, of course, appealed to the Supreme Court of the United States and the Supreme Court took 29 pages to decide the case in the records. It is at 306 U.S. 118, and it runs to 147. Ultimately, the Supreme Court dismissed the case, affirmed the dismissal on the grounds that the companies had no standing because no legally protected right had been invaded. The companies challenged the constitutionality of the statute. The Court examined carefully in this 29 pages all of the allegations of the company and then dismissed the case because of the lack of the standing on the part of the companies to maintain the action. The Supreme Court held as follows:

Cooperation by two Federal officials, one acting under a statute whereby funds provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. As the courts below held, such cooperation does not involve unlawful concert, plan, or design, or cooperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute.

Ultimately, the Court decided the case on the ground of standing. That perhaps may be dicta in this case because the final decision was

no standing. Nonetheless, nobody since that case has attempted to challenge basically the constitutionality of TVA.

Professor Davis has commented and criticized the case very heavily. He says—

the worst trouble spot in the law of standing is the confusion about the question whether an adverse effect in fact is enough to confer standing, or whether a deprivation of a legal right is required.

And I respectfully call your attention to the words “adverse effect,” which is the language included in S. 1336 in substance.

He criticizes the *Tennessee Electric Power* case in the words—

the Court laid down the palpably false proposition that one threatened with direct injury by governmental action may not challenge that action “unless the right invaded is a legal right.”

And he claims that perhaps the *Tennessee Electric* case is not law at the time of his treatise, which was, as I recall, in 1958.

Professor Davis, I call to your attention, did not take into account that there was a trial on that case at the trial court level and that the Supreme Court took 29 pages to decide it. There was a complete hearing on the minutes at the trial court level and the Supreme Court devoted a very considerable portion of its opinion to the minutes.

Now, the Administrative Procedure Act as it now stands was passed in 1946. And the language of section 10 is, “any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

Now, what did Congress mean by this in the light of the *Tennessee* case?

The Senate committee report seemed to follow the *Tennessee* case and to equate the language of the Administrative Procedure Act, section 10(a) with the finding with the court in this case. And the Senate committee report reads at page 26, “this subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute. The phrase ‘legal wrong’ means such a wrong as is specified in subsection (e) of this section. It means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect.”

And the House committee language was as follows: “this section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute. The phrase ‘legal wrong’ means such wrong as is specified in section 10(e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect. Almost any governmental action may adversely affect somebody”——

Mr. FENSTERWALD. Mr. Robinson, could I interrupt you at that point to see if I understand you.

Would it obviate your difficulty if the report on S. 1336, if it is reported out in this form, contained language somewhat similar to that contained in the 1946 reports?

Mr. ROBINSON. I think it would help, Mr. Fensterwald, but frankly, and I think you will see when I get a little further along, to the extent

you take out this language, "suffering legal wrong because of any action, or adversely affected or aggrieved," you are taking out language that, as stated by the Attorney General, are "terms of art." It is language which has been repeatedly adjudicated and it is language which the REA Administrator is almost critically relying on. And I will get to that in the next case, which is the *Kansas City* case. And that is the landmark case in the field of REA constitutional law, if I may use that phraseology.

Mr. FENSTERWALD. Do you know if the REA Administrator has officially commented on this bill?

Mr. ROBINSON. The Department of Agriculture has commented on it. They have commented adversely. The Department, I am advised, unofficially is in the process of formulating a further submission. Now, whether or not the views of REA will be represented in the submission, I do not know.

Mr. FENSTERWALD. The reason I ask is, if we do not get any submission directly from REA, can we assume for now to a certain extent that you are speaking on behalf of the Administrator?

Mr. ROBINSON. Let me say this, that we have prepared our testimony after some informal conferences with the lawyers that have represented REA in the cases.

Mr. FENSTERWALD. Thank you.

Mr. ROBINSON. Now, after this Administrative Procedure Act was passed in 1946, after the committee report language was included, 10 power companies located in Missouri brought suit in 1950 against the REA Administrator, the Secretary of Agriculture, the Secretary of the Treasury, Secretary of the Interior, and the Administrator of the Southwestern Power Administration. It brought the suit in the U.S. District Court for the District of Columbia. Plaintiff companies sought to enjoin the generation and transmission facilities or REA borrowers in Missouri and to enjoin the interconnection of such facilities with the hydroelectric system of the Southwestern Power Administration, a Federal power marketing agency, pursuant to contracts between the borrowers of the REA and the Southwestern Power Administration.

Plaintiffs alleged that defendants conspired to establish an unlawful Federal power system and to thereby deprive plaintiffs of existing and potential customers and to cause to plaintiffs irreparable damage.

Now, in this case, which was brought in 1950, after the Administrative Procedure Act was passed, the plaintiffs relied in part upon section 10(a) of the Administrative Procedure Act, in addition to the general equity powers of the court, the U.S. Constitution and the REA Act, and some other statutes. But section 10(a) was at issue in this case. The Government's motion to dismiss was denied and again, as with the *Tennessee* case, the trial court heard the entire case on its merits. I attended the trial. It was lengthy. It was complete. All of the issues were thoroughly heard. The trial court of June 7, 1953, decided for the Government and found that, without exception, all of the Government activities complained of were wholly lawful.

The companies appealed to the circuit court of appeals. And in 1955 the circuit court ordered the trial court decision vacated and remanded the case with an order to dismiss. And the court of appeals, with one judge dissenting, said:

The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants. It is not—under the controlling precedents—subject to review by this court.

Another quote from the court of appeals:

Appellants seek, finally, to base their right to bring this action on their alleged status as persons "suffering legal wrong" or "adversely affected or aggrieved" within the meaning of section 10(a) of the Administrative Procedure Act.

This is the court of appeals speaking:

But the act does not help appellants.

The court then quotes from the Administrative Procedure Act and has this to say about section 10(a):

The terms used in this section are terms of art. As the Attorney General's manual on the Administrative Procedure Act points: "The delicate problem of the draftsman was to identify in general terms the persons who are entitled to judicial review." As so used, "legal wrong" means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review. "Adversely affected or aggrieved" has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.

Continuing the quote:

The determination of who is "adversely affected or aggrieved within the meaning of any relevant statute" has "been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the court's judgment as to the probable legislative intent derived from the spirit of the statutory scheme."

And a new quote:

Section 10(a) was restatement of existing law.

The case was dismissed by the court of appeals on the ground that the companies had no standing under the Administrative Procedure Act, which the court specifically held was drafted in compliance with existing law at the time of its passage.

Now, this meant that the companies had been held by courts of last resort to not have standing to challenge the final decision of the REA Administrator.

A case came up in 1957, the *Iowa-Illinois Gas and Electric Company v. Benson* case. And again the Court of Appeals for the District of Columbia affirmed a dismissal by the lower court holding that the companies had no standing. There was no trial this time. I assume that the court concluded that two prior precedents had established the lawful operation of the Rural Electrification Administration, and that the standing would be all that was necessary to decide in this case. It was a very short decision.

Now, the language that is proposed in section 10(a) appears to be that suggested by Professor Davis at section 22.18 of his treatise, and he writes—

a careful examination of the Federal and State law of standing leads to the conclusion that the very simple and natural proposition is entirely sound: one who is in fact adversely affected by Government action should have standing to challenge that action if it is judicially reviewable.

That is what Professor Davis states.

He further states:

This simple and natural proposition has full support in the Administrative Procedure Act, which in section 10(a) provides for review upon petition of "any person adversely affected." Committee reports of both House and Senate ex-

plained: "this subsection confers a right of review upon any person adversely affected in fact."

Professor Davis' interpretation of the act, as it exists, appears to be at variance with that of the Attorney General and with that of the committee reports on the bill when it was passed.

Now, the situation you place the REA Administrator in if you change this language is that you take out the very words which the courts have held on at least two occasions protect him against attack by the power companies in these cases involving controversial loans which the companies attempt to stop by court action.

There are two cases pending at the moment; one case in Louisiana involving about \$60 million for the construction of a generating plant; one case in Alabama involving another loan of about \$30 million. There are about \$110 million of Government loans involved in these two cases.

In the Louisiana case, so desperate are the companies to obtain a peg on which to hang their standing that they have invoked the fact that the Administrator published in the Federal Register, pursuant to an order from the Senate Appropriations Committee, the procedure by which he grants GT loans. This, the company says, would therefore benefit and confer standing on them. They are also using again section 10(a) of the Administrative Procedure Act. That is in Louisiana.

In the Alabama case the companies are using the Administrative Procedure Act as a base for their standing and are, in addition, alleging a conspiracy to violate the antitrust laws between the REA Administrator and the co-ops in Alabama. This, they claim, constitutes an illegal conspiracy.

You may recall that the earlier Tennessee case also involved a charge of a conspiracy, which was found by the trial court, and by way of dicta in the Supreme Court, to be without foundation.

But to the extent you change this, "adversely affected" or aggrieved by such action within the meaning of any relevant statute, you will destroy the protection that the REA Administrator has. And you will at least subject to readjudication the standing of the companies, and ultimately perhaps the merits of each GT loan.

Now, Mr. Chairman, we want to talk a little bit about the changes in the act with respect to the availability of agency records.

The present Administrative Procedure Act—this language appears at page 10 of the committee print on the left hand column—provides—save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Now, we recognize that there have probably been some cases in which Government agencies have abused this right they have to maintain confidential certain records. But on the other hand in the case of an agency which is receiving from its borrowers detailed information on the financial, economic, and technical operational details of every facet of its operation, the co-op must submit to REA to get this loan intimate details of every facet of its operation as of the present and as to the future. If you enact a change in the statute which will require this information to be made public, you will place the rural electric systems in a position whereby the most intimate details of their operation will

be really available to the power companies, which have been attempting to destroy them since the initiation of the program.

Mr. KENNEDY. Mr. Robinson, if that is correct, would it not be true that the REA Co-ops would have the same right to get all of the records of the private power companies from the Federal Power Commission?

Mr. ROBINSON. It might be.

Mr. KENNEDY. Well, there is a specific exemption in here to cover that point, and I do not think anybody has any intention that this material be made public. But I think that the thing, if what you say is correct, it would cut both ways.

Mr. ROBINSON. Well, maybe it would cut both ways, except you run into the problem that the private power companies are not banking with the Government. FPC has no reason to extract from the companies the details of their banking operations, what their future plans may be, how these plans relate to their service territories, how much money they are going to need in the future. The only thing that FPC asks of them is operational records and general financial information as to their vast operation.

The problem you get into is this problem of future operation. And to the extent you extract that from the REA borrower and make it available to the public, you will give the companies, it seems to us, a very unfair advantage. The companies are not banking with the Government. And this, I think, is a basic consideration to this entire act, that there are certain proprietary functions of the Government which do not regulate the course of conduct among the people of the country, but in fact provide proprietary services.

Mr. KENNEDY. Before you get too far into that, let me see if I understand what you are saying. It is that the REA co-ops ought to be treated with respect to their borrowing activity from the REA the same as private companies confidential relationships are with its banker.

Mr. ROBINSON. That is right.

Mr. KENNEDY. Is that the idea? And so far as that is a banking relationship, you think the REA should be in the same position, I mean the REA co-ops with respect to their dealings with the REA.

Mr. ROBINSON. I think that is right.

Mr. KENNEDY. Now, let me ask this, though, as a corollary. To the extent that the private companies, whether they be power companies or any other private companies, are required to furnish information for the purpose of a regulatory agency, do you then carry out the same parallel that the REA co-ops would be required to furnish the same type of information if they were being regulated?

Mr. ROBINSON. Yes, but the information is of a much, much more restricted nature.

Mr. KENNEDY. I am only talking now about the same class of information that the private companies have to furnish to the Federal Power Commission.

Now, you would not then have any objection to that same class of information being furnished by the co-ops—

Mr. ROBINSON. Some do.

Mr. KENNEDY (continuing). To the Power Commission or any other regulatory commission.

Mr. ROBINSON. State commissions. It is their banking relationship and the information as to future operations that would really kill them.

Mr. KENNEDY. As I understand it, for example, the regulated companies, whether they are called companies or radio stations, furnish certain information as to their future activities to the regulatory agencies.

Now, to that extent, I suppose all companies in the same general field should be required to furnish the same kind of information and no further. I assume that is your point. As I understand it, you want these co-ops treated just the same as any other type of business with respect to their banking relationships and all other relationships.

Mr. ROBINSON. We are not asking for preferential treatment, Mr. Kennedy.

Let me give you an example. Let's say you have a group of co-ops in a particular State that are paying a higher than normal cost for wholesale energy to a power company, higher than they should in equity pay. These co-ops come to the REA Administrator for a loan to build a generating plant. Now, the REA Administrator is not allowed to make that loan unless one of three situations prevail. Either the cost of power to be produced in the plant must be lower than that which is available from any other source. Or there must be no other source; that is the second criterion. And the third criterion is that the security of the borrower's future must be threatened by his existing source of power supply.

As soon as the loan application for the generating plant and transmission facility is filed, the companies immediately want to know at what rate can the co-ops produce power themselves, because once they are in possession of that information in detail they can then tailor their right to kill the GT plant in effect. This is not an infrequent occurrence. Once you get into a situation where the loan application is filed, the power company reduces its rate a little bit, the REA Administrator continues consideration of the loan. The rate comes down a little more, and you get into a situation where the company if the accurate figures were entirely available to it could reduce its rate to a point where the GT plant would be infeasible because it would be producing power higher in cost than the company which would be willing to sell to kill that plant. Once the plant were killed the rate could then be increased.

Mr. KENNEDY. Is this not the same kind of a problem though that the Interstate Commerce Commission, CAB, and other agencies have with respect to competitors intervening on rate filings?

Mr. ROBINSON. These are regulatory agencies. REA in addition to its regulatory activity is a banker. Now, the Attorney General's manual—

Mr. KENNEDY. What I want you to do is to distinguish then between this banking function, which I think is one separate line, and the general problem of competitors being able to intervene or to participate in actions with respect to REA, the same way that the trucks and the railroads and the bargelines fight out a rate proceeding, or that competing airlines might fight out a rate filing by one airline.

Mr. ROBINSON. Mr. Partridge, Mr. Robert Partridge, our legislature representative here might be able to answer that for you. He has

about 20 years with REA as a program analyst, and in other positions. He came to us directly from REA and is an expert in all phases of the program. I wonder if I may call upon him to try and clarify the answer to your question.

Mr. PARTRIDGE. I think our principal problem in this area is that—well, we on the one hand have no objection whatever to the release of our information exposed. We do think that it creates, just as Mr. Robinson has pointed out, a very unequal kind of situation where you have revealed your plans. This would be true of any kind of lending operation.

Mr. KENNEDY. You are speaking of the lending aspect now.

Mr. PARTRIDGE. Yes.

Mr. KENNEDY. I think you make a very good case on the lending operation. But I hope as you describe your viewpoints you differentiate between a borrower-customer relationship and the effect of the bill on that relationship, and then the effect of the bill on just what would be the competitor's situation. There can be two quite separate problems.

Mr. PARTRIDGE. Well, I am not quite sure I grasp your question. As to the release of information by REA, I have here a copy of the Annual Statistical Report published by REA, and I believe that almost every facet of its borrowers' operations are contained in great detail in here.

Mr. Fensterwald inquired earlier about the comparability of the information released on REA borrowers with that of FPC. I think that except for differences in operational characteristics, which would mean somewhat the release of information, you would find that that is at least as comprehensive as the information released by the Federal Power Commission on the investor-owned utilities.

Mr. FENSTERWALD. I believe you will find it more comprehensive.

Mr. PARTRIDGE. It may very well be. It is in great detail, and we certainly have no objection to this. I have almost a briefcase full of data and information released by REA on its borrowers and their operations. But all of these data and all of these facts are after the decision point, not prior to the decision point, so to speak. In other words, nothing is released currently by REA that relates to the future plans, as Mr. Robinson pointed out, of the REA borrower.

Mr. KENNEDY. Is that true now with respect to the Federal Power Commission and the companies that are regulated by it?

Mr. PARTRIDGE. As a matter of fact, Mr. Kennedy, I do not think the Federal Power Commission gets from the investor-owned utility that kind of information. REA does and should because it is the banker and must make decisions as to the feasibility and the security the Government has in its loans. But we think while on the one hand REA certainly is entitled to this information, that it is quite a different thing to say that the general public is entitled to that information. And we feel that in a general sense that just as a bank does not reveal its clients' plans and the details of financing operations that have not yet been consummated, then neither should REA release that kind of information.

Mr. FENSTERWALD. May I ask why that does not protect this kind of information which is privileged or confidential, which was put in for the purpose of protecting this kind of information?

Senator BURDICK. Could you go on to his point about whether or not the exception or exemption here is broad enough?

Mr. ROBINSON. First of all let me say, Mr. Chairman, we are happy indeed to know this is the area at which exemption No. 4 was aimed. The problem with it is whether trade secrets and commercial or financial information obtained from the public are privileged or confidential. Obviously, it must be obtained from the public. It must be "privileged" or "confidential." But we cannot find any good description of what "privileged" or "confidential" means. We have done what little research we could on this in the area of the legal definitions of these two words. There is, of course, mention in the cases of the lawyer-client, patient-doctor, husband-wife relationship. Professor Davis, in his book, and I refer you to the second supplement of our prepared statement, states at one place, "The scattered case law is conflicting."

And another case, in another place he says, "Judicial attitudes are far from uniform."

Now, what do you do, especially in the light of that section of 1336 which confers on any member of the public apparently a standing to go into Federal court to compel production of whatever documents he wants and to place the burden of proving the confidential and privileged relationship of the material in question on the agency. In other words, let us assume that a case occurs in which a company wants to extract from the REA Administrator certain information which the Administrator refuses to divulge.

As I read the statute, the company would be given immediate preferential access to the district court where he can maintain an action under the protested statute to require production by the Administrator of this information to enjoin the Administrator from withholding it and to climax this, the burden of proof in the case will fall on the Administrator. He is the one who must prove the material comes within the exception No. 4. So you are immediately going to open at least a broad field of litigation as to what privileged and confidential means.

Now, each of these cases are obviously going to go to the Supreme Court sooner or later, or you are going to require a battery of lawyers, a battery of information experts and a battery of technicians at REA in addition to what is already there for the purpose of defending these cases.

Now, even if you get ultimately a favorable result and the REA Administrator is upheld in his refusal to disclose this one piece of information, the next day somebody is going to file a suit asking for another piece of information. This process is going to go on and on and on until a body of case laws are established which more or less outlines the area of confidentiality and privilege. We do not know what it is now according to Professor Davis. This particular language will open up the area to continuous litigation until the outlines are established. And meanwhile the program will suffer. It will be, I suppose you could call it, judicial harrassment. But with that provision in there allowing access on a preferential time basis to the Federal courts for getting this information, it seems to me that it is a rather extreme provision as it relates to suits against the Government.

Mr. KENNEDY. I think we need to narrow this down because I think this is what we want to do. What you want to make sure of is that the confidentiality of the borrower-lender relationship is preserved.

Mr. ROBINSON. Right.

Mr. KENNEDY. With respect to the REA co-ops and the REA, to preserve it and to the same extent of the borrower-lender relationship of any private company and any bank is preserved.

Mr. ROBINSON. Right.

Mr. KENNEDY. And I think we can achieve that result, since that is what your point boils down to—certainly setting aside, I would think, the overall problem of the use of public funds, which is a completely separate problem—your point is that relationship between the borrower and the lender here.

Mr. ROBINSON. Let me answer that two ways, Mr. Chairman and Mr. Kennedy. We have suggested in our prepared statement revised language with respect to exemptions four and five which would allow the REA Administrator and its borrowers to make the decision on what is confidential and what is privileged as we understand it. The trouble with the language in exemption No. 4 as it now stands is that it must be privileged and confidential, but nobody knows what that means. So let the REA Administrator and the borrowers decide what is privileged and confidential, as we have set out in our suggested amendment to exemption No. 4. Then if there is still court action at least the Administrator is going to be in the position of having made a finding in accordance with the act and have that leg in the law suit.

Mr. KENNEDY. This is not going to prevent him from doing that anyway whether we change the language or we do not.

Mr. ROBINSON. Except that it has no effect if you do not change the language.

Mr. KENNEDY. I am not so sure it is going to have any effect either way.

Mr. ROBINSON. If he has the option of declaring a matter confidential under the act and so declares it, the court is going to look on that action a little more favorably without any statutory authority.

Senator BURDICK. Would you contest this proposed language with the present law? Where is the burden of proof presently?

Mr. ROBINSON. The burden of proof under the present language, if the case gets into court, it is on the Administrator to defend his action that the material is confidential.

Senator BURDICK. The present act?

Mr. KENNEDY. The chairman was asking about present law.

Senator BURDICK. Present law, excuse me.

Mr. ROBINSON. In the present law there is no court action. I beg your pardon.

Senator BURDICK. There is no court action, but there is a definition, there is a standard of some kind.

Mr. ROBINSON. Yes, sir.

Mr. KENNEDY. I think your statement is probably right with respect to the present law because information is made available except information held confidential for good cause shown, so the Administrator would have to show good cause to withhold the informa-

tion. The burden then is the same insofar as the ultimate burden goes.

Mr. ROBINSON. Yes, sir; except there is no provision in the present Act which confers on every citizen a preferential opportunity to go into Federal court.

Mr. KENNEDY. So it is the procedure that is different, but the burden is still on the Administrator to sustain his decision to withhold.

Mr. ROBINSON. That is right, but there is nowhere near the effective remedy available at the moment that there would be under this act. This is a devastating remedy and I am sure the authors of the act recognize this.

Mr. FENSTERWALD. Would you point out any remedy under the present act?

Mr. ROBINSON. Yes, sir, certainly. What do you do when you want a piece of information from REA that will not be divulged? The same remedy which is available to every citizen of the United States that happens to be dissatisfied with a policy decision of the Government. He goes to his Congressman, he goes to a Senator, he goes to committee chairmen, and he brings to bear what influence is available under our system of government.

Now, if he cannot secure release of the information in this manner, he has no judicial remedy.

Mr. KENNEDY. Would it not be better to leave this matter directly between the parties instead of dragging others into it—instead of dragging the Members of Congress into it every time you want to find out something?

Mr. ROBINSON. Well, I think that would be fine, except the attempt here is to transform from what is now a policy decision, to transform a policy decision into a judicial decision and to place the burden of proof on the defendant.

Now, this whole area was probably recognized by the Attorney General when he talked about the blanket exemptions for loan agencies from the adjudication and rulemaking provision of the present act. And the Attorney General said this—

The exemptions for matters relating to "agency manning or personnel" is self-explanatory and has been considered in the discussion of "internal management" under section 3. The exemption of "any matter relating to public property, loans, grants, benefits, or contracts" is intended generally to cover the "proprietary" function of the Federal Government.

Now, what you are trying to do in this act is lump together the regulatory, the judicial, the quasi-judicial and the proprietary functions of the Government all in one slug.

Mr. KENNEDY. Is that exemption that you just referred to a part of section 3, though?

Mr. ROBINSON. No, no; that is a separate matter.

Mr. KENNEDY. So that does not relate to the public information section.

Mr. ROBINSON. No; but the principle is the same. The principle is the same. I am talking about a proprietary activity of the Federal Government, a loan problem. The FHA program, TVA loans, small business loans, all of this area is not really a governmental function in the traditional sense of the word. It is a proprietary function.

And, therefore, to the extent that you try to cover all of this with the governmental quasi-judicial procedure, you are attempting to impose on these activities procedures which are just not fitted to their operation.

Senator BURDICK. So you have any objection to these procedures that apply to regulatory agencies or the regulatory portion of the REA?

Mr. ROBINSON. Mr. Chairman, I have not studied the effect except as to REA.

Senator BURDICK. I do not know whether we have any or not, but I was just wondering.

Mr. ROBINSON. We would have no objection to it. I just have not studied it. With respect to REA, our principal concern is the loan program.

Senator BURDICK. From your testimony I gather you are of the opinion that the information given to the regulatory agency should be made more available than those which the agencies that have, as you say, a proprietary interest, is that correct?

Mr. ROBINSON. Yes, sir. I am not well acquainted with the Federal Housing statute, but would any citizens be able to compel production of the confidential information submitted to the FHA Administrator in reliance on obtaining a loan? I do not know whether he would or not. But this is the type of situation you get into.

Mr. KENNEDY. If we can make the language clearer that with respect to the lender-borrower relationship, that will meet the problem which you are talking about.

Mr. ROBINSON. Yes, sir.

Mr. FENSTERWALD. That can easily be taken care of in the reports.

Senator BURDICK. Not only with respect to REA, but any other place under the lender-borrower relationship.

Mr. ROBINSON. Mr. Chairman, we are speaking specifically of the REA. We just have not studied the other agencies.

Senator BURDICK. But we have to write the bill for everybody.

Mr. FENSTERWALD. One of our difficulties, Mr. Chairman.

Mr. ROBINSON. We have suggested certain language in view of the opportunity afforded by the proposed act to give everybody a right in a Federal court to, and a preferential right to obtain information. It seems to us that this banker-borrower relationship ought to be thoroughly protected in these exemptions.

Mr. Chairman, the final portion of the act which we wish to discuss is that which goes to rulemaking and adjudication. Under the law as it is now written—

Senator BURDICK. What section are you referring to?

Mr. KENNEDY. Sections 4 and 5.

Mr. ROBINSON. Page 13 of the committee print. Section 4 of the present act provides, with respect to rulemaking, "except to the extent that there is involved any military, naval, or foreign affairs functions of the United States or any matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts * * *." Now, this is a section of the requirements for agency rulemaking which exists in the law as it now stands. This exemption would be completely absent from the law if S. 1336 was passed. And

REA would thereby be subject to the applicable rulemaking procedures.

The Administrator publishes perhaps 60 rulemakings per year in the area of both electric and telephone operations.

Now, by rulemakings I am referring to policy bulletins of general applicability to the borrower. If he were subject to the rulemaking provisions of the Administrative Procedure Act, as provided for in S. 1336, there would be placed upon him the additional burden of formalizing procedure every time he decided to revise the policy under which the borrowers operate. This would apply to both telephone and electric borrowers.

Mr. KENNEDY. Why is it bad to do that if it is good for him to publish them in the first place?

Mr. ROBINSON. Mr. Chairman, Mr. Kennedy, I would not categorize it as bad, necessarily. I would categorize it as the placement on the Administrator of a completely unnecessary procedural burden.

Now, let me read you the title of a few of these bulletins.

Mr. FENSTERWALD. Mr. Robinson, before you do that, I want to be sure I understand what you are saying.

If you will go over to page 15, subsection (c) (1), which has to do with participation of interested persons—

Mr. ROBINSON. Yes, sir.

Mr. FENSTERWALD. Now, as I understand it, the only thing that would be required if you do have something that falls within a new definition of the rule is that the Administrator would afford interested persons the opportunity to participate to the submission of written data, et cetera. That does not seem to be a very burdensome obligation to place on the Administrator. I do not know how many people would take advantage of this, but it seems to me it would not take either much time or effort on the part of the Administrator because he does not have to have any oral presentation.

Mr. ROBINSON. I understand there is no requirement for an oral presentation.

Mr. FENSTERWALD. So before a rule is promulgated in the Register he could allow 30 days for anybody to submit written data that wanted to on the subject. I do not think it would be a burden on the Administrator. It might be a burden on the private power companies to get the data out and submit it, but it does not seem much of a burden for him to accept it. I just want to be sure that we are talking about the same thing.

Mr. ROBINSON. Would not this, however, require the maintaining of a docket and a general staff operation for the handling of procedures, and so forth?

Mr. FENSTERWALD. A docket consisting of, I think you said, 65 items a year would not be something that 1 clerk could not handle in one-fiftieth of his time, I should think.

Mr. ROBINSON. Well, that might only be a slight exaggeration. But let us assume that you get into a situation where a particular policy involves matters of interest to a large number of power companies. A company can pretty well deluge you with written material, material of relevance, pertinent material and material that comes in large volume. Now, let us assume that a hearing was demanded.

Now, the agency can of course determine that an oral argument is inappropriate, but if substantial pressure is brought on the agency to hold the hearing on the case, you are going to get right back into the burden of a normal procedure.

Mr. FENSTERWALD. That would certainly be true today. I should think that if you have got enough interest and relevance to get a hearing today you are going to get one. The same thing would be true under this act. The only thing this act provides is that before you promulgate a rule you give a certain length of time for written permissions. And I just do not put any great burden on the agency.

Mr. ROBINSON. Except under the act as it now stands there is a complete exemption for loan programs.

Mr. KENNEDY. Now, I have another area of concern along the same general line. This bill would apply to the REA Administrator, not directly to the REA cooperatives who are users in a sense, borrowers. Looking down the road a ways, I could foresee the time when some of the REA co-ops or maybe a large number of them would not be of the same frame of mind as the Administrator and they might want an opportunity to present their views on the policies or changes in policy, but it would seem that there ought to be some opportunity for them to at least submit written data that they did not like the way he was going to change his policy. And this is, in other words, a permanent statute meant to deal with these problems over a long period of time. And this act has not been revised in 16 years. It was 30 years in getting enacted the first time, roughly. It is to deal with the relationships of the Government and the borrowers, not the co-ops, who in the long run might be the beneficiaries of some opportunity to present views.

Mr. ROBINSON. Mr. Chairman, Mr. Kennedy, let us for the sake of argument concede that the opportunity to submit material to the Administrator would be a burden of less than crushing magnitude.

Now, if you will, if there is some assurance that the judicial review provisions of the act will remain as they are, then you have to some extent taken care of this problem, because if the judicial review provisions remain as they are the decision of the Administrator under the case law as it now stands would probably hold up.

Now, if you are going to change the judicial review provisions of the act in accordance with the proposal in 1336, which appear to reflect Professor Davis' views, then every time somebody disagreed with the outcome of this rulemaking procedure you are in court.

Mr. KENNEDY. But to what extent is there judicial review of rule-making as opposed to adjudication under the present law, assuming that loans and grants were covered?

Mr. ROBINSON. Under the present law?

Mr. KENNEDY. To what extent is a general policy determination subject to judicial review?

Mr. ROBINSON. I am not an expert in the broad area of administrative law. All I can say is that it is my opinion, after studying the statute and the cases, that the decision of the REA Administrator would not be reviewable by an adverse party at the present time. By that I mean a power company. Now, what would happen if a borrower should sue him I just do not know.

Mr. KENNEDY. Well, you have already told us of the need to have jurisdiction to get judicial review.

Mr. ROBINSON. That is at the moment.

Mr. KENNEDY. At the moment. Now, is there any jurisdiction with respect to rulemaking as a function of an agency?

Mr. ROBINSON. Not with respect to the REA Administrator, not under the case law as it now stands.

Mr. KENNEDY. Well, with respect to a food and drug rulemaking procedure or any other agency rulemaking procedure, is there the type of jurisdiction with which you can get judicial review?

Mr. ROBINSON. Mr. Chairman and Mr. Kennedy, I have not read any cases on food and drug, so I cannot answer that question.

Senator BURDICK. The point that you are making is that this rule-making section would not be objectionable to you if the review section is corrected.

Mr. ROBINSON. That is correct, Mr. Chairman.

Now, with respect to adjudication, in section 5(b) of the proposed revisions contained in 1336, the present law limits adjudication to those cases required by statute to be determined on the record. The material in S. 1336, the proposals of the revision divide these areas of adjudication, as I read it, into two parts: One, at 5(a) providing for formal adjudication in those cases which are required by the Constitution or by the statute to be determined on the record after a hearing, and, 5(b), which goes to uniform adjudication, which would presumably be applicable to REA.

That appears at page 23. This is, Mr. Chairman and Mr. Kennedy, the same area as that of rulemaking. REA statute does not require formal adjudication after a hearing at the present moment. Therefore, REA is not conducting adjudications. It is exempt by the statute as it is presently written. This language of section 5(b) appearing at page 23 would subject the agency to uniform adjudication on each loan decision—and about 431 loans were granted by the agency in 1964. During that year there were an estimated 5,000 decisions rendered on construction contracts involving REA borrowers. Now, with respect to informal adjudication, assuming 5(b) applies, it might be possible for the REA Administrator to comply with this. It would be burdensome, but this, in essence, before he makes a major controversial GT loan he is required by the rules of the Senate Appropriations Committee to go through a more or less formal procedure at the present time. So if—again as to rulemaking—the judicial review provisions of section 10(a) are held as they now stand in the law, then the decision of the REA Administrator after the informal adjudication provided for in section 5(b) would be final, and there would be no appeal to the courts on that.

Mr. KENNEDY. Let me ask this, though, because I keep getting troubled by the two hats you wear, as Mr. Fensterwald inquired earlier. At least ostensibly your first interest is the co-ops welfare; right?

Mr. ROBINSON. Yes, sir.

Mr. KENNEDY. And this bill does not impose any formal procedure for dealing with loans to the co-ops. All it says, since 5(b) is the only pertinent provision, that if a co-op applies for a loan that the agency shall by rule, the REA shall by rule provide procedures which shall

promptly, adequately, and fairly inform it of the issues, facts, and arguments involved. In other words, it requires the REA to provide a procedure by which it can be promptly, adequately, and fairly informed by the co-op applying for the loan of the need for the loan.

Now, why is that not from the standpoint of the co-op a very good procedure? You do not want an REA Administrator who might be unfriendly to co-ops to be able to arbitrarily close his eyes and ears to any information that the co-ops might want to present.

Mr. ROBINSON. We have not, fortunately, in the 15 years in which I have been associated with the program encountered exactly that situation.

Mr. KENNEDY. No; and we hope you never do. But still from the co-ops standpoint, is that not a good provision?

Mr. ROBINSON. Mr. Kennedy and Mr. Fensterwald, Mr. Chairman, this provision, I feel, the REA Administrator might be able to live with, provided you do not also throw in—throw him into court on every decision.

Senator BURDICK. Well, then again you go back to the review section.

Mr. ROBINSON. That is the worst part of the entire proposed revision from our standpoint.

Now, Mr. Kennedy stated that our first interest was that of the borrowers, and he is exactly correct. But to the extent that the Administrator is hampered and hamstrung by lawsuits in operating a program, the borrowers are out of business and that is why we are going so strong on the effect which this language would have on the agency. It would, in our opinion, seriously deteriorate the operation of the agency and thereby injure the borrowers.

Mr. FENSTERWALD. Mr. Robinson, since you are in contact with the REA Administrator and his lawyers, I think it might be helpful if you would suggest to them that they submit before the close of this record on the first of June a statement of their position on the proposed revisions because I have somewhat the difficulty Mr. Kennedy does in separating the two hats, and I think if it would be possible it would be helpful to the committee to have a formal statement out of the REA on this bill.

Mr. ROBINSON. Mr. Chairman, Mr. Fensterwald, I will be happy to suggest that to the Administrator, but you get into the, pardon the word, "formalized" procedures of the executive branch in which he is a little bit inhibited in taking independent action to submit documents to the Congress without clearing them with at least the Secretary of Agriculture and the Bureau of the Budget, and whom else, I do not know. I tried to, I suggested the possibility of having one of the counsel from the Department, one of the counsel who is intimately associated with the REA program to appear with us this morning, and he said—

Senator BURDICK. I think I can answer this question myself. In view of your testimony this morning, I think I would request their views.

Mr. FENSTERWALD. I might also state that if because of the inhibitions of the bureaucracy at the moment that he is incapable of giving us a formal statement, we would be delighted to meet with him and his associates at any time, informally if necessary.

Mr. ROBINSON. Mr. Chairman, if it were to come from the committee I believe that there would be no problem. But this particular member of the General Counsel staff at Agriculture advised me that it would take him more time than was available to obtain the necessary clearance to appear here with me this morning. Of course this goes to the whole principle of administrative procedures. I do not want to get into that.

Mr. KENNEDY. Do not relate these comments to administrative procedure.

Senator BURDICK. Well, your statement will be made a part of the record. Do you have any more highlights here?

Mr. ROBINSON. Mr. Chairman, we are deeply appreciative to you for allowing us to appear here this morning. We think in general what the bill does with respect to REA is to substitute judicial decisions for policy decisions, and there is a point beyond which you cannot substitute the Federal courts for decisions of the executive branch based on policy. The people of the United States elect a Government every 2 years with respect to the House, every 6 years with respect to the Senate, every 4 years with respect to the President—these people are given certain powers and a few attempt to impose on the elected officials and those appointed by the elected officials judicial review of every one of their decisions, it seems to me you are going to paralyze the operation of the Government.

Mr. KENNEDY. The Federal Power Commission, though, is subject to judicial review, is it not?

Mr. ROBINSON. Yes, sir; by its own statute, but only to parties aggrieved in a proceeding before the Commission, those who have formally participated in a docket at the Commission.

That, Mr. Chairman, concludes our reviews. The very worst feature of the proposed revision from our standpoint is section 10(a) which very vastly broadens the area of judicial review and would wipe out all of the case law which supports the proposition that a final decision of the REA Administrator on individual loans are not subject to judicial review by power companies which have sought to destroy the program. This language would wipe out that protection, and would bring about readjudication of the issues, would bring about an extreme amount of law suits. There are law suits pending in the State courts in Indiana and in Mississippi. We have pending suits in the Federal courts, as I mentioned, in Louisiana and Alabama. Every time a controversial loan is made the companies use the State commissions and the State courts wherever that forum is available to them. If you, in addition, open up the Federal courts as a source of judicial review for action by the Administrator, you are going to wind up with a barrage, a deluge of law suits against him and energy and activity is going to be channeled into defending these law suits, and the agency will be thrown into chaos. So we are very hopeful and we strongly urge you, respectfully, to leave the language of section 10(a) as it is: adjudicated language. It is language which at least in the opinion of the Attorney General and the committee which reported the bill in 1946 declaratory of the existing law before the act was written.

And again, Mr. Chairman, we very much appreciate the opportunity to have been able to appear here today.

(Mr. Robinson's statement in full is as follows:)

STATEMENT OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION ON S. 1336

Mr. Chairman and gentlemen of the subcommittee, my name is Charles A. Robinson, Jr. I am the staff engineer and staff counsel of the National Rural Electric Cooperative Association. NRECA is the national trade and service organization of nearly 1,000 REA-financed electric systems in 46 States. These nonprofit, consumer-owned electric systems supply about 20 million Americans with electricity, and serve nearly half the land mass of the United States.

All REA-financed rural electric systems are incorporated as consumer-owned businesses in their respective States. Each is managed by a membership elected board of directors. However, virtually the entire capital investment in the electric utility plant of all such systems is derived from REA loans. They are thus absolutely dependent for their existence on the administrative operation of REA and the statutory requirements governing such operation.

The interest of the NRECA membership in S. 1336, as it affects the Rural Electrification Administration is, therefore, substantial, immediate, and urgent. We fully recognize the desirability and necessity for Congress to review from time to time the impact on the Nation's social and economic system of the law governing administrative procedure in the Federal Government. And, we commend this subcommittee and its chairman for their crusading effort to assure the people of the United States that their basic constitutional freedoms are not subverted by an entrenched bureaucracy.

In all fairness, however, we respectfully urge the subcommittee to carefully weigh the problems which certain changes in the Administrative Procedure Act, proposed in S. 1336, would create for the beneficiaries of existing Federal statutes such as the rural electric systems financed by REA.

To the extent that S. 1336 would open to complete public inspection the hitherto confidential exchange of information between REA as the lender, and its borrowers; to the extent that it would delay and harass the REA Administrator in reaching decisions, and to the extent it would permit judicial appeal from such decisions, it would seriously hamper operation of the agency, do irreparable harm to the REA program beneficiaries and constitute the vehicle through which every controversial REA loan could be litigated in Federal courts.

As additional background for our consideration of the proposals contained in S. 1336, we respectfully remind the subcommittee that many privately owned electric companies have over the years utilized every available forum at every level of government to hamper and delay effectuation and administration of the Rural Electrification Act of 1936. These forums include committees and subcommittees of the Congress, State courts, State directors of finance, Federal courts, State and Federal administrative officials, municipal councils, the American Bar Association, and other national organizations.

We would deny to no person, corporation, or organization the right to be heard in any forum on his position and the right to seek out and use all available means of communication. We, however, respectfully direct the attention of the subcommittee to the concept that Congress, in establishing Federal administrative procedures, has a responsibility to assure that Government agencies and the programs which they administer are not rendered completely ineffective by the imposition on them of due process and information requirements which open the way to agency paralysis and ultimate stagnation.

ACCESS TO INFORMATION

REA as the banking organization for the some 1,000 beneficiaries of the Rural Electrification Act of 1936 is constantly soliciting and constantly receiving and processing information on the technical, financial, operational, organizational, and every other phase of the business of its borrowers. Such information goes not only to past and present programs but to those planned for the future as well.

Release of this type material to adversary privately owned electric utilities which are frequently engaged in sustained and purposeful efforts to destroy the businesses of REA borrowers is not warranted by any reasonable interpretation of accepted business ethics. It is analogous to making personal Federal income tax returns a matter of public record.

Under the present law (5 U.S.C.A. 1002): "matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause shown."

The present exception thus leaves reasonable administrative discretion with REA to protect the information which if publicly disclosed would destroy the business of its borrowers.

Section 3 of S. 1336, rather than committing broad record control discretion to the administrative agencies such as REA; confers a legally enforceable right upon "any person" to demand production of "any agency records—or information" and places the burden of judicial proof on the defendant agency.

Of the specific exemptions to applicability of the above general rule, it appears that section 3(e)(4): "trade secrets and commercial or financial information obtained from the public and privileged or confidential," and section 3(e)(5): "interagency or intraagency memorandums or letters dealing solely with matters of law or policy," may have been designed to meet the aforementioned problems which arise in connection with the administration of Federal loan programs.

We respectfully point out, however, that the authority in 3(e)(4) to withhold information is limited on the words "privileged or confidential". Since this language could well be limited in the judicial process to the "privilege" or "confidence" generally attributable to a fiduciary relationship between you parties, or to the limited class of situations involving attorney-client; physician-patient or husband-wife circumstances, we respectfully ask that section 3(e)(4) be amended to read: "(4) trade secrets and commercial, technical and financial information submitted and received as privileged or confidential".

The suggested change would assure, we think, the ability of REA and its borrowers to protect material which if released would endanger the borrowers existence.

With respect to 3(e)(5) we suggest that the following language be substituted for that contained in S. 1336 as introduced:

"(5) Interagency or intraagency memorandums or letters dealing with matters of fact, law or policy."

This modification we suggest in order that REA may include material which it receives under 3(e)(4) in whatever internal working papers, and communications with other agencies, are required to properly process loan applications.

RULEMAKING AND ADJUDICATION

The present law (5 U.S.C.A. 1003) as we read it, exempts from the rulemaking procedure "(2) any matter relating to * * * loans, grants, benefits or contracts." Thus, REA as a loan agency is granted a blanket exemption to the procedures of 5 U.S.C.A. 1003(a) (b) and (c) which go to matters of general applicability.

In addition, the provisions of 5 U.S.C.A. 1004 which limit formal adjudication procedures to those "required by statute to be determined on the record * * *" exempt REA from such formal proceedings because the Rural Electrification Act of 1936 (7 U.S.C.A. 901 et seq.) contains no such statutory requirement.

S. 1336, as introduced, defines "rulemaking" in section 2(c) as: "agency process for the formulation, amendment, repeal of, or exception from" rule; the latter being defined as: "the whole or any part of any agency statement of general 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 any exception from a rule."

The term "adjudication" as defined in S. 1336 appears to mean any agency action "in any proceeding * * * to determine the rights, obligations, and privileges of named parties." The apparent intent of the bill is to define as "adjudication" any agency action which does not fall within definition of "rulemaking."

There appear to be no exemptions applicable to REA contained in either section 4 of S. 1336, which prescribes rulemaking procedures or in section 5(b) to which REA loan authorizations would be subject.

REA is constantly in process of publishing and revising memoranda and bulletins of general applicability to its borrowers and to the conduct of their business. Some 30 new bulletins or memorandums or revisions of such are processed each year. To subject these activities to the formal procedure of section 4 of S. 1336 would require substantial additional staff, involve added expense and delay, and confuse the administration of the act without any commensurate advantage.

In general the only parties which have consistently objected to REA general rules and policies are the investor-owned companies. They are probably the

only parties which would benefit by the described formal procedures, and their object would be to divert the activities of the agency into unproductive channels and prevent effectuation of the purposes of the act.

In addition, presumably every loan authorization decision would be subject to the "adjudication" procedures of section 5(b) of S. 1336. During fiscal year 1964 REA approved 285 electric loans and 146 telephone loans—a total of 431. Even informal adjudication in each case would require substantially increased staff and delay action. Only the investor-owned companies would benefit.

Moreover, any approval or disapproval by REA of construction contracts, power purchase, exchange of sale contracts, materials contracts, borrower personnel employment, mergers, consolidations, rescissions, and the like would be subject to a formal proceeding. During fiscal year 1964 REA officials estimate that 5,000 contract decisions were made. The result of subjecting each of these to adjudication would be absurd.

In view of the foregoing considerations, we respectfully urge that the exemption for Federal loan programs be retained, so far as the rural electrification program is concerned, by adding to S. 1336 the following new section 2(h):

"(h) Except as to section 3, nothing in this act shall apply to any matters relating to loans, grants, benefits, or contracts."

This change would allow the REA to continue the existing administrative procedures which have been demonstrably successful in effectuating the rural electrification program for 30 years.

JUDICIAL REVIEW

The present statute (5 U.S.C.A. 1009) provides that:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof."

The Federal courts of last resort have consistently held that the REA Administrator, in approving loans to borrowers over the objections of investor-owned electric companies, does not cause such companies to "suffer a legal wrong" within the meaning of 5 U.S.C.A. 1009(a), and that such companies are not "persons adversely affected or aggrieved" as therein contemplated. Such companies have, therefore, always been denied standing to maintain any judicial action based on 5 U.S.C.A. 1009 to challenge the decisions of the REA Administrator. (*Kansas City Power & Light Co. v. McKay C.A. 1955*, 225 F. 2d 924, 96 U.S. App. D.C. 273, certiorari denied 76 S. Ct. 137, 350 U.S. 884.

The Administrator has thus, on the procedural question of standing, been able to prevent the power companies from using the Federal courts to block REA loans to which they are opposed.

Section 10 of S. 1336 would, however, overturn this long line of statutory and case law protection for the program. Section 10(a) substitutes for the well-tested and adjudicated language of the existing law, relating to standing, the wording:

"Any person adversely affected in fact by any reviewable agency action shall have standing and be entitled to judicial review thereof."

This language is substantially broader in scope than the present law and might well result in the complete collapse of the *Kansas City* doctrine. The *Kansas City* case did not decide whether the second prefatory condition of 5 U.S.C.A. 1009 "Except so far as agency action is by law committed to agency discretion" would also bar judicial review of REA activities. However, the parallel language of section 10(2) of S. 1336 "Except so far as judicial review of agency discretion is precluded by law" is an infinitely harder to prove element of protection.

In essence, it appears that the language of section 10 practically guarantees readjudication of the *Kansas City* rule and the probability that every "order" which arises from REA "adjudications" and every "rule" which arises from an REA "rulemaking" would be subject to judicial review. In our opinion, the result would be a series of legal actions of unprecedented variety and number which would completely paralyze the work of the agency.

In our opinion, the language which we suggested be added to S. 1336 as a new section 2(h) would avoid such a result by placing the REA program beyond the formal procedures required by S. 1336, and thus beyond its provisions for judicial review.

In the alternative, we respectfully suggest that the present language of 5 U.S.C.A. 1009 be allowed to stand with its broad range of interpretative case laws.

SUMMARY

It is important that arbitrary and capricious governmental actions be prevented if possible, and, certainly, be held within tolerable limits. It is equally important, however, that Government agencies be permitted to operate without constant harassment, sometimes based on equal caprice, and, more frequently on policy disagreement.

The judicial process is not, in our opinion, the remedy with which to correct an unpopular determination of policy. The remedy for that is the ballot box. Once the electorate has chosen its officials, they should be allowed to operate under their policies without the necessity of vindicating each decision in the court.

Moreover, the Office of the Comptroller General, the committees of both Houses of Congress, and individual Members of both Houses, can more expeditiously correct many problems of arbitrary administrations and abuse of discretion than would judicial review.

The bill S. 1336, as introduced, would subject all REA activities to substantially more burdensome procedures than those presently employed, would, under rigid interpretations of section 3, require disclosure of hitherto confidential information submitted to REA by its borrowers for the purpose of securing loans, and would reopen to court decision the question of whether each and every action of the Administrator is subject to judicial appeal.

In its 30 years of operation, the only major source of complaint against REA has been the privately owned power companies which seek to destroy its borrowers. These complainants are the very reason for the agency's existence. S. 1336, as introduced, would give to the companies the means to destroy what is perhaps the most effective program of agricultural aid ever devised. We do not believe that is the objective of this subcommittee and we respectfully, therefore, commend to its consideration the aforementioned amendments to S. 1336.

SUPPLEMENT NO. 1 TO STATEMENT OF CHARLES A. ROBINSON, JR.

HISTORY OF "STANDING" AS IT RELATES TO CHALLENGING ACTIVITIES OF REA AND FEDERAL POWER AGENCIES

I. Tennessee Electric Power Company v. T.V.A. (306 U.S. 118). (1939)

The grievance here was that activities of TVA would result in systems competing with numerous plaintiffs who were electric power companies and that this would inflict substantial damages upon them. The three-judge district court held after a 2-month trial on the merits that although the companies would be injured, such injury would be *damnum absque injuria* unless the TVA program was unlawful. The district court found, however, that the TVA program was a completely lawful exercise of the commerce and war powers (32 Ia. L.R. 317). The Supreme Court, on appeal, held that no one could complain and challenge the validity of a statute, or of action taken thereunder (306 U.S. 118, 137-138) "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." By these tests, electric power companies had no standing to sue to restrain alleged wrongful activities of TVA founded on a statute whose constitutionality was challenged. The Supreme Court said (306 U.S. 118, at 146-147) :

"Cooperation by two Federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy, to injure their business. As the courts below held, such cooperation does not involve unlawful concert, plan, or design, or cooperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute."

The Court concluded (p. 147) :

"In no aspect of the case have the appellants standing to maintain the suit and the bill was properly dismissed."

Thus, although electric power companies claimed that their properties were being destroyed by defendants' unauthorized acts, they had no standing to sue, because no direct and special injury to their rights was inflicted and threatened.

Prof. Kenneth Culp Davis, at section 22.04 of his "Administrative Law Treatise," commenting on *TEPCO v. TVA*, states:

"The worst trouble spot in the law of standing is the confusion about the question whether an adverse effect in fact is enough to confer standing, or whether a deprivation of a legal right is required. * * *

"One type of judicial exposition appears in *Tennessee Electric Power Co. v. TVA* (306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1937)). Eighteen competing corporations sued to enjoin operations of the TVA, asserting unconstitutionality. The Supreme Court held the plaintiffs to be without standing to raise the constitutional issues, because 'the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue' (306 U.S. at p. 140, 59 S. Ct. at p. 371). The catch lies in the two words 'otherwise lawful.' The plaintiffs were asserting that the competition was unlawful, and the Court was denying them an opportunity to show the unlawfulness. The question was not whether the plaintiffs had standing to challenge lawful competition but whether they had standing to challenge competition the lawfulness of which was at issue. The Court laid down the palpably false proposition that one threatened with direct injury by governmental action may not challenge that action 'unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege' (306 U.S. at pp. 137-138, 59 S. Ct. at pp. 369-370).

Davis further comments on the case at section 22.11 of his treatise:

"In absence of such a statutory provision, a competitor may lack standing under cases such as *Tennessee Electric Power Co. v. TVA* (306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1937)), which denied standing to 18 power companies to challenge the constitutionality of new competition through the TVA. But, as we have seen above (see sec. 22.04 at notes 1-4), the reasoning of the Court in the *Tennessee Electric* case is of questionable soundness and will not necessarily be followed."

The comment of Professor Davis appears to wholly ignore the important practical fact that in *Tepeco* against *TVA*, the trial court had held that on the merits the *TVA* statute and the *TVA* operation were completely lawful. "The Government has an equal right to sell hydroelectric power, lawfully created in competition with a private utility," said the three-judge district court.

II. Judicial review under APA

The Administrative Procedure Act (5 U.S.C.A. 1001 et seq.) became law in 1946, 7 years after the decision of the Supreme Court in the *Tennessee Electric Power Company* case.

As to standing for judicial review, it reads:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

What did the Congress intend by the language of section 10(a) (5 U.S.C.A. 1009)?

The language of the Senate and House committee reports on the 1946 Administrative Procedure Act (Public Law 79-404) are of interest in finding an answer.

The Senate committee reports (S. Rept. 752, 79th Cong., 1st sess.) reads as follows at page 26:

"This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute. The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section. It means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect."

The House committee report (H. Rept. 1980, 79th Cong., 2d sess.) reads as follows at page 42:

"This section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute. The phrase 'legal wrong' means such a wrong as is specified in section 10(e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect. Al-

most any governmental action may adversely affect somebody—as where rates or prices are fixed—but a complainant, in order to prevail, must show that the action is contrary to law in either substance or procedure. * * *

In his comment on the above-mentioned portion of the APA, and the interpretative committee report language, Professor Davis states at section 22.02 of his treatise:

“Although the legislative history is not entirely free from conflicting views, the part of the legislative history that is both clear and authoritative is the statement made by the committees of both the Senate and the House, identical in both reports: ‘This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute.’ (S. Doc. 248, 79th Cong., 2d sess. 212, 276, 1946).

“The solid part of the legislative history is thus the statement of the Senate and House committees that one who is ‘adversely affected in fact’ may challenge administrative action.”

For some reason, Professor Davis does not include in his Treatise, any reference to that part of the committee report language which indicates a clear intent that the adverse effect necessary to confer standing under APA must be an “illegal effect”.

III. Kansas City Power & Light Co. et al. v. McKay, et al., 225 F. 2d 924 (1955), cert. denied 350 U.S. 884

In 1950, 10 investor-owned electric companies serving franchised territories in Missouri brought an action in the U.S. District Court for the District of Columbia against the Secretaries of the Interior, Treasury, and Agriculture, the Administrator of the Southwestern Power Administration and the REA Administrator. Plaintiff companies sought to enjoin the use of REA loan funds to construct generation and transmission facilities for REA borrowers in Missouri and to enjoin the interconnection of such facilities with the hydroelectric system of the Southwestern Power Administration, a Federal power marketing agency; pursuant to contracts between the borrowers and SPA.

Plaintiffs alleged that defendants conspired to establish an unlawful Federal power system and to thereby deprive plaintiffs of existing and potential customers and cause to plaintiffs “irreparable damage.”

For standing plaintiffs relied on the judicial review provisions of the AP act (sec. 10(a)) (5 U.S.C. 1009), in addition to the general equity powers of the court, the U.S. Constitution and the RE act.

The Government’s motion to dismiss was denied and the trial court heard the case on its merits. On June 7, 1953, the district court, in deciding for the Government on the merits, found that, without exception, all of the Government activities complained of were wholly lawful.

The companies appealed to the U.S. Circuit of Appeals for the District of Columbia Circuit which, on April 28, 1955, ordered the trial court decision vacated and remanded the case with an order to dismiss for lack of standing. The court of appeals said (one judge dissenting):

“The continuance of defendants’ activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants. It is not—under the controlling precedents—subject to review by this court.

“Appellants seek, finally, to base their right to bring this action on their alleged status as persons ‘suffering legal wrong’ or ‘adversely affected or aggrieved’ within the meaning of section 10(a) of the Administrative Procedure Act¹ (5 U.S.C. sec. 1009(a) (1952)). But the act does not help appellants. The text of section 10(a) reads:

“Sec. 10. Except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion—

“(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

¹The absence of a provision for judicial review in the relevant statutes does not ipso facto negate by implication the right to judicial review under the preclusion clause of sec. 10 of the Administrative Procedure Act. *Airline Dispatchers Ass’n v. National Mediation Board*, 89 U.S. App. D.C. 24, 189 F. 2d 685, cert. denied, 342 U.S. 849 (1951). But preclusion of judicial review might well be implied here from the statutory scheme involved, at least as we view it, though we do not need to go that far. Cf. *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Trans-World Airlines v. Civil Aeronautics Board*, 134 F. 2d 66 (2d Cir. 1950), cert. denied, 340 U.S. 941 (1951).”

"The terms used in this section are terms of art. As the Attorney General's manual on the Administrative Procedure Act points out: 'The delicate problem of the draftsman was to identify in general terms the persons who are entitled to judicial review. As so used, "legal wrong" means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review. "Adversely affected or aggrieved" has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.

"* * * The determination of who is 'adversely affected or aggrieved' * * * within the meaning of any relevant statute has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' Final report, page 83; see also pages 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law * * * This construction of section 10(a) was not questioned or contradicted in the legislative history."

IV. Iowa-Illinois Gas & Electric Co. v. Ezra Taft Benson, individually and as Secretary of Agriculture et al., 247 F. 2d, cert. denied, 356 U.S. 949 (1957)

In this case, the company sought to enjoin the Secretary of Agriculture and the REA Administrator from approving a loan for construction of a transmission line which was to be used to serve an unserved load in a rural area.

Plaintiff relied again on section 10(a) of APA for standing. The trial court, in a memorandum decision of September 24, 1956, stated its inability to distinguish the case from *Kansas City*, supra.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed as follows:

"PER CURIAM: The district court was unable to distinguish this case from *Kansas City Power & Light Co. v. McKay* (96 U.S. App. D.C. 273, 225 F. 2d 924, (1955), cert. denied, 350 U.S. 884, 100 L. Ed. 780, 76 S. Ct. 137 (1955)), and therefore concluded as a matter of law that the plaintiff, Iowa-Illinois Gas & Electric Co., had no standing to sue. Upon that basis the trial judge denied the plaintiff's motion for a preliminary injunction. This appeal followed.

"Appellant would distinguish the *Kansas City* case, but we are unable to find decisive differences. The order of the district court must therefore be affirmed."

V. Proposed changes in section 10

At section 22.18 of his Treatise, Professor Davis writes:

"A careful examination of the Federal and State law of standing leads to the conclusion that a very simple and natural proposition is entirely sound: *One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable.* [Italic supplied.]

"This simple and natural proposition has full support in the Administrative Procedure Act, which in section 10(a) provides for review upon petition of 'any person * * * adversely affected.' Committee reports of both House and Senate explained: 'This subsection confers a right of review upon any person adversely affected in fact * * *' (S. Doc. 248, 79th Cong., 2d sess., 212, 276 (1946))."

Professor Davis' interpretation of the APA, as it exists, is at variance with that of the Attorney General and with the committee reports on the bill which became the Administrative Procedure Act.

It nonetheless appears that his concept that any person "in fact adversely affected" should have standing to judicially challenge governmental activity is what S. 1336 is designed to achieve.

The U.S. Court of Appeals for the District of Columbia, in the *Kansas City* case, denied standing to sue of power companies seeking to challenge the legality of REA loans. *This decision was based upon a determination the plaintiffs were not within the terms of section 10(a) of the Administrative Procedure Act, persons "suffering legal wrong" or persons "adversely affected or aggrieved by such [agency] action within the meaning of any relevant statute," in that case, the relevant statute being the Rural Electrification Act.* The proposed amendment of section 10(a) in S. 1336 would delete the test of "suffering legal wrong" and, with reference to a person "adversely affected or aggrieved," would delete the provision "within the meaning of any relevant statute" and substitute the phrase "in fact." Thus, if a person such as a power company can be regarded as "adversely affected or aggrieved in fact," it would, under the amended section 10(a), have standing to sue REA on account of alleged illegality of an REA loan for

generation and transmission facilities which would supplant the power company as wholesale supplier for an REA borrower, even though, as decided by the court of appeals in the *Kansas City* case, the power company suffered no legal wrong and was not affected or aggrieved within the meaning of the Rural Electrification Act.

The first part of section 10 of the Administrative Procedure Act denies judicial review where (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion. The court of appeals, in the *Kansas City* case, stated that it did not have to consider the applicability of these provisions to the issue of the power companies' standing to challenge by suit the legality of REA loans. However, the amendment of the provision, while leaving part (1) as it is, amends part (2) by substituting for it the following:

"(2) Judicial review of agency discretion is precluded by law."

In view of these changes, which eliminate the provisions in the present Administrative Procedure Act upon which the decision of "no standing" in the *Kansas City* case was based and at the same time clearly indicate an intent to broaden the scope of judicial review, litigation is invited and there is, at a minimum, absent any assurance that the loan programs of REA, which the courts have held to be free from litigation from interests indirectly affected, would not be subjected to the burdens and the practically crippling effects of commercial power company litigation.

SUPPLEMENT NO. 2 TO STATEMENT OF CHARLES A. ROBINSON, JR.

"PRIVILEGED AND CONFIDENTIAL" INFORMATION—POORLY DEFINED IN AN ADMINISTRATIVE CONTEXT

I. Legal dictionaries don't define administratively "privileged" or "confidential" material

"Black's Law Dictionary" does not define "privileged" or "confidential" material in an administrative law context.

"West's Words and Phrases" (vol. 8A, pp. 80-88) barely defines "confidential" in an administrative sense. The only remotely pertinent case cited is *Bowles v. Ackerman*, D.C.N.Y., 4 F.R.D. 260, 262, which held that documents procured from defendants on which the Price Administrator relied as foundation for an action were not "confidential material" within the Emergency Price Control Act.

No satisfactory definitions of "privileged" in an administrative context were discovered. Most references to "privileged" in "Words and Phrases" and "Corpus Juris Secundum" refer to the relationships of husband-wife, doctor-patient, lawyer-client, employer-employee, insurer-insured, etc.

II. Textbooks indicate law on "privileged and confidential" is unclear

A good analysis of the meaning of "privileged and confidential" in an administrative sense is found in the "Administrative Law Treatise" of Prof. K. C. Davis.

At section 3.14 therein, Professor Davis describes the present state of the law as follows:

"Agency disclosure of information to the public is often controlled or affected by statutory provisions but, apart from statutes, courts sometimes provide protection against disclosures deemed improper. The scattered case law is conflicting."

Professor Davis cites two cases which favor the protection of disclosure of information to the public. In *FTC v. Menzies*, 145 F. Supp. 164, 171, affd. on other grounds, 242 F. 2d 81 (4th Cir.), cert. den. 353 U.S. 957, 77 S. Ct. 863 (1957), it was held that:

"No part of the documentary evidence should be made public and available to the competitors of the several respondent corporations unless it is necessary to do so in the proper enforcement of the law."

FTC v. Bowman, 149 F. Supp. 624 (N.D. Ill.), affd. on other grounds, 248 F. 2d 456 (7th Cir. 1957) held that a mere assertion that information is confidential and "might prove beneficial to competitors if made public" has been the basis for requiring the FTC to keep documentary evidence confidential.

However, as Professor Davis notes at section 3.13 of his "Treatise," "Judicial attitudes are far from uniform."

In view of the above, we respectfully submit that the terms "privileged and confidential" may be subject to wide interpretation by the courts, particularly since there is so little exiting law on the point.

Since S. 1336 would remove administrative discretion from section 3(c) of the Administrative Procedure Act, which presently permits the agency to withhold information "held confidential for good cause found," we believe that the exemptions under subsection (e) of S. 1336 should be drawn to include records and information which are properly protected under the present law. In this respect, the application of exemption (4) at section 3(e) of S. 1336, extending to "trade secrets and commercial or financial information obtained from the public and privileged and confidential" should be very carefully defined. To the extent that "privileged and confidential" has not been interpreted by courts in an administrative context, we believe that S. 1336 should carefully define these terms and the information and parties to which they may afford protection.

Senator BURDICK. Well, thank you very much for your testimony. That will conclude this morning's hearings.

(Whereupon, at 10:45 a.m., the hearing in the above-entitled matter was adjourned, subject to the call of the Chair.)

Dg. 364

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APPENDIX AND EXHIBITS

APPENDIX I. AGENCY COMMENTS ON S. 1160, S. 1336, AND S. 1758

CIVIL AERONAUTICS BOARD,
Washington, D.C., May 13, 1965.

HON. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your letter of March 24, 1965, requesting a report by the Board on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes, which is to be the subject of hearings by the Subcommittee on Administrative Practice and Procedure on May 12-14, 1965, inclusive.

The Board does not propose to present testimony at the hearings. However, it requests that this report be incorporated in the record of such hearings.

The Board is gratified to note that certain provisions contained in similar legislation in the 88th Congress (S. 1663), to which the Board objected in its letter of July 23, 1964, to the Subcommittee on Administrative Practice and Procedure, have not been incorporated in S. 1336. However, the bill contains provisions which are still objectionable to the Board for reasons subsequently indicated.

Prior to discussing the specific provisions of S. 1336, the Board believes it necessary to reiterate some of its previous comments with respect to prior legislation which continue to be pertinent to the bill. To begin with, the Board is not aware of any need for a general revision of the Administrative Procedure Act. Furthermore, it is understood that many of the changes are not intended to alter existing law, but rather are in the nature of proposed recodifications. Since the Administrative Procedure Act has been in force for approximately 19 years and since there are innumerable judicial and administrative decisions interpreting its specific provisions, the Board believes that changes in language which are not intended to alter existing law should be avoided. Such alterations may be expected to invite litigation or contentions that substantive alterations were intended, since, otherwise, the provisions would have not been recast by the Congress.

As to whether there should be changes in substance, the Board again invites the committee's attention to the final report of the Administrative Conference of the United States, dated December 15, 1962, made after an intensive study of the procedures of the regulatory agencies. The vast majority of recommendations for changes in existing procedures, contained in that report, could be effectuated without any change in the basic law, thus indicating a view that no need for an extensive revision existed.

In this overall context, attention is again invited to the various reorganization plans affecting the regulatory agencies which became effective in 1961, and particularly plan No. 3 which applied to the Board (63 Stat. 203, 5 U.S.C. 133z). This plan enabled the Board to delegate various functions to its staff, and the Board has amended its procedural regulations to delegate to hearing examiners the function of making the agency decisions in most economic and air safety proceedings, subject to discretionary review by the Board. (14 CFR 301.40, 301.45; 14 CFR 302.27, 302.28.) The Board also has made other delegations designed to improve its procedures and expedite its work. (See 14 CFR 385.) These procedures were found meritorious by the Administrative Conference, which separately considered the Board's procedures. They have now been operative for approximately 3 years and have served to expedite the Board's proceedings, particularly in air safety cases, and to permit the Board's members to devote the necessary time to the planning and adoption of policies designed to

accomplish the overall purposes of the act. These are the same goals, which S. 1336 is designed to accomplish.

The Board's comments on the provisions of S. 1336 follow. For convenience in presentation, the provisions are discussed under substantive headings rather than on a section-by-section basis.

1. PUBLIC INFORMATION

A. The requirements relating to Federal Register publication

The Board favors the proposed change in section 3(a) of the act which would require that the agencies publish in the Federal Register a description of forms available rather than the forms themselves in that the present requirement that forms be published on occasion results in a costly inclusion in the Federal Register of lengthy forms without any commensurate benefit in terms of information to the public. Also, the Board has no objection to the proposed change which would require publication in the Federal Register of an agency's rules of procedure and amendments, revisions, or repeals of such rules, and the Board presently endeavors to publish these materials. The Board also favors the provisions in section 3(a) which would bind a person who had notice of the terms of a rule, statement of general policy or interpretation, irrespective of whether it is published in the Federal Register, as being fair and equitable.

B. The requirement relating to the availability of internal materials

1. *Agency opinions, orders and the like.*—Under existing law the Board presently makes available for public inspection and copying its opinions, orders, statements of general policy and interpretations which have been adopted by the agency for the guidance of the public, and therefore agrees that such matters should be available for public inspection and copying. However, the Board, on balance, is opposed to a similar disclosure of staff manuals and instructions to staff that affect any member of the public as proposed in section 3(b)(C). None of these instructions establish norms of behavior required of any member of the public. Moreover, actions taken by the Board's staff pursuant to these internal instructions, which affect any legally protected right of a member of the public, can be reviewed judicially and their propriety and legality is in no way dependent on the internal instructions given. On the other hand, the disclosure of its internal instructions in staff manuals could only result in inhibiting the issuance of internal instructions which are needed for the guidance and productivity of the staff. The Board, therefore, is opposed to this requirement.

2. *Disclosure of other internal materials.*—Before discussing the provisions dealing with the disclosure of an agency's internal records, (sections 3(c) and (e)), the Board wishes to point out that it recognizes the overall desirability of making factual information available to the public to the fullest extent consistent with the effective discharge of the public business and the private rights of the persons from whom the information is obtained. In furtherance of this objective, the Board attempts to make such information in its possession available to private persons to the fullest possible extent. Thus, the Board makes factual information relating to aircraft accidents available for the use of private litigants when it cannot be obtained from other sources. The Board also makes available various statistical and other information relating to air carriers, and section 1103 of the Federal Aviation Act (49 U.S.C. 1503) specifies that most of the matters filed with the Board by air carriers and other persons be treated as public records. Consequently, there is little in the way of factual information which is not now available to the public. Indeed, the Board is not aware of any complaints concerning its present informational policies with respect to basic factual matters.

Turning to the exemption provisions (section 3(e)), the Board assumes that the exemption from disclosure covering matters "specifically exempted * * * by statute" would be applicable to its procedures under sections 902(f) (divulging of information), 1001 (conduct of proceedings), and 1104 (withholding of information) of the Federal Aviation Act (49 U.S.C. 1472(f), 1481, and 1504).

Concerning the exemption for "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy," the Board believes that there are documents of this nature not restricted to matters of "law or policy" which should not be disclosed to the public since many of them contain a discussion of facts as well as staff views and recommendations. It has long been

recognized that the disclosure of internal governmental materials containing staff views and recommendations tends to destroy candor in presentation contrary to the public interest, and the courts have accorded a qualified public policy privilege to such materials for this reason. See *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939. As there stated by Mr. Justice Reed (at pp. 945-946) :

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

"There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief. * * *"

The Board also believes that exempting from disclosure only "investigatory files compiled for law enforcement purposes" could impede and hamper the discharge of certain of its important functions. Although investigatory files developed in discharge of the Board's responsibility under section 701(e) of the act (49 U.S.C. 1441(e)) for ascertaining the cause of aircraft accidents, and making recommendations designed to avoid future such accidents, are not compiled for "law enforcement purposes," such files contain staff views and statements. Thus, the opening up of these files would be contrary to the public interest as well as impede the discharge of the Board's responsibilities in this area.

The Board further believes that permitting persons desiring access to records to select the judicial district most convenient to them for production of the records, rather than the district in which the records are located, could impose a severe administrative burden on it. In addition to the time and expense that would be required for travel by the Board's employees to numerous points throughout the country, substantial costs and inconvenience would be incurred by shipment of voluminous records to such points.

The Board is, therefore, opposed to the enactment of the foregoing provisions of section 3 because it believes that its existing policies and procedures adequately make available to the public its official records and provide the public with factual information, and because of the undesirable effects that these provisions would have on the discharge of its functions.

II. RULEMAKING

A. The principal change in the statutory definitions of rule and rulemaking, and to place them within the definitions of order and adjudication. The significance of these changes is not so much in the definitions themselves, but rather in the substantive procedural requirements which are applicable in terms of order or rule. The change in definition would have the effect of subjecting particularized rules to the revised and much more stringent separation of functions provisions set forth in section 5(a)(6) of the bill, and our objections to these provisions are subsequently set forth.

B. The Board also believes that the present exception in section 4(a) of the act permitting the adoption of rules of practice and statements of policy without prior notice should be continued. While it is recognized that section 4(d) of the bill permits the immediate adoption, without notice, of rules to be effective for no more than 6 months pending full rulemaking proceedings, we do not believe that rules of practice should be subjected to this requirement. Similarly, statements of policy often are only reiterations of statutory standards or statements of decisional law, and frequently are not appropriate for comment. To the extent that new substantive standards are intended, the agencies may be expected to give prior notice.

III. ADJUDICATION

The bill contains new procedures which must be followed by an agency in advance of hearings, during hearings, and by way of review of presiding officers' decisions, and such procedures are discussed under these headings.

A. Proposed procedures in advance of hearings

1. Section 5(c) of the bill would make it mandatory that a party be afforded an opportunity for settlement in advance of the hearing as the agency may prescribe, thereby altering existing law under which a matter may proceed to hearing without awaiting settlement negotiations which can be entered into at any time. The proposed change would make it possible for a party, by an offer of settlement or a series of amended offers of settlement, to delay the commencement of a hearing for an unduly protracted period. Again, the Board is not aware of any factual justification for a change in its present procedures which provide adequate opportunities for settlement in enforcement cases, and the results would be to permit delay without any commensurate benefits.

2. Section 5(a) of the act would be broadened by section 5(a)(1) of the bill to provide that persons entitled to notice of agency proceedings be informed of the "nature of the proceedings * * * and, if the issues or the matters of a hearing are to be limited, the particular issues or matters to be considered at the hearing." At present the Board's orders defining the scope of the proceedings, the pleadings, the prehearing conference reports and the published notices of hearings, amply apprise the parties of all the issue involved. Despite the large number of Board's formal adjudicatory proceedings, we are aware of no criticism from any persons with regard to any failure to receive satisfactory notice of the issues. The proposed amendment raises substantial interpretative questions as to the extent the agency would be obligated to provide detailed notice as to subsidiary factual issues underlying the basic issues of which the parties have received notice by virtue of the Board's orders, pleadings, etc. This ambiguity alone will be productive of needless litigation, and to the extent that the requirement may be read as necessitating notice of all subsidiary factual issues it would be unduly burdensome and impracticable.

3. Section 5(a)(5) of the bill requires the agencies to provide by rule for "abridged procedures," to be utilized only with the consent of the parties, which shall be on the record and be reasonably calculated to promptly, adequately and fairly inform the agencies and the parties as to the issues, facts, and arguments involved. Such proceedings may be presided over by hearing examiners or agency personnel of appropriate ability and the presiding officer's decision shall be in accordance with the requirements of section 8.

The Board favors the utilization of informal proceedings to the fullest extent possible, and believes that it presently has ample statutory authority to invoke them where the parties consent. While the Board has no objection to the "abridged procedure" provided for in section 5(a)(5), it nonetheless wishes to point out that the effect thereof might be to preclude an agency from resorting to informal procedures different from those described. For example, the Board's staff presently employs informal conference procedures in connection with its consideration of mail rate cases under section 406 of the Federal Aviation Act (see 14 CFR 302.11 and 302.21) which do not accord with the procedures proposed in section 5(a)(5). The Board also utilizes other informal procedures, such as the issuance of show cause orders proposing particular types of action to which the parties subsequently consent. These too conceivably could be precluded. Accordingly, the Board suggests that section 5(a)(5) be amended to provide that the agencies may follow such informal procedures as are agreeable to the parties with respect to any matter in controversy.

4. Section 6(k) of the bill provides that an agency shall act upon request for declaratory orders, and it is authorized, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove an uncertainty. In this respect, it alters the provisions of section 5(d) of the existing law which authorizes an agency, in its sound discretion to issue such declaratory orders. The authority to issue declaratory judgments in the Federal courts is pursuant to statute (28 U.S.C. 2201) and is discretionary with such courts. In the Board's view, there exists no necessity that a more stringent requirement be placed on the administrative agencies. Moreover, declaratory proceedings, particularly those designed to remove uncertainty, would involve the Board in complex proceedings and therefore interfere with the Board's control of its calendar under which it has assigned priority to various hearing matters. (See 14 CFR 399.60.) The Board is, therefore, opposed to this section.

5. Section 5(a)(2) of the bill requires that the agency shall provide rules governing its pleadings, which shall to the extent practicable conform to the Rules of Civil or Criminal Procedures for the U.S. district courts. While the Board

is of the view that uniformity in agency pleadings is a desirable objective, it believes that the Federal rules in this area, which permit conclusory pleadings, cannot be applied to many of the activities of the regulatory agencies. Because the Federal Aviation Act requires the Board to make findings, often on the basis of pleadings, the Board's rules of practice require the inclusion in pleadings of economic data and other matters, not required by the Federal rules. For example, there are specific requirements with respect to applications for exemptions (14 CFR 302.402); complaints seeking to set aside rates, fares or charges, as unlawful (14 CFR 302.502); or complaints requesting the suspension of tariffs (14 CFR 302.505); and petitions seeking adequacy of service investigations (14 CFR 302.702). Consequently, while the Board has no objection to a provision empowering the agencies to adopt rules of pleadings which conform to those used in the Federal courts, it is of the view that the proposed section might be construed to place the burden on the Board of establishing that it is impracticable to conform its rules to the Federal rules dealing with pleadings, and for this reason the Board is opposed to the section.

6. The Board, for similar reasons, objects to the proposed section 6(h) which would require that the Board's present procedures dealing with depositions and discovery, conform, to the extent practicable, to procedures in this area now available to parties in civil litigation in the U.S. district courts. Section 1004 of the Federal Aviation Act authorizes the use of depositions in Board proceedings and such procedure, for good cause shown, is available to the parties to a Board proceeding in accordance with Board rule. (See 14 CFR 302.20.) Similarly, all questions relating to the discovery are usually disposed of at prehearing conferences and further discovery can be obtained by a party through appropriate motion. Based on recommendations made by the Administrative Conference the Board recently revised its rules concerning discovery procedures so that they should conform as closely as practicable to the discovery techniques now employed in civil litigation in the Federal courts. The Board is unaware of any complaint concerning its present discovery procedures and since the proposed section might be construed to impose a burden on the Board to demonstrate its procedures cannot practicably be conformed to the discovery procedures now available to parties in civil litigation in the Federal courts, the Board is opposed to the section.

B. Proposed procedures during the course of hearings

1. Section 6(e), relating to the issuance of subpoenas, provides for their automatic issuance on request of a party to an adjudication, unless the statute otherwise provides. It therefore has the effect of eliminating the present standard that subpoenas be authorized by law and the agencies' authority to require, as a prerequisite to their issuance, a statement or showing of general relevance and reasonable scope of the evidence sought. Section 6(e) also provides that the issuing officer or the agency may quash or modify the subpoena where objection is made to its general relevance or reasonable scope.

The Board does not favor these changes. First, removing discretionary authority from the agencies and requiring the mechanical issuance of subpoenas would increase the burdens of presiding officers and the agency in connection with hearings on motions to quash. Further, subpoenas can be put to oppressive uses, and the present provisions permitting the agency most familiar with the subject matter to require a showing of general relevance and reasonable scope are believed to present a safeguard to the rights of the public. Additionally, the proposed revisions would enable private parties to obtain, merely upon request, subpoenas directed to agency personnel for the production of governmental records and information. This ability coupled with provisions such as those contained in section 1004 of the Federal Aviation Act which permit enforcement action at the instance of the person at whose instance the subpoena is issued, would immediately transfer to a district court the question of whether particular records should be made available. In this respect, the provision is similar to that of proposed section 3(e) which empowers the district courts to order the production of records or information improperly withheld from the complainant and which, as previously indicated, would serve to delay administrative proceedings.

2. Section 7(e) of the bill provides for interlocutory appeals to the agencies by certification or action of the presiding officer in circumstances where such appeals would expedite the proceeding without any substantial prejudice to any

party thereto. It further provides that the agency may permit an interlocutory appeal upon a showing of substantial prejudice and after denial of such an appeal by the presiding officer. The Board's rules of practice in air safety and economic proceedings presently permit interlocutory appeals with the consent of the presiding officer (14 CFR 301.10(f); 302.18(f)). The Board is of the view that such appeals should be restricted to cases where the presiding official allows them since he is best qualified to determine whether the proceeding will be expedited, rather than delayed, by such an allowance, and further whether the rights of any party to the proceeding would be prejudiced thereby. In this respect, the Board's procedures are consistent with those employed in connection with the allowance of interlocutory appeals from orders of the district courts. (See 28 U.S.C. 1292.) The Board is unaware of any complaint concerning its procedures in this area, and the provision permitting an appeal from the denial of an application for an interlocutory appeal would only serve to delay the Board's proceedings. The Board, therefore, is opposed to the provision in this section which would authorize appeals to the agency from denials of an allowance of an interlocutory appeal by the presiding officer where the examiner has not consented to such an appeal.

3. The Board is opposed to section 7(b)(8), which would authorize presiding officers to dispose of motions for summary decisions. The Board presently exercises this authority and, under Reorganization Plan No. 3, is authorized to delegate this power to the presiding officers. In the Board's opinion, the extent to which presiding officers should be authorized to rule on summary motions should be left to the discretion of the agency.

C. Proposed provisions relating to decisions and appeal and review within the agency

1. Section 5(a)(6) provides for an extension of "separation of functions" so as to encompass the presiding officers and members of the agency appeal boards as well as to embrace those proceedings presently exempt from its coverage, i.e., those involving the determination of initial licenses or the application of rates, facilities, or practices of public utilities or carriers. The effect, therefore, would be to preclude presiding officers and members of appeal boards from consulting with any person or agency on any fact in issue in licensing and ratemaking proceedings unless notice and opportunity for parties to participate were given. The Board is of the view that the present exemption should be retained, in that there is a genuine need for presiding officers, as well as members of appeal boards, to consult with disinterested members of the Board's staff on factual as well as policy matters involved in the complicated licensing and rate cases before the Board. Since the Board is not aware of any factual basis which would call for a more stringent separation of functions than those which presently exist with respect to licensing and rate matters, the Board believes that the disadvantages of the proposal to eliminate the exemption outweigh the advantages, and is therefore opposed to its enactment.

2. Section 8 of the bill, relating to decisions and appeal and review within the agency, appear to be designed to encourage to the fullest extent final decisions by hearing officers, with limited review by appeal boards, in part to afford greater opportunity to the agency heads for the formulation of policy through freeing them from the burdens of routine adjudication, and in part to give greater effect to the decisions of presiding officers. Thus, while any party may appeal as a matter of right to the appeal board, only a private party may request the agency to entertain the appeal, and these appeals are discouraged in that, if the agency denies the request, the decision of the presiding officer shall be deemed affirmed and shall become that of the agency. There is no provision for an appeal to the agency from a decision of the appeal board, but the agency may, in its discretion, order review of a decision of a presiding officer or of the appeal board on grounds that the decision or action is contrary to law or agency policy, that it wishes to reconsider its policy, or that a novel question of policy is presented.

As previously stated, the Board, pursuant to Reorganization Plan No. 3, has delegated its decisional functions in most proceedings to the Board's hearing examiners, with a right of discretionary review in the Board. Additionally, the Board, under Reorganization Plan No. 3, is empowered to establish divisions or to create employee boards which could entertain appeals from hearing examiners' decisions, with a discretionary right of review in the Board from the action of the appeal division or panel so created. Accordingly, while the Board is of the view

that there is no need for legislation to empower the Board to delegate its decisional and reviewing functions to subordinate officials within the agency, it would favor a provision to such effect in section 8 of the present act to make it clear that such delegations are proper. For this reason, the Board has endorsed recommendation No. 9 of the administrative conference so providing.

However, some of the proposals contained in section 8 are, in the Board's view, unnecessary to achieve the objectives sought, and would create undesirable results. Thus, if the purpose is to preclude an agency from the necessity of entertaining appeals, the provision enabling a private party to immediately appeal to an agency appears inconsistent with such an objective. Also, it is believed that an agency should be empowered, on its own initiative or at the request of any party, to grant discretionary review of either a presiding officer's decision or that of an appeal board, with the same powers being vested in the agency as are vested in the presiding officer if the agency cares to exercise those powers. Those regulatory agencies such as the Board who are charged with responsibility for public utility regulation in broad areas affecting the national welfare necessarily must have greater freedom of action in reviewing subordinates' decisions than those agencies dealing, for example, with the qualifications of individuals for occupational licenses in relatively narrow fields. A factual determination concerning an air carrier's qualifications, the selection of a given air carrier to provide a particular service, or concerning any significant matter affecting the amount of subsidy mail pay a carrier is to receive, may have as much a significance to the overall public interest as a so-called policy question. This is not to say that an agency should provide de novo review in all cases, and the Board does not now do so. The point is that this is a matter believed best left to the agency to determine in the light of its particular problems and responsibilities.

D. Proposed provisions concerning judicial review

Under the Federal Aviation Act, as in the case of most regulatory statutes, judicial review of agency action is generally confined to that specified in the statute (review in a circuit court of the United States pursuant to 49 U.S.C. 1486), with occasional challenges in district courts to actions which for one reason or another do not fall within the scope of the statutory review provision. Thus, the provisions relating to judicial review set forth in the Administrative Procedure Act are merely supplemental to the express review provisions contained in the basic regulatory statutes, and any proposed revision of section 10 should continue to represent an accommodation of the Administrative Procedure Act provisions to the basic review provisions specified in these other statutes. In the light of this principle, the following modifications of the bill are suggested:

1. Section 10(a) of the bill would confer a right of review in "any person adversely affected in fact by any reviewable agency action," as contrasted to the existing section 10(a) of the act, which grants standing to seek review to persons "suffering legal wrong" or "adversely affected or aggrieved" by the action "within the meaning of any relevant statute." We interpret the present section 10(a) provision as meaning that a person not having standing to obtain review under the basic regulatory statute would also lack standing under section 10. The proposed change is susceptible of being interpreted as conferring standing to obtain district court review upon persons who could not obtain review under the express statutory review provisions—an incongruous result. Further, if the committee is of the view that the class of persons who should have standing and be entitled to statutory review of any agency's final orders should be enlarged, this should be accomplished by amending the basic regulatory statutes rather than by modifying section 10(a) of the act.

2. Section 10(b) of the bill provides that the district courts of the United States shall have jurisdiction to review agency action reviewable under the act, except where a statute provides for judicial review in a specific court and jurisdiction to "protect the other substantial rights of any person in an agency proceeding." In the absence of a definition of what is meant by "other substantial rights," the Board is opposed to the specific provision on the ground that it is ambiguous, vague, and can only serve to foster litigation.

3. Section 9(b) of the bill provides that a reviewing court may find that publicity issued by an agency or any member of its staff, which discredits or disparages a person under investigation or a party to a proceeding, constitutes a prejudicial prejudging of the issues in controversy, and therefore may set aside agency action taken against such a person or party or enter any other orders

it deems appropriate. The Board is of the view that agency action of the character here described occurs so infrequently that there exists no necessity for such a provision in the Administrative Procedure Act, and that such matters can be handled on an ad hoc basis by the courts. Further, to the extent such a provision is necessary, it should be restricted to publicity which occurs during the pendency of the proceeding.

The Board has been advised by the Bureau of the Budget that there is no objection to the submission of this report from the standpoint of the administration's program.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., May 11, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in reply to your letter of March 24, 1965, requesting a report on S. 1336, a bill "to amend the Administrative Procedure Act, and for other purposes."

While in some respects S. 1336 is an improvement over S. 1663 of the 88th Congress, the Commission finds objectionable certain provisions of sections 5, 6, and 8. These provisions will make the act applicable to a number of employee cases (sec. 5) that were formerly excluded under the exemption of matters relating to the selection and tenure of officers and employees of the United States; will provide for the right of counsel to persons appearing in the course of an investigation (sec. 6); and require that the decision of the presiding officer be final unless appealed or reviewed with the appeal being heard by special boards composed of agency members, examiners or both (sec. 8). In this connection I would like to make the following comments:

(1) I recognize the great value of the procedures provided by the Administrative Procedure Act in matters relating to the exercise of Government authority affecting the rights of citizens, and I am not questioning this aspect of the Administrative Procedure Act.

(2) My concern is solely with the consequences of the application of the act to the many thousands of personnel actions that Federal agencies take as employers regarding their employees in their regular exercise of their personnel management responsibilities.

(3) Federal employees already have many procedural protections designed specifically for employee-employer relationships. The Civil Service Commission has played an important part in this regard. We have been responsible for administration of certain aspects of the employee protection provisions of the Lloyd-La Follette Act of 1912, and the Veterans' Preference Act of 1944. The Civil Service Commission was instrumental in promoting the issuance by President Kennedy, in January 1962, of two Executive orders which reinforced protections available to employees. Executive Order 10987 established a new appeals system within the Federal agencies covering adverse actions such as separations and demotions. Executive Order 10988 provided the basis for the establishment of agency grievance procedures. Executive Order 10988 also provided for the extension to nonveterans in the competitive service of appeal rights in adverse action cases similar to that which had been granted to veterans in the Federal service.

In addition to the thousands of personnel actions reviewed by agencies each year, the Civil Service Commission during this last fiscal year processed over 2,000 appeals from employees in the Federal service.

I believe that the systems presently existing within the Federal service have demonstrated their value as means of protecting employees from arbitrary actions, while at the same time permitting reasonable effectiveness of agency personnel operations. S. 1336 would impose upon the Federal Government as an employer procedures for handling employee complaints and dissatisfactions which are not normally imposed on employers in the private sphere. Yet, the Federal Government generally already extends to its employees far greater rights and protections than for the most part exist in the private sector of the economy.

(4) S. 1336, by requiring that the decision of the hearing officer be final unless subject to agency appeal and review, would seriously interfere with the exercise of administrative responsibility by agency officials. Agency officials must have the authority to make decisions affecting the performance of work and the conduct

of their employees and there should be opportunity, where appropriate, for review of such actions by higher level officials in the agency.

(5) Under present procedures, the members of the Board of Appeals and Review of the Commission, and various members of appeals boards in agencies are not "hearing examiners" under section 11 of the Administrative Procedure Act. S. 1336 requires that members of appeals boards be agency members or hearing examiners. This is another example of the impact of the bill upon what we believe to be internal matters between the Government as an employer and its employees. Not all agencies have appeal boards, many appeals are decided by persons acting under delegated authority from the agency head. The provision that appeals be decided by a board of agency members or hearing examiners will only complicate the disposition of appeals.

(6) Application of the formal procedures of the Administrative Procedure Act to separation actions in the Federal service would tend to make it even more difficult than at present to eliminate inefficient employees from the Federal rolls, and it would seriously handicap the Government in its continuing effort to maintain high standards of performance and service.

(7) The Government as an employer must have, in appropriate areas, authority over its employees that it does not have over private citizens, or it could not function as an employer.

(8) The provision for counsel to persons appearing in the course of an investigation could have a serious impact on our work. The Commission conducts 35,000 to 40,000 investigations each year. The time that is presently takes to complete an investigation will be increased proportionately with the number of persons who avail themselves of the right to counsel. We think that this is a matter that could be more appropriately left to administrative regulation than imposed by statute.

In summary, I find that S. 1336 has certain provisions which, in my view, are detrimental to the best interests of the Federal civil service. Over the years, the Congress has provided special legislation in the areas of discipline of Federal employees, in particular, the Lloyd-LaFollette Act of 1912 and the Veterans' Preference Act of 1944. In neither of these acts has the Congress extended rights of hearing conforming to the APA. What is the necessity and what are the reasons for the change at this time? Unless there are substantial reasons for modification of present law and policy, the matter of discipline of Federal employees should be left for administrative determination under the special laws of the Congress.

There are two technical matters that should be noted. On page 2, line 3, the word "Territories" appears. There are no more Territories since the admission of Alaska and Hawaii to statehood. The word should either be changed to "territories" or omitted.

On page 33, line 13, the reference to the "Classification Act of 1923" is erroneous. That statute was repealed when the Classification Act of 1949 was enacted. The references to sections of the 1923 act on lines 14-16 are, of course, also inaccurate. Change lines 13-16 to read as follows:

"Classification Act of 1949, as amended, except that the provisions of sections 507(a) (5), 701(a) (B), and 702 of said Act, as amended, and the provisions of the Performance Rating Act of 1950, as amended, shall not be applicable."

For the reasons set forth above with respect to Sections 5, 6, and 8, the Commission is opposed to the enactment of this bill.

The Bureau of the Budget advises that from the standpoint of the administration's program there is no objection to the submission of this report.

By direction of the Commission.

Sincerely yours,

JOHN W. MACY, Jr.,
Chairman.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., May 18, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letter of April 27, 1965, transmitted a copy of S. 1336, entitled "A bill to amend the Administrative Procedure Act, and for other purposes," and requested our report thereon. The bill constitutes a complete rewriting of the existing Administrative Procedure Act.

We have always taken the view that the General Accounting Office is not to be regarded as falling within the purview of the Administrative Procedure Act. As you know, our Office is the agency of Congress to check on the financial transactions of the Government. It was created by the Budget and Accounting Act, 1921, as an arm of the Congress and has since been a part of the legislative branch of the Government, as was emphasized by the Congress in the 1945 Reorganization Act and again in the 1949 Reorganization Act. Statutes enacted subsequent to 1921, principally the Government Corporation Control Act, the Post Office Department Financial Control Act of 1950, and the Budget and Accounting Procedures Act of 1950 have added to the powers and duties of the Office. The responsibilities given to the Comptroller General and the General Accounting Office by the 1921 act and subsequent legislation include the making of independent audits and investigations of financial transactions; prescribing principles, standards, and related requirements for accounting to be observed by the executive agencies; settling claims by and against the United States; rendering decisions pertaining to Government fiscal matters; and reporting to the Congress the results of their work, including recommendations to further the effectiveness of Government financial operations and to promote economy and efficiency in Government operations.

The functions of those agencies which operate under the Administrative Procedure Act are primarily those of administrative tribunals in administering statutes affecting the members of the general public by the exercise of their authority to grant licenses, permits, and other privileges, to impose certain penalties or sanctions. But the General Accounting Office is in no sense a regulatory body, since it does not undertake to regulate private business or restrict the exercise of private rights. The functions and procedural methods of our Office are thus believed to be different from the practice of those agencies which the act was intended to reach. There follows a section-by-section analysis of the Administrative Procedure Act as it relates to our operations.

5 U.S.C. 1002, Public information (sec. 3 of S. 1336)

While we consider that the present Administrative Procedure Act does not apply to the General Accounting Office, we recognize that certain information concerning its activities must be made available to the public. Thus, in accord with the purpose of, but not pursuant to, 5 U.S.C. 1002, the General Accounting Office publishes in the Federal Register all information concerning its operations which is of interest to the public. This includes information with respect to where claims may be filed, where information relating to claims may be obtained, and how recognition as an attorney or agent may be obtained. Opinions of the Comptroller General or general import are available to the public in published form and persons having a direct and immediate interest in any transaction, or their duly authorized legal representatives, may be permitted access to records of the General Accounting Office for the examination of their claims, upon a satisfactory showing as to the reasons therefor.

In this connection, we note that subsections 3(c) and 3(e) of S. 1336 are substantially identical with subsections (b) and (c) of section 161 of the Revised Statutes of the United States (5 U.S.C. 22) as proposed by H.R. 5012, 89th Congress. There is enclosed for your information a copy of our report on that bill to the House Committee on Government Operations dated March 25, 1965, B-130411. The views expressed therein would be equally applicable to subsections 3(c) and 3(e) of S. 1336 if the bill is made applicable to the General Accounting Office.

5 U.S.C. 1003, Rulemaking (sec. 4 of S. 1336)

With respect to provisions relating to the rulemaking process, the regulations issued by the General Accounting Office are not concerned with prescribing the limits of permissible conduct of the public generally or with the periodic modification of such limits. Such regulations deal solely with the internal functions of the Government in matters relating to the accounting for appropriated moneys. The only exception to this general statement would be, under the definition of rule contained in 5 U.S.C. 1001(c) and section 2(c) of S. 1336, our rule concerning recognition of attorneys, agents, and other persons to represent claimants before the General Accounting Office.

5 U.S.C. 1004 through 1007 and 1010, Adjudications and hearings (sec. 5 through 8 and 11 of S. 1336)

The provisions relating to administrative adjudication predicated upon formal hearings are not considered applicable to the General Accounting Office, since

there is no statutory requirement that formal hearings be granted to claimants before our Office.

As a general proposition, no real need exists in connection with claims considered by the General Accounting Office for taking oral testimony, cross-examining witnesses, etc., because the facts usually are not in dispute. There is generally involved only the application of established legal principles upon reported facts.

Under existing procedure of the General Accounting Office—which has been in effect for a considerable number of years—when a claim is settled the claimant is notified promptly of the action taken and the reasons therefor. If a claimant is dissatisfied with the action taken he may request review thereof, upon receipt of which request the entire matter is reviewed and a decision rendered thereon by the Comptroller General. The employees who participate in the study and preparation of the claim for the Comptroller General's consideration are not the same employees as those who considered and acted upon the claim when originally settled. If the settlement is sustained on appeal, the claimant yet may submit additional evidence and request further consideration of the case. It is the practice to reply to all communications received from a claimant respecting a claim and to continue consideration thereof so long as it is considered any useful purpose will be served thereby. The procedure is free from technicalities and formal rules and, regardless of the amount involved or the financial status of the claimant, he is permitted without expenditure of funds for counsel, witnesses, etc., to have his claim considered on the written record in a manner less formal than ordinarily prevails in the courts. Further, in the event a claimant or his authorized representative desires a conference with respect to his case, such a conference is arranged upon request.

While persons involved in matters before the General Accounting Office are never compelled to appear before any representative thereof, as covered by 5 U.S.C. 1005 (or sec. 6 of S. 1336), all persons having a claim or other rights assertable in the General Accounting Office may prosecute such claim or right individually or through a recognized attorney or agent.

5 U.S.C. 1008, Sanctions and licenses (sec. 9 of S. 1336)

The General Accounting Office does not grant licenses or impose sanctions.

5 U.S.C. 1009, Judicial review (sec. 10 of S. 1336)

In the vast majority of cases, persons having claims cognizable by the General Accounting Office may present them to the Court of Claims (28 U.S.C. 1491) or the U.S. District Court (28 U.S.C. 1346) before, during or after consideration by the General Accounting Office, provided, of course, they do so during the period of limitations fixed by statute, wherein the law and the facts are determined de novo. And this right prevails irrespective of the Administrative Procedure Act. Generally, therefore, if any dispute with a claimant exists with respect to essential facts, or if for any reason a claimant is dissatisfied with the action of the General Accounting Office and desires a formal hearing in the matter with an opportunity to present oral evidence, and to examine and cross-examine witnesses, he has an adequate remedy.

If this section were made applicable to the General Accounting Office, it would apparently make claims settlements and possibly decisions relating to availability of appropriations subject to a direct review by the courts, although on the basis of a record established by the court. It would also enable the courts, not only to render judgments affecting the liability of the United States but would enable them to direct or restrain decisions on fiscal matters which are now for the determination of the Comptroller General. While we cannot foresee whether there are grounds for serious objection to rendering of monetary judgments in this fashion, we do believe the Comptroller General cannot function effectively as the agent of Congress if his decisions in matters confided to his judgment with respect to fiscal transactions generally are made subject to injunctive processes of the courts.

In light of the above, we do not consider that the provisions of S. 1336 are or should be applicable to the General Accounting Office. In summary, we believe that the application of the bill to our Office is unnecessary because the procedures of our Office now meet the purposes of the bill to the extent desirable and because claimants may now resort to the courts in a proceeding de novo before, during, or after consideration of their claims here. Moreover, we are apprehensive that, in subjecting the functions of our Office to the broad injunctive processes of the courts, its usefulness as an agent of Congress would be impaired. If the committee has any doubt that the General Accounting Office

is outside the purview of S. 1336 as it is now written, we recommend that the committee amend the bill so as to specifically exclude the General Accounting Office.

In the interest of editorial accuracy, the word "interetsed" in line 10 on page 9 should be changed to "interested".

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 25, 1965.

HON. WILLIAM L. DAWSON,
*Chairman, Committee on Government Operations,
House of Representatives.*

DEAR MR. CHAIRMAN: Reference is made to your letter of February 19, 1965, requesting our comments on H.R. 5012 which proposes to amend section 161 of the Revised Statutes (5 U.S.C. 22) with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

The proposed legislation apparently is designed to permit any person to examine the records of every Federal agency except for those records which fall within the eight categories listed in the proposed subsection (c). The bill also provides that upon complaint of a person denied access to any public record, the appropriate Federal district court shall have jurisdiction to order the production of any agency records or information improperly withheld from the complainant.

We are in general agreement with the concept that governmental information and records should be made available at the request of the public to the maximum reasonable extent, under appropriate safeguards. However, we believe the reference to "any person" is too broad. This language would make it mandatory for an agency to open its records to subversives, aliens—even enemy aliens, to claim hunters, and to others whose interests might be adverse to the Government. We think that the individuals being given access to Government records should, at least, be citizens of the United States, and demonstrate that their interest in the records is not adverse to the Government's interest.

We believe, also, that it should be made clear either in the law or its legislative history, that the agency may require in its regulations an identification of documents to be produced; that it may postpone production of documents which are necessary to the Government's current consideration of a matter; that the records are to be made available only for inspection, their custody remaining in the Government agency; and that a reasonable charge may be made for services rendered the public.

We have no basis for estimating the additional cost which might result from servicing legislation such as this, but we would expect that a charge for the service might discourage frivolous requests and at the same time conform with the policy of section 501 of the act of August 31, 1951 (65 Stat. 290, 5 U.S.C. 140).

In addition to the above general comments, we have some question as to how several of the eight stated exceptions would apply to several categories of files maintained by the General Accounting Office. In this connection the divisions and offices of the General Accounting Office prepare and maintain certain records which we believe should be exempted from public disclosure requirements. These include—

1. Memorandums between or within divisions concerning legal or policy matters, reviews of drafts of audit reports, letters to congressional committees and Members of the Congress, letters to heads of agencies and others, and preliminary drafts of decisions of the Comptroller General.
2. The working files relating to the material contained in the audit and report manuals and the manuals themselves.
3. Personnel and administrative files relating to such things as assignments, promotions, and performance of staff members.
4. Audit and investigative working papers.

While items in the first category usually relate to matters of law and policy, there would be many cases where they would not be solely related to such matters. In addition we do not believe drafts of decisions of the Comptroller General should be made available to the public. Accordingly, we recommend that the word "solely" be deleted from the exception set out in subsection (c) (5) of

the bill, and that the words "and preliminary drafts of decisions" be inserted after the word "letters" in subsection (c) (5).

Items in categories 2 and 3 above apparently would be exempt from the provisions of the bill by reason of exclusions provided in subsections (c) (5) and (c) (6), respectively, the internal policy instructions for our personnel contained in our audit and report manuals being intro-agency memorandums dealing with policy within subsection (c) (5). We, therefore, make no recommendations in regard thereto. We do believe, however, that the language in subsection (c) (6) "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" is so indefinite that the legislative intent should be clearly set out in the committee reports.

Audit and investigative working papers referred to in category 4 above, apparently would not be exempt from public examination under the language of the proposed legislation.

Audit working papers, while primarily an accumulation of factual information obtained from the records of agencies and contractors, also contain analyses, records of discussions with individuals, personal opinions of individuals, potential audit leads, all of which may not be confirmed on further examination, and thus the disclosure of which may lead to erroneous judgments by uninformed readers or may be harmful to the individuals involved. Moreover, disclosure of information in audit files may jeopardize the Government's position in situations in which there may be legal actions contemplated or in process.

With respect to audits of contractors, our working papers oftentimes will include information that could be construed as trade secrets and commercial or financial information of a privileged or confidential nature. While it would appear that this type of information would be excluded from the coverage of the bill by subsection (c) (4), there is no assurance that the courts would agree.

Many files also include identification of informants, the source of allegations made in confidence, and requests for information by the Congress, its committees or its Members, the disclosure of which might be harmful to the informants, or in the case of requests from Congress, its committees, or its Members, the disclosure of such requests may not be desired by the congressional interest. The files also often contain references to individuals and officials of agencies and contractors which may or may not appear in the finally issued report. However, their mere inclusion in working papers and the context in which they appear may be detrimental to the individuals or violate a confidence of an individual if made available to the public at large.

Our audit working papers many times will also contain information which is specifically exempted from release to the public by the proposed bill. Screening of the working papers to exclude such information would be impractical and costly. Also, exhaustive screening would not assure the removal of all such information.

Under the provisions of 49 U.S.C. 66 payment for transportation services furnished the United States is made upon presentation of bills therefor, prior to audit and settlement by the General Accounting Office. The right is reserved, however, to set off any overcharges thus made from any amount subsequently found to be due the carrier. 49 U.S.C. 66 also imposes a 3-year limitation upon setoff action by the General Accounting Office and a like period during which claims may be filed by carriers. Any claim not filed prior to the expiration of the period of limitation is forever barred.

During the fiscal year 1964 we audited over 4.8 million Government bills of lading on which over \$897 million were paid and on which there was found a total of over \$9.8 million in overcharges. Undue interference with the orderly and timely audit of transportation accounts because of the demand of persons wishing to examine vouchers and related records could delay our settlement of transportation accounts beyond the 3-year period, thus depriving the Government of recovery of overcharges.

A general requirement that all transportation records be made available for examination by the public could generate large scale demands by commercial rate auditing organizations, in order that they might develop undercharge claims against the United States, determine the practice and traffic distribution patterns of common carriers, or to secure possible future clients from our list of carriers indebted to the Government. In this connection, we understand it is the usual practice for such organizations to share any recovery of undercharges on a 50-50 basis.

A similar situation could result with respect to the records maintained in our Claims Division in that there could arise a rash of "fishing expeditions" into those

files by attorneys and others in search for bases for claims against the Government. These files of settled claims contain much information within the exceptions contained in this bill the separation of which before permitting examination would be a costly and time-consuming operation.

However, we are making no recommendation with respect to the exclusion of our transportation and claims records from the bill except to the extent they are within the general exclusions recommended herein or presently contained in the bill, but wish the committee to be aware of the possible results if the legislation is enacted in its present form.

For the reasons stated above, we recommend strongly that our working papers be excluded from the provisions of this bill. To accomplish this, we propose language along the following lines as an additional exception under section 161 (c) :

"Investigatory and/or audit files compiled for the purpose of complying with requests for information by the Congress, its committees, or its Members or for the purpose of reporting to the Congress on investigations or audits made pursuant to law."

The inclusion of an exception of this nature should preclude us from being required to make information available to individuals that would be detrimental to the interests of the Government since, in our opinion, all of the work of the accounting and auditing divisions is, as required by law, basically for the purpose of reporting to the Congress, its committees or its Members. We believe that this premise should be brought out in the committee's report on this bill.

In addition to the reasons stated above for the exclusion of information furnished by informants or otherwise submitted in confidence, it is evident that if such information and its sources are divulged to the public, information from such sources would no longer be available to the Government. Accordingly, we recommend that an additional exception be added to subsection (c) to the effect that disclosure is not required as to information submitted in confidence pursuant to statute or published rule or regulation or it be made clear in the legislative history that such information is of a "privileged or confidential nature" as that term is used in subsection (c) (4). It should also be made clear that subsections (c) (3) or (c) (4) include any information the disclosure of which would be a violation of 18 U.S.C. 1905.

We would like to point out that a number of files consisting of accountable officers' accounts containing such items as vouchers, contracts, etc., are in the technical custody of the General Accounting Office but actually in the physical possession of the various agencies. We assume that the responsibility of complying with the proposed legislation with respect to those files would be the responsibility of the agencies having physical possession of such files and that we could so provide in our regulations under subsection (a).

In order to assure that the authority of the General Accounting Office or other Federal agencies to examine agency records is not impaired by the exclusions set out in subsection (c), we suggest that there be included in section 2 of the bill a provision reading that—

"Nothing contained in this Act shall be construed as in any way diminishing the authority of any Federal agency to examine the records or files of any other agency subject to the provisions of this Act."

Your letter of February 19 also requested our comments on H.R. 5013 through H.R. 5021 and your letters of February 24, 26, and March 2 and 15, 1965, requested our comments on H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, and H.R. 6172. Since the above-mentioned bills are identical with H.R. 5012 considered above, the comments contained herein are likewise applicable to those bills.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General, of the United States.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., June 9, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: On May 14, 1965, this Department, pursuant to your request of March 24, submitted an initial report on S. 1336, a bill "To amend the Administrative Procedure Act and for other purposes." In such initial report

the Department stated that it was making a careful and detailed analysis of the changes that would be made by S. 1336, including the effect of such changes on the numerous and diversified programs of the Department. We have completed such analysis and are enclosing four copies thereof. If additional copies are desired we will be pleased to furnish them.

It is requested that the enclosed analysis be included as a part of the printed hearing record following our initial report dated May 14.

Your cooperation in this matter is greatly appreciated.

Sincerely yours,

JOHN A. SCHNITTKER, *Under Secretary.*

DETAILED ANALYSIS OF S. 1336 BY THE U.S. DEPARTMENT OF AGRICULTURE AND COMMENTS REGARDING THE IMPACT OF THE PROPOSED REVISION OF THE ADMINISTRATIVE PROCEDURE ACT UPON THE PROGRAMS AND ACTIVITIES OF THE DEPARTMENT

(This document supplements the Department's initial report dated May 14, 1965, in which the Department objected to the complete rewrite approach to amending the act and expressed its views concerning certain major changes contemplated by S. 1336. The Department's comments herein are limited to those provisions that involve changes in the existing act.)

SECTION 2—DEFINITIONS

Subsection 2(a)

S. 1336 would add the word "Commonwealths" in the exceptions to the definition of "agency" and would make agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them subject to section 4, as well as section 3. These changes appear to be justifiable. S. 1336 would also eliminate the exemption of functions under certain statutes from the Administrative Procedure Act, other than section 3 thereof. The Department has no objection to this change as it would not appear to have an effect on the operations of the Department.

Subsection 2(b)

The new definition of "private party" appears unnecessary. Moreover, the use of the term in subsequent provisions of the bill gives rise to concern. For example, the use of the term in subsection 8(c)(2) gives to private parties certain rights relating to a determination of exceptions by an agency rather than an agency appeal board while denying such rights to Government agencies appearing as parties in the proceeding. Further comments will be made later in connection with this matter.

Subsections 2(c) and (d)

The Administrative Procedure Act, in its definition of "rule," includes any agency statement of general "or particular" applicability and future effect and provides that the term 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." S. 1336 would strike the words "or particular" and the balance of the quoted language. It would include within the definition of "rule" any exception from a rule and include agency process for exception from a rule in the definition of "rule-making." S. 1336 would also change the definition of "order" by substituting the word "proceeding" for the word "matter," deleting the words "other than rulemaking but" and adding the words "to determine the rights, obligations, and privileges of named parties." It would also add a definition of "opinion" and include agency process for the amendment or repeal of an order in the definition of adjudication.

The changes in the definitions of "rule" and "order" would transfer to adjudication substantial areas of activities which are presently rulemaking. This transfer to the category of adjudication would include proceedings involving the issuance of orders prescribing rates for the future which are addressed to a particular person or persons performing functions in the nature of a public utility. The change would be in conflict with the basic principle of the Administrative Procedure Act that the public, except in unusual circumstances, should have notice and an opportunity to participate in proceedings for the purpose of formulating and promulgating substantive requirements of this nature.

The users of such facilities are entitled to the public notice required in rule-making proceedings and not provided for under adjudication proceedings.

The deletion of statements of "particular" applicability from the definition of "rule" would seriously and adversely affect the important regulatory programs under the Agricultural Marketing Agreement Act of 1937, as amended. For example, there are presently outstanding 75 milk marketing orders and 43 fruit and vegetable orders issued under such act. All of these orders are restricted to particular marketing or production areas and provide for the regulation of "particular" handlers who are described, but not named, in the marketing orders. These regulatory orders thus have been treated as orders of "particular" applicability and consequently within the rulemaking coverage of the Administrative Procedure Act. The underlying statute clearly deals with the promulgation of these marketing orders as quasi-legislative or rule-making in nature because it requires a public hearing at which all interested persons may appear and such hearing is not restricted to named parties. The courts also have so applied these provisions of the underlying statute as requiring rulemaking and not adjudicatory processes and this was the case both prior to and after the Administrative Procedure Act. See, e.g., *United States v. Wrightwood Dairy Company*, 127 F. 2d 907 (C.A. 7 1942). The deletion from the definition of "rule" of statements which have particular applicability but which are not addressed to named parties could only lead to unnecessary confusion and probably litigation as to what was intended by Congress.

Rules of general applicability having the force and effect of law do not contemplate exceptions therefrom for individuals subject thereto in the absence of specific provision in the rules for appropriate exceptions for classes of individuals. Any appropriate exceptions would necessarily be a part of the rule or amendment thereof. Ad hoc exceptions clearly do not constitute rulemaking. Therefore, the reference to exceptions in the definitions of "rule" and "rule-making" is not necessary and may be misleading.

For these reasons, the Department strongly recommends that the proposed changes not be made in the existing definitions of "rule" and "order."

With respect to the definition of "opinion" it would appear that the words "presented on the record" should be deleted as many opinions are issued in proceedings that are not determined on the record.

Subsection 2(e)

This amendment appears to make no substantive change in the present meaning of the term "conditioning of a license" but merely makes clear what is contemplated by the term "conditioning" and that it relates to the conditioning of a named licensee's license. Therefore, it would seem to be a desirable amendment.

SECTION 3—PUBLIC INFORMATION

General

The changes contemplated in this section represent a comprehensive revision involving substantial modification of the present requirements applicable to "public information." The Administrative Procedure Act presently exempts from the requirements of section 3 any function of the United States requiring secrecy in the public interest and any matter relating solely to the internal management of an agency. It further provides that other records shall be made available to persons "properly and directly concerned" but vests in the agency discretion to withhold records upon a finding of good cause. However, the proposed amendments, among other things, would delete the present exemption provisions, provide for the availability of records to "any person" without regard to his interest therein unless the records in question fall within certain specified exemptions of a more limited nature, with no discretion being vested in the agency, and impose burdensome indexing requirements which will not be of significant benefit to the public.

Our experience in the exercise of the discretion presently vested in the Department in connection with its numerous programs has not demonstrated a need for the substantial changes contemplated. The requirements of the proposed section 3 are so broad, and the specified exemptions are of such a limited nature, that the proposed changes would substantially interfere with the orderly and effective administration of the Department's responsibilities under statutory programs. A discussion of the specific changes follows.

Opening language

S. 1336 deletes the opening language of section 3 of the Administrative Procedure Act containing exceptions from the information requirements of such section for (1) any function of the United States requiring secrecy in the public interest and (2) any matter relating solely to the internal management of an agency and includes in lieu thereof certain exemptions from the information requirements in a new subsection (e). The provisions of exceptions or exemptions applicable to the entire section is a much more desirable approach than providing different exceptions or exemptions for the various subsections as was proposed in S. 1663. However, the scope of the exemptions contained in subsection 3(e) is much too narrow to protect the public interest. This matter will be considered more fully in our discussion of the provisions of subsection 3(e).

Subsection 3(a)

The words "for the guidance of the public" have been added after the words "currently published in the Federal Register." There is no objection to this change. In addition, the language of the Administrative Procedure Act reading "descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby the public may secure information or make submittals or requests" would be changed to "descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions." Apparently, the insertion of the words "the officers from whom" and "or obtain decisions" is intended to take the place of the present language requiring publication of delegations by the agency of final authority. While it would appear to have that effect it should be noted that it would require the agency to designate all officers from whom information or decisions may be obtained. This could lead to confusion and unnecessarily burden the agencies and the Federal Register, particularly in situations where a number of persons in an office serve the public in a purely ministerial manner.

The amendment would also delete the words "as well as forms" in subsection 3(a) and add "rules of procedure, descriptions of forms available or the places at which forms may be obtained." It would appear that publication of rules of procedure is contemplated by paragraph (B) of proposed subsection 3(a) and therefore the reference to rules of procedure in (C) is unnecessary. The inclusion of the language "or the places at which forms may be obtained" is an improvement and desirable.

The amendment would add the words "of general applicability" after the word "interpretations" and specifically include within the publication requirements every amendment, revision, or repeal of any of the listed documents. These would not appear to be substantive changes and the Department has no objection to them.

S. 1336 would further change the language with respect to the effect of failure to publish and provide that matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register. The provision for incorporation by reference in the Federal Register would seem to be desirable. However, it would appear that the provision that no person shall be adversely affected by any matter required to be published and not so published may lead to uncertainty and unnecessary litigation.

Subsection 3(b)

This subsection provides that staff manuals and instructions to staff that affect any member of the public must be made available for public inspection and copying, in accordance with published rules, unless such materials are promptly published and copies are offered for sale. The Department is strongly opposed to this provision. There are many types of staff manuals and instructions to staff that may affect members of the public but should not be published or made available for public inspection or copying. For example, staff manuals concerning investigation procedures or techniques to develop evidence of alleged violations of regulatory statutes or personnel irregularities may affect members of the public but they are internal in nature and should not be published or made available to the public. Similarly, instructions to staff often affect members of the public

but should not be made public information. This would include instructions to personnel in connection with the carrying out of investigations and a multitude of other instructions of a purely internal nature. The proposed requirement would impose a substantial burden on Government agencies and seriously impair the effective administration of statutory programs without a corresponding benefit to the public.

The requirement that each agency shall maintain and make available for public inspection and copying a current index of all matter which is required to be made available or published would impose a tremendous and expensive workload upon the agencies with no compensating benefit to the members of the public. It would include all matter presently published and indexed in the Federal Register, interpretations and statements of policy which are not so published, staff manuals and instructions to staff that affect any member of the public, and final opinions, orders and determinations in formal and informal adjudications. There would be literally millions of such documents. In this connection reference is made to our discussion relating to the provisions of subsection 5(b) concerning the great number of adjudications that would be subject to the provisions of that subsection. The very mass of the material required to be indexed would make the index of little use to the public. The Department is vigorously opposed to such a broad requirement.

The change in language with respect to the effect of failure to index and to either make available or publish any interpretation, staff manual or instruction that affects any member of the public, particularly the prohibition against "use," would appear to be unnecessary and could not only lead to uncertainty and unwarranted litigation. It should also be noted that the use of the term "private party" in such language results in an anomalous situation in proceedings where one Government agency appears as a party before another Government agency. In such a case the material that has not been indexed and either made available or published could not be relied upon, used, or cited as precedent against the private parties but could against the Government agency that is a party.

Subsection 3(c)

This subsection provides that "Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person." This would completely change the concept of the present provision of the Administrative Procedure Act which provides that matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

The proposed change could disrupt Government operations. If literally construed, persons having no legitimate interest or concern could make such broad demands for Government records as to make it impossible to carry on efficiently the normal operations of the agency.

The subsection also provides that an action to compel production of agency records and information may be brought in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated. The use of the term "information" would not seem to be appropriate. The use of such term will encourage litigation on the basis of the contentions that the provision is applicable to all information—not just written material—and that an agency must compile information requested by a member of the public, not merely produce records. Moreover, if a venue provision is to be included, provision should be made that a Government agency shall not be required to produce records except at the place where such records are kept. Without such a limitation Government operations could be seriously impeded.

Subsection 3(e)

As heretofore noted, S. 1336 would delete the opening language of section 3 of the Administrative Procedure Act providing that the requirements of such section shall not apply to (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency. In lieu thereof, subsection 3(e) provides for certain specific exemptions from the requirements of section 3. While these exemptions dispose of certain problems that were inherent in previous drafts of the proposed legislation, there are still a number of matters that cause serious concern. In the first place, in lieu of the general exemption for matters relating solely to internal management, it is proposed that there be exempted matters "related solely to the

internal personnel rules and practices of any agency" and "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." These changes, together with the limitation of the exemption for interagency or intraagency written communications to those "dealing solely with matters of law and policy" would have a serious impact upon the programs of the Department. The free exchange of views and information within an agency or between agencies is essential to efficient and effective administration. A discussion of the facts is usually an integral part of a discussion of law or policy. Nevertheless, a reference to the facts in such a memorandum would make the document nonexempt. This would discourage the exchange of views and result in extremely poor administration. It is the position of the Department that all internal management matters should be exempted from the public information provisions.

In addition, the exemption for "trade secrets and commercial or financial information obtained from the public and privileged or confidential" is clearly too restricted in scope. It would not include such matters as informal complaints made to an agency of alleged unlawful action in connection with regulatory programs. The absence of a clear exemption for information received by an agency on a confidential basis would seriously impair many programs administered by the Department, including research, loan, regulatory, and service programs. The language also would not include any "trade secrets or commercial or financial information" obtained at Government expense and not from the public. Moreover, the exemption would not protect from premature disclosure decisions and the details thereof concerning Government purchasing programs and the results of experiments and research performed at Government expense. Furthermore, the language "and privileged or confidential" is not clear and will lead to unwarranted litigation. The exemption relating to "investigatory files compiled for law enforcement purposes *except to the extent available by law to a private party*" is entirely too narrow. It would not include investigations to determine compliance with conditions of loan agreements or other contracts, or investigations for any purposes except law enforcement. The proposed exemption is also uncertain in scope and will encourage litigation.

SECTION 4—RULEMAKING

General

The opening language of section 4 of the Administrative Procedure Act contains exceptions from the rulemaking requirements of such section for (1) any military, naval, or foreign affairs functions of the United States and (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. S. 1336 deletes such language and in lieu thereof provides for certain exemptions in subsection 4(h). It is the view of the Department that the exemptions in subsection 4(h) are not sufficiently broad in scope to protect the public interest. We will discuss this matter in more detail in connection with our comments on that subsection.

Subsection 4(a)

The provision in the proposed new subsection 4(a) that prior to notice of proposed rulemaking an agency may afford opportunity to interested persons to submit suggestions would have no impact upon the work of the Department since all agencies presently have such authority.

Subsections 4(b), (c), and (d)

Subsection 4(b) of S. 1336 makes a number of changes in the present language of the Administrative Procedure Act without apparent substantive change. There appears to be no need for such changes in language and, therefore, they should not be made as they can only lead to uncertainty as to the intent of such changes.

Subsection 4(b) also strikes the exception in subsection 4(a) of the Administrative Procedure Act from the requirement of publication of notice of proposed rulemaking in the Federal Register reading "(unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law)." It would seem that the best possible notice of rulemaking that persons subject to the rule can have is actual notice in accordance with law. The only apparent reason for eliminating this exception is that it is proposed to change the definitions of "rule" and "adjudication," to make certain rules addressed to named parties; e.g., rate orders (and perhaps rules of particular applicability), adjudication, thereby eliminating any need for prior notice of

proposed rulemaking in such matters. These changes appear to result in a conflict with the basic concept of affording reasonable notice to the public of proposed agency action where possible. For these reasons the proposed changes should not be made.

Subsection 4(a) of the Administrative Procedure Act presently provides that except where notice or hearing is required by statute, the notice provisions shall not apply to "interpretative rules, general statements of policy, rules of agency organization, procedure, or practice." S. 1336 would delete such exception from the notice provisions and would provide in subsection 4(h) that advisory interpretations and rulings of particular applicability, minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights and rules of agency organization are exempted from all the requirements of section 4.

These changes would appear to make informal rulemaking procedures applicable to interpretative rules, general statements of policy, and rules of procedure or practice which presently are not subject to such procedures. The subjecting of interpretative rules and statements of policy, as well as rules of procedure and practice, to the rulemaking procedures of section 4 for informal rulemaking can only complicate unnecessarily the administration of programs and discourage the issuance of interpretative rules and statements of policy to the detriment of the affected members of the public. There would be a tendency to rely upon decisions resulting from ad hoc consideration of problems without the benefit of general interpretative rules and statements of policy. The issuance of such rules and policy statements should be encouraged in the public interest rather than discouraged by subjecting their issuance to unnecessary procedural requirements.

Subsection 4(a) of the Administrative Procedure Act presently provides also that the notice provisions of section 4 shall not apply in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. S. 1336 would delete such provision but include a provision in subsection 4(d) to the effect that "In any situation in which the agency finds (and incorporates the finding and a brief statement of the reasons therefor in the rule issued) that rulemaking without the notice and procedures provided by subsections (b) and (c) of this section is necessary in the public interest, an agency may issue an emergency rule which shall be effective for not more than 6 months from the effective date thereof and may be extended for a period not to exceed 1 year only by commencement, prior to the expiration of the original effective period, of a rulemaking proceeding dealing with the same subject matter, upon the notice required by subsection 4(b) which shall contain an express statement of the extension of such emergency rule and the period for which it is extended."

These proposed changes would appear to be unnecessary and undesirable. The present provision of the act for exemption of rulemaking from procedural requirements on a finding that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest" adequately protects affected persons and allows the necessary latitude for effectuating the statutory programs and objectives. The provision for temporary rules could only lead to a substantial amount of unnecessary rulemaking proceedings where affected persons are not concerned with or benefited by such proceedings. The experience of the Department demonstrates no need for these time-consuming procedures. The Department, therefore, strongly recommends that the existing provision be retained.

Subsection 4(b) of the Administrative Procedure Act presently provides that interested persons shall be afforded an opportunity to participate in rulemaking through the submission of written data, views, or arguments "with or without opportunity to present the same orally." Subsection 4(c) of S. 1336 would substitute a requirement for opportunity to present views orally "unless the agency determines that oral argument is inappropriate or unwarranted." The use of these standards for refusal to afford opportunity for oral submission—namely, "inappropriate" or "unwarranted," could only lead to uncertainty and litigation. It is believed that full discretion should be vested in the agency as at present if the agency functions are to be efficiently and properly exercised in the public interest.

Subsection 4(b) of the Administrative Procedure Act provides that the requirements of sections 7 and 8 shall apply in place of those of subsection 4(b)

in formal rulemaking where action is required to be based upon the record after opportunity for a hearing. Subsection 4(c) of S. 1336 would provide that where rules are required by the Constitution or by statute to be made on the record after opportunity for hearing, section 7 shall apply to such proceedings except that the presiding officer may be any responsible officer of the agency. It would further provide that in proceedings in which the agency has not presided at the hearing, the officer who presided "shall make a recommended decision," but that the agency may omit a recommended decision when the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires. These changes would result in eliminating the application of section 8 to such proceedings. The objective of relieving such proceedings from rigid formal adjudication procedures is desirable. However, the changes also require the presiding officer to make a recommended decision with no provision for the issuance of a tentative decision by the agency in lieu of a recommended decision where determined desirable. This present procedure is essential in quasi-legislative matters involving substantial policy considerations and frequently requiring expeditious action to insure the interested members of the public receiving the full benefits anticipated by the statutory programs in question.

In certain rulemaking proceedings there are substantial policy considerations and a need for the use of experienced and technical personnel. The present provisions of the Administrative Procedure Act recognize these considerations and provide that an agency or a responsible official thereof may issue the recommended decision without having presided at the rulemaking hearing. The proposed amendments would eliminate this flexibility of procedure to the detriment of Department programs.

Subsection 4(f)

Subsection 4(c) of the Administrative Procedure Act presently provides that the required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than 30 days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

S. 1336 would eliminate "substantive" thereby including nonsubstantive rules under the requirement for publication 30 days prior to effective date, and would eliminate the exception for rules granting or recognizing exemption or relieving restriction and interpretative rules and statements of policy. These changes raise serious problems, particularly with respect to rules relieving restrictions and interpretative rules and statements of policy. These matters frequently must be made effective promptly upon issuance to afford the public the full benefit thereof. Under the proposed changes there is serious question that an agency could make a finding of good cause for not giving the 30-day notice with respect to this type of rule. Although the Congress by the present provision recognized that it was in the public interest for these categories of rules to be free from such limitation, the proposed amendments may constitute a determination by the Congress to the contrary and it would, therefore, be difficult to make the necessary finding.

Subsection 4(g)

Subsection 4(d) of the Administrative Procedure Act presently provides that every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. Subsection 4(g) of S. 1336 would, in addition, provide that any interested person shall be accorded the right to petition for an exception from such rule.

The rules affected by this change are rules of general applicability having the force and effect of law and, therefore, they do not contemplate exceptions therefrom for individuals subject thereto, in the absence of specific provision in the rules for appropriate exceptions for classes of individuals. This proposed change would violate the concept of equal application of the law and create pressure for unwarranted exceptions. Where there is a sound basis for amendment to a rule to provide exceptions under appropriately prescribed circumstances the present provision of the act is adequate to take care of such circumstances.

Subsection 4(h)

The opening language of section 4 of the Administrative Procedure Act excepts from the rulemaking requirements of such section (1) any military,

naval, or foreign affairs functions of the United States and (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts. S. 1336 deletes such language and in place thereof contains certain specific exemptions in subsection 4(h). The exception for military, naval, and foreign affairs functions has been replaced by an exemption for rulemaking required by an Executive order to be kept secret in the interest of the national defense or foreign policy. This change would not appear to adversely affect the work of this Department. The general exception for matters relating to internal management or personnel has been replaced by limited exemptions for rulemaking that relates solely to internal personnel rules and practices of an agency and rules of agency organization. These limited exemptions are not adequate to effectuate the public interest and would result in a substantial increase in the operating expenses of Government agencies without a resulting benefit to the public. It is essential that a general exemption for matters relating to agency management or personnel be retained.

S. 1336 would completely eliminate the exception for matters relating to public property, loans, grants, benefits, or contracts. The tremendous scope of governmental operations in these areas makes it essential that the determinations of mechanics, policies, and procedures in connection with such functions be not burdened by rigid procedural requirements or exposed to unnecessary litigation with respect to procedures. The committees of Congress in their reports on the Administrative Procedure Act clearly indicated this need as follows: "The exception of proprietary matters is included because the principal considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements." This change, by reason of the extensive price support, agricultural conservation programs, land diversion programs, loan, management of national forest lands and national grass lands, and other programs administered by the Department which would be affected, would substantially impair the efficient administration of the Department's responsibilities and could result in considerable increases in cost with no compensating benefits to the large segment of the public affected by the programs in question or to the general public.

SECTION 5—ADJUDICATION

Subsection 5(a)—Formal adjudication—Introductory language

The opening language of section 5 of the Administrative Procedure Act presently provides that "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives * * *". Subsection 5(a) of S. 1336 would change the phrase "required by statute" to "required by the Constitution or by statute" and would delete the present exemption from the requirements of section 5 for the six categories of cases specified above.

The addition of the words "by the Constitution" would not appear to constitute a substantive change in the present law. Under the existing language the courts have held that the provisions of section 5 are applicable in cases required by the Constitution to be determined on the record after opportunity for an agency hearing.

The deletion of the exemptions now contained in section 5 of the Administrative Procedure Act would greatly extend the scope of cases subject to formal adjudicatory procedures.

The elimination of the exemption for proceedings subject to a subsequent trial *de novo* would have substantial impact on this Department. This Department handles about 500 reparation proceedings annually in which the decision of the Department is expressly made subject, by statute, to a trial *de novo* in a U.S. district court. Such reparation proceedings, therefore, are not now subject to formal adjudicatory procedures under section 5 of the Administrative Procedure Act.

These reparation cases are conducted under the Perishable Agricultural Commodities Act (7 U.S.C. 799a et seq.), and the Packers and Stockyards Act (7 U.S.C. 181 et seq.). All of the parties are private litigants and the agency acts in a quasi-judicial capacity to resolve disputes between such private parties. The Department utilizes specially qualified attorneys from the General Counsel's Office, in Washington and in numerous field offices, as presiding officers to hear and consider the evidence presented by the respective parties to the litigation and recommend the granting or denial of reparation. The final order granting or denying reparation is issued by the Judicial Officer of the Department.

The present procedure provides a long established and satisfactory means of resolving these disputes between private litigants, particularly because of the flexibility in the timing and location of hearings which is made possible by the use of field attorneys of the Office of the General Counsel throughout the United States. Adequate protection is accorded to the parties by reason of the fact that a trial de novo is a matter of right by statute. We believe that the imposition of the formal adjudicatory procedures required by subsection 5(a) would seriously impair the effectiveness of these programs, would result in substantial delays and unwieldy handling of these matters, and would deprive the parties of the benefit of informed judgment by specialists in this field. It would, of course, also require a very substantial increase in the number of hearing examiners assigned to the Department of Agriculture.

The deletion of the exemption concerning the selection or tenure of an officer or employee of the United States and the consequent application of formalized procedures to such matters could only result in unwarranted delays and costs without commensurate benefit to the persons affected.

The deletion of the exemption dealing with matters where the decision rests solely on inspections, tests, or elections, also is not desirable. As to matters where the decision rests solely on inspections or tests, it is important that highly qualified technical personnel deal with the questions involved so as to assure all persons affected of an informed judgment by expert personnel. The application of formalized procedures, together with the requirement that such matters be decided solely by hearing examiners who are not specialists in the field, would almost certainly impair the benefits which the affected members of the public now receive through review by specially qualified technical personnel. The complicated procedural requirements would also serve to delay actions. The elimination of the exemption for proceedings where the decision rests solely upon elections clearly is not appropriate by reason of the very nature of election procedures.

The deletion of the remaining three exemptions, i.e., the conduct of military, naval, or foreign affairs functions, cases in which the agency is acting as an agent for a court and the certification of employee representatives, likewise does not appear to be necessary or desirable. For example, where an agency is acting as agent for a court, the court presumably would be the best judge of the procedures which it believes appropriate to carry out the responsibilities which it asks the agency to perform.

Formal adjudication—Specific procedural changes

Subsection 5(a) of the Administrative Procedure Act now requires a notice of *hearing* in formal adjudication cases. Paragraph (1) of subsection 5(a) of S. 1336 requires notice of a "proceeding."

We have no objection to the proposed change, provided that it does not necessitate contentions made by him in his own petition. In most adjudicatory cases, the adjudicatory proceeding may be instituted by a petition or complaint filed by the allegedly aggrieved party against the agency, see, e.g., 7 U.S.C. 608c(15) (A). It would serve no useful purpose for the agency to notify the petitioner of the contentions made by him in his own petition. In most adjudicatory cases, the pleadings of the parties should adequately delineate the issues without need for any special notices, and presumably proposed paragraph (2) of subsection 5(a) dealing with pleadings would more appropriately cover such questions. While the provisions of paragraph (1) of subsection 5(a) may be appropriate for disciplinary actions or other proceedings brought by the agency, they do not appear to be appropriate for those situations where allegedly aggrieved parties initiate the proceeding.

Paragraph (2) of subsection 5(a) of the proposed bill would require each agency to provide adequate rules governing "its pleadings, including responsive

pleadings, and other papers." It further provides that to the extent practicable, such rules shall conform to the "Rules of Civil Procedure" or "Rules of Criminal Procedure for the District Courts of the United States." No such provision is presently contained in the Administrative Procedure Act.

We believe this change should not be adopted in its proposed form.

The Rules of Civil Procedure for the U.S. District Courts primarily were designed to fit requirements of litigation involving two or more private parties to a dispute and are not automatically necessary or desirable in the many cases of adjudication covered by subsection 5(a) which do not involve the resolution of disputes between two or more private parties. Similarly, the Rules of Criminal Procedure for the U.S. District Courts were designed for the disposition of criminal matters and may not be particularly appropriate for administrative adjudications. Moreover, the requirement that the agency rules shall, to the extent practicable, conform to the Rules of Civil Procedure or the Rules of Criminal Procedure will necessarily lead to contentions that agency rules for particular proceedings do not conform to the extent practicable to the Rules of Civil Procedure or the Rules of Criminal Procedure, as the case may be. Furthermore, the term "other papers" is not defined and in the absence of definition could only lead to uncertainty as to its meaning and effect.

We believe the provision, as written, would almost certainly lead to much confusion and unnecessary litigation concerning its purpose and effect. If any change is to be made concerning pleadings we suggest, as a substitute, a provision that each agency shall specify, by published rule, the required content of pleadings in cases before it subject to the requirements of proposed subsection 5(a).

Paragraph (3) of subsection 5(a) of the proposed legislation would provide for prehearing conferences. Such conferences would not be mandatorily required in every case, but would be provided for by rule for use in such proceedings as the agency or presiding officer may designate. Such conferences would be held before the presiding officer who may require the production and service of relevant matter upon all parties and may require statements of facts and issues and arguments in support thereof. At the conclusion of the conference, the presiding officer would issue an order limiting the issues for hearing to those not disposed of by admissions or agreements, which order would generally control the subsequent course of the proceeding.

The Department has no objection to the basic concept of such prehearing conferences, provided that they are not to be required in all cases on a mandatory basis. In fact, this Department has made provision for prehearing conferences in some of its rules of practice in cases now subject to section 5. However, the provision for the production and service of "relevant" matter upon all parties should be modified to make it clear that privileged matter, even though relevant, is not subject to this requirement. This could be done by inserting the words ", not privileged," after "relevant matter." It should also be noted that the word "order" is used twice in a manner inconsistent with the defined meaning of the word. See also our remarks on discovery.

Paragraph (4) of subsection 5(a) provides that where modified procedures have not been designated (under 5(a)(5)), or to the extent that the controversy has not been settled or adjusted, there shall be a hearing and decision upon notice and in conformity with sections 7 and 8. This, apparently, represents no substantive change from the present provisions of the Administrative Procedure Act dealing with formal adjudication. However, with the expanded scope of formal adjudication, problems may arise as indicated in our comments regarding such expansion. The language "Where modified procedures have not been designated" is not clear in meaning. Paragraph (5) states that the agency may "designate" the proceedings in which such procedures may be used by consent of the parties. To clarify the application of paragraph (4), it is suggested that the wording of the paragraph be changed to read as follows: "Where modified procedures provided for in paragraph (5) of this subsection are not to be used, to the extent that the controversy has not been settled or adjusted, there shall be a hearing and decision upon notice and in conformity with sections 7 and 8."

S. 1336 would add a new paragraph (5) to subsection 5(a) providing for modified hearing procedures for formal adjudicatory matters. It would provide that each agency shall by rule provide for abridged procedures which shall be on the record and be reasonably calculated to promptly, adequately and fairly inform the agency and the parties as to the issues, facts, and arguments involved. Such

procedures would be for use by consent of the parties in such proceedings as the agency may designate. Provision would be made for the agency to designate hearing examiners or other agency personnel of appropriate ability to conduct such abridged proceedings. The officer who conducted such a proceeding would be required to make his decision based on the record and subject to the provisions of section 8, but the requirements of section 7 would not be applicable.

This proposal for abridged and simplified formal adjudicatory proceedings may have some merit, particularly if the scope of formal adjudicatory proceedings were to be broadened.

As noted in our comments concerning the opening language of subsection 5(a), it is the Department's view that the elimination of the exemption from the formal adjudicatory procedures for proceedings subject to a subsequent trial de novo would seriously and adversely affect the programs of the Department under the Perishable Agricultural Commodities Act and the Packers and Stockyards Act. If, notwithstanding the views expressed by this Department, the exemption for such proceedings should not be retained, the language of paragraph (5) would give rise to complications with reference to the handling of reparation proceedings under the Perishable Agricultural Commodities Act. That act provides that in complaints wherein the amount claimed as damages does not exceed the sum of \$1,500, an oral hearing need not be held and proof in support of the complaint and in support of the defendant's answer may be supplied in the form of depositions or verified statements of fact unless the Secretary directs that an oral hearing be held. The procedure provided for by the statute has expedited proceedings and resulted in substantial savings to the parties and to the Government in cases involving relatively minor amounts. To make it possible to continue to use such procedures specifically provided for by statute, it would seem necessary to amend the third sentence of paragraph (5) to read as follows: "Unless otherwise provided by statute, the procedures shall be for use by consent of the parties in such proceedings as the agency may designate."

Paragraph (6) of subsection 5(a) deals with separation of functions in formal adjudicatory matters. Subdivision (A) provides that no officer who presides at the reception of evidence shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating, prosecuting, or advocating functions for any agency, and that no such person, other than a member of an agency, engaged in the performance of investigating, prosecuting, or advocating functions in any case, shall in that or a factually related case, participate or advise in the decision, originally or on agency appeal or review, of such case except as witness or counsel in public proceedings. Subdivision (B), except with respect to ex parte matters, prohibits communications by presiding officers or members of an agency appeal board, other than members of an agency, with any person or agency on any fact in issue, unless upon notice to all parties, except that a member of an agency appeal board may consult with other members of the board.

This Department has no objection to the objective and purpose of this provision, but does question whether it is an improvement over present subsection 5(c) of the Administrative Procedure Act dealing with the same subject matter.

Subdivision (B) would prohibit consultation by one presiding officer with another presiding officer who may have previously decided or have pending a factually similar case, not concerning the same parties. Such a prohibition would be undesirable.

We fail to see the need for precluding presiding officers and members of agency appeal boards from obtaining the aid of specially qualified employees who have not engaged in investigating, prosecuting, or advocating functions. This will unduly impair their access to necessary assistance from experts who have no investigating, prosecuting, or advocating functions and no interest in the particular proceeding. The existing provision of the Administrative Procedure Act precluding consultation with employees who have engaged in investigating, prosecuting, or advocating functions in the particular proceeding or a factually related case would appear adequate.

Emergency action

Paragraph (7) of proposed subsection 5(a) would permit a summary adjudication without the notice of other procedures required by subsection 5(a), provided that a finding is made that immediate action is necessary for the preservation of the public health or safety or in situations where summary action is otherwise provided by law. The summary action would be subject to immediate judi-

cial review unless the agency provides for an immediate hearing to be conducted in accordance with the act and takes such other action as will effectively protect the rights of the persons affected. Express provision is made for injunctive relief to stay the taking of such action in appropriate cases.

In view of the proposed elimination of the exemptions from the formal adjudication requirements presently contained in the Administrative Procedure Act many determinations may be made in matters subject to subsection 5(a) not involving the public health or safety but where immediate action is required to promote the public interest or the interest of individuals. For example, this could be the case in matters relating to the selection or tenure of officers or employees of the United States and matters in which the decisions rest solely on inspections and tests. The language requiring a finding that immediate action is necessary for the preservation of the public health or safety should, therefore, be broadened.

The provision for immediate judicial review of such emergency action seems inappropriate and unnecessary. Any such action presumably would be of sufficient finality to permit judicial review under section 10, if otherwise permitted by that section.

The wording of the second sentence of paragraph (7) gives rise to concern for another reason. The sentence reads: "Such action shall be subject to immediate judicial review in accordance with the provisions of section 10, unless the agency provides for an immediate hearing to be conducted in accordance with this act and takes such other action as will effectively protect the rights of the persons affected." This language will encourage litigation even where the agency has provided for an immediate hearing, on the basis that the agency has not taken other action required to protect the rights of the complainant.

Subsection 5(b)—Mandatory procedures—All other "adjudication"

Subsection 5(b) would impose minimal procedural requirements for all cases of adjudication not covered by subsection 5(a), except those involving inspections and tests. It would require the agency by rule to provide procedures which shall promptly, adequately, and fairly inform the agency and the parties of the issues, facts, and arguments involved. It would further provide that without delay "after conclusion of the proceeding" the officer who conducted such proceeding shall make his decision which shall constitute final agency action, subject only to such appeal and review as may be provided by agency rule. This proposed change would seriously and adversely affect numerous important programs of the Department of Agriculture and we believe it to be highly objectionable.

The broad definitions of "order" and "adjudication" in section 2(d) are so worded as to make virtually every informal determination or action of the Department, other than rulemaking, an "adjudication" which would be subject to the requirements of subsection 5(b), except matters involving inspections and tests. Some of the programs which would be directly and seriously affected would be the agricultural conservation programs, land diversion programs, and price support programs, which directly or indirectly affect millions of farmers who produce agricultural commodities and involve innumerable determinations concerning such matters as qualification for the benefits of the program; the rural electrification and telephone programs which involve numerous substantial loans and many decisions under each loan in taking specific actions under loan contracts and mortgages by way of approval or disapproval of borrowers' proposals; the Farmers Home Administration program which also entails the making of a vast number of loans to individual farmers and others in rural areas; and the Forest Service programs which involve the management of the national forests and national grasslands, including each year the consummation of forest products sales and the granting of permits for access, grazing, occupancy, recreation, and other special uses. The magnitude of such operations is illustrated by the following facts: In fiscal year 1963, there were approximately 170,000 such sales and permits involved in the land management functions of the Forest Service. Under the 1964 feed grain program approximately 1,300,000 applications to participate in the program were approved and under the 1964 wheat diversion program approximately 611,000 applications to participate were approved. The Farmers Home Administration, in 1963, received 202,799 applications for loans and rejected 70,005. Each of these matters involves at least one or more individual determinations which would appear to come within the coverage of proposed subsection 5(b) and, therefore, be subject to the formalized requirements imposed by that subsection.

It is respectfully urged that proposed subsection 5(b), which would for the first time impose drastic and unworkable procedural requirements on the day-to-day determinations which must be made by the Department of Agriculture in the expeditious and ordinary handling of its many programs in the public interest, should not be adopted.

It should be noted that the language of subsection 5(b) is inept. It provides that: "Without delay after conclusion of the proceeding, the officer who has conducted it shall make his decision." A proceeding is not concluded until after the decision has been rendered.

Subsection 5(c)—Opportunity for settlement

Subsection 5(c) would incorporate, with modification, some of the language presently in subsection 5(b) of the Administrative Procedure Act concerning opportunity to parties to submit and have considered offers of settlement. The change would seem to make such opportunity a matter of right prior to the hearing and a matter of discretion of the agency at any time thereafter, if time, the nature of the proceeding, and the public interest permit. The placement of the new provision within section 5 would make such opportunity for settlement mandatory with respect to all informal as well as formal adjudicatory proceedings.

We see no need for this proposed change. If the objective is to compell still another formalized step in the course of the proceeding, it would only serve to delay and confuse the conduct of the action and impose on agencies an additional and unnecessary workload. Also, as drafted, it is not clear whether the opportunity for settlement is a matter of right or a matter of discretion during the hearing itself. Furthermore, although the provision may be appropriate for formal adjudicatory cases, it is inappropriate for the numerous determinations made daily by this Department in the course of operation of its programs which are not truly "cases" in which offers of settlement would be appropriate. For example, it would not be appropriate to provide for opportunity to make an offer of settlement in a situation where the Forest Service, in its management of the national forests and national grasslands, determine that a grazing permit shall be terminated.

Offers of settlement would be inappropriate in certain proceedings, such as ratemaking proceedings, that are essentially rulemaking in nature and are so considered under the Administrative Procedure Act but which would become adjudication under the proposed broadened definition of that term.

It should also be noted that the provision assumes that hearings are held in all adjudications. The great bulk of agency actions that are defined as "adjudications" normally do not involve hearings.

In many program areas there is no authority to compromise claims. It is assumed that it is not the intent to create such authority where none presently exists.

SECTION 6—ANCILLARY MATTERS

Subsection 6(a)

Subsection 6(a) of the Administrative Procedure Act presently provides that any person compelled to appear in person before any agency or representative thereof shall be accorded the right to counsel, or, if permitted by the agency, representation by other qualified representative. S. 1336 would delete the words "compelled to appear in person" and add in lieu thereof the words "appearing voluntarily or involuntarily." It would also add the words "in the course of an investigation or in any agency proceeding."

The Department has no objection to these amendments. It has been the consistent practice of the Department to accord all persons appearing before it full rights to adequate representation.

The bill would also amend the second sentence of subsection 6(a) which reads "Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding" by adding at the end thereof the words "or investigation." It would appear that the added language should be changed to "or public investigation." A person who is being investigated in a nonpublic investigation should not be accorded the right to appear by counsel. Consideration should also be given to the use of the words "Every party" at the beginning of the sentence in question. It would appear that a public investigation may or may not have "parties" within the normal connotation or such word depending on the nature of the investigation.

Subsections 6 (b) and (c)

S. 1336 would add a new subsection 6(b) entitled "Practice by Attorneys" providing that "Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency." The amendment would also provide that when such a person represents another before an agency his personal appearance or signature shall constitute a representation that he is both properly qualified and authorized to represent the particular party in whose behalf he acts. The amendment further provides that "Nothing herein shall be construed * * * (B) to authorize or to limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; (C) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation of an agency; or (D) to prevent an agency from requiring a power of attorney before the agency transfers funds to the attorney for the party whom he represents." A new subsection 6(c) would also be added providing for service upon attorneys or other qualified representatives.

Although the Department is in accord with the purpose of these amendments, there would appear to be no need for legislation insofar as the programs of the Department are concerned. Our present procedures provide that an interested party in any proceeding may appear in person or by counsel or other representative. In regard to counsel representing an interested party, no specific standards are provided and any person who is a member in good standing of the bar of the highest court of a State or possession of the United States or of the District of Columbia, is entitled to appear as counsel. The only requirement imposed by the Department on persons appearing in a representative capacity is that such persons must conform to the standards of ethical conduct required of practitioners before the courts of the United States. The Department provides for service to or by such representatives.

It is our view that if legislation is desirable on this subject it would be preferable to deal with it as separate legislation rather than as an amendment to the Administrative Procedure Act.

Subsection 6(d)

Subsection 6(d) of the Administrative Procedure Act presently provides that "Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." S. 1336 would delete the words "compelled to submit" and substitute in lieu thereof the words "who submits" and would delete the exception relating to nonpublic investigatory proceedings.

The Department has no objection to the change in language from "compelled to submit" to "who submits." It would appear reasonable that any person who submits data or evidence, in any proceeding other than a nonpublic investigatory proceeding, whether voluntarily or compelled to do so, should be able to procure a copy or transcript thereof upon payment of prescribed costs. The Department, however, strongly opposes the elimination of the exception for nonpublic investigatory proceedings. The elimination of such exception could adversely affect and impede the conduct of such nonpublic investigations.

Subsection 6(e)

Subsection 6(e) of the Administrative Procedure Act presently provides that agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. It further provides that upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law. The present provision does not constitute an affirmative grant of subpoena authority. It is applicable only where subpoenas are authorized by other statutes. In such cases the provision has the effect of making subpoenas available to private parties subject to a showing of general relevance and reasonable scope of the evidence sought, if so provided by the agency rules of practice.

Subsection 6(e) of S. 1336 requires that: "Unless otherwise provided by statute, every agency shall by rule provide for the issuance of subpoenas and shall issue

subpenas upon request to any party to an adjudication and shall by rule designate officers, including the presiding officer, who are authorized to sign and issue such subpenas" and that "When objection is made to the general relevance or reasonable scope of such subpoena, the presiding officer or the agency may quash or modify the subpoena." The subsection further provides that: "Agency subpoenas authorized by law shall be issued to any party to a rulemaking proceeding upon request upon a showing of general relevance and reasonable scope of the evidence sought" and that court action with reference to a subpoena may be "in the district court in the judicial district in which the appearance is required or in which the person to whom the subpoena is directed is found, resides, or has his principal place of business."

The proposed language would provide for the automatic issuance of subpoenas in adjudication proceedings but would authorize the issuing officer or the agency to quash or modify a subpoena when objection is made to the general relevance or reasonable scope thereof. This would constitute an affirmative grant of subpoena authority in all adjudication proceedings. Due to the broadened application of the adjudication requirements, the provisions with reference to subpoenas would be applicable to determinations affecting the public under a great number of programs, many of which are far removed from the areas where subpoenas are normally considered as appropriate. In rulemaking proceedings subpoenas would be made available only where authorized by other statutes. The reason for the differentiation in this respect between adjudication and rulemaking is not clear.

It should be noted that the reference to the issuance of subpoenas to any party to a rulemaking proceeding" is inappropriate in view of the fact that in the usual rulemaking proceeding there are no parties.

It is the Department's view that the language presently contained in subsection 6(c) provides the necessary authority and safeguards with reference to the issuance of subpoenas. Where subpoena authority is necessary it is specifically provided for by statute. The experience of the Department has not demonstrated the need for such authority in connection with all adjudication proceedings. The Department, therefore, opposes the provision generally granting subpoena authority in such proceedings. Certainly, any general grant of subpoena authority should be limited to formal adjudication proceedings. This could be accomplished by inserting the language "subject to subsection 5(a)" after "party to an adjudication" in the first sentence of subsection 6(e). The Department does not oppose the change providing for the designation of officers who may sign subpoenas, or the change relating to venue of subpoena actions.

Subsection 6(f)

The bill would redesignate present subsection 6(d) and 6(f) and change the last sentence to read as follows: "Except in affirming a prior denial, or where the denial is self-explanatory or of an application for agency review such notice shall be accompanied by a simple statement of reasons." The Department has no objection to such change.

Subsection 6(g)

S. 1336 would add a new subsection 6(g) as follows: "Any period of time prescribed or allowed by this act, by any other statute administered under this act, or by rule or order of an agency, shall not include the day of the act, event or default after which the designated period of time begins to run. However, the last day of the period so computed is to be included unless it is a Saturday, Sunday, holiday or half holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, holiday, nor half holiday."

The Department concurs with the intent of this change. Uniformity in the computation of time would seem highly desirable. It would appear, however, that clarification is necessary. It is not clear whether Federal, State, or local holidays are referred to. We are not aware of any Federal half holidays. If not restricted to Federal holidays, considerable confusion could result.

Subsection 6(h)

The bill would add a new subsection 6(h) reading as follows: "Depositions and discovery shall be available to the same extent and in the same manner as in civil proceedings in the district courts of the United States except to the extent an agency deems such conformity impracticable and otherwise provides for deposition and discovery by published rule."

The proposed provision would make depositions and discovery available in all proceedings, formal and informal, adjudicatory and rulemaking, in the broadest sense. The procedures in connection therewith would be required to conform to those applicable to civil proceedings in the district courts of the United States except to the extent an agency deems such conformity impracticable and otherwise provides for depositions and discovery by published rule.

Recommendation No. 30 of the Administrative Conference of the United States approves the principle of discovery in adjudicatory proceedings and recommends that each agency adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings. This recommendation recognizes (1) that discovery is not appropriate in rulemaking proceedings and (2) that the agency, by rule, should specify when and in what manner discovery should be had in particular adjudicatory proceedings. We concur in this recommendation rather than in the proposed amendment.

We believe that the agency should be empowered to prescribe, by rule, the manner and extent in which discovery is to be applied to particular proceedings. For example, agency proceedings, particularly disciplinary proceedings, may also have criminal implications and it would be improper to require discovery in agency proceedings for use in the criminal action. Also, discovery is not appropriate in public rulemaking proceedings which are quasi-legislative in nature. Moreover, exemption should be provided for privileged matter, including agency records of a confidential nature.

The Department strongly objects to the proposed amendment. It would have a substantial adverse impact on all programs of the Department and result in considerable litigation. The experience of the Department has demonstrated no need for such change.

Subsection 6(i)

The bill would add a new subsection 6(i) which would provide that "Upon reasonable notice an agency may consolidate related proceedings or order joint hearings on common or related issues in different proceedings." The Department has no objection to the proposed change although agencies presently have and exercise the authority to consolidate related proceedings and hold joint hearings in different proceedings in appropriate situations.

Subsection 6(j)

S. 1336 would add a new subsection 6(j) reading: "Every agency proceeding or action exempted by this act because the national defense or foreign policy is involved, from the procedures otherwise required by this act shall be governed by rules of procedure which conform to the greatest extent practicable to the procedures provided in this act."

This change, while having a worthwhile purpose, would impose a heavy burden on the various agencies. Application of the provision to the myriad circumstances involved in national defense and foreign policy actions would appear to be extremely impractical.

Subsection 6(k)

S. 1336 would add a new subsection 6(k) providing that: "An agency shall act upon requests for declaratory orders and is authorized with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove an uncertainty. Any action taken shall constitute final agency action within the meaning of section 10." This language is comparable to that presently contained in subsection 5(d). It should be noted, however, that in view of the opening language of section 5 of the present act, the provision for declaratory orders in subsection 5(d) is limited to formal adjudication. The provision for declaratory orders contained in the proposed amendment would be applicable to all agency proceedings. The last sentence of the proposed amendment would make agency action denying a request for a declaratory order appealable. This, together with the deletion of the present language relating to "agency discretion," may lead to unnecessary litigation.

Subsection 6(l)

S. 1336 would also add a new subsection 6(l) providing that: "An agency is authorized to dispose of motions for summary decisions, motions to dismiss or motions for decision on the pleadings." There would appear to be no need for this change as the agencies now have the authority to take such action.

SECTION 7—HEARINGS

Preliminary language

Although the preliminary language of section 7 remains unchanged in that it applies only to hearings which section 4 or 5 requires to be conducted pursuant to section 7, its impact is different because of changes in sections 4 and 5. Thus, as to formal rulemaking, paragraph (2) of subsection 4(c), instead of section 7, would prescribe who is to be the presiding officer and who is to make decisions, rule on exceptions and take final action. In view of this provision of paragraph 4(c) (2), the opening language of section 7 should include a limiting clause such as "Except as otherwise provided in paragraph (2) of subsection 4(c)."

Subsection 7(a)

The proposed amendment would add a new provision in subsection 7(a) providing for the substitution of a new presiding officer if the original presiding officer is disqualified or otherwise becomes unavailable unless substantial prejudice to any party is shown to result from such substitution. There is no objection to this provision.

Subsection 7(b)

Present subsection 7(b) of the Administrative Procedure Act gives hearing officers authority, subject to the published rules of the agency and within its powers, to perform certain enumerated acts. The proposed amendment to such subsection would appear to vest any such authority which the agency has directly in the presiding officer subject only to agency rules which may prescribe the manner of exercising such powers, but not limit the authority to do so. We believe the agency should remain free to restrict such authority by published rule in proper situations.

Thus, some of the enumerated powers may not be appropriate for use by the presiding officer in public rulemaking proceedings. For example, the authority to dispose of motions for summary decisions, motions for decisions on the pleadings, or motions to dismiss, should not be vested in a presiding officer in a rulemaking hearing, who, under subsection 4(c) (2), only has authority to issue a recommended decision, not a final one. Similarly, prehearing conferences, discovery procedures, etc., which are peculiarly designed for adjudication cases between named parties, are not appropriate in the usual type of public rulemaking proceedings. We believe that the enumerated powers should, as at present, be subject to published rules of the agency covering particular kinds of proceedings.

The amendment would authorize the presiding officer to sign, as well as issue, subpoenas. There is no objection to authorizing such signature and issuance if properly limited to subpoenas authorized by law and by published rule of the agency.

The amendment would also authorize the presiding officer to take depositions or cause them to be taken and require compliance with "other discovery procedures" in all proceedings subject to section 7, including formal rulemaking proceedings. We believe that the agency and not the presiding officer should be empowered to prescribe, by rule, the manner in which and extent to which discovery is to be applied in particular proceedings. See our earlier comments relating to the subject of discovery.

Subsection 7(c)

The second sentence of subsection 7(c) of S. 1336, provides that "Any oral or documentary evidence may be received, but every agency shall provide for the exclusion of irrelevant, immaterial, or unduly cumulative or repetitious evidence." This is substantially a reversion to the language of the present Administrative Procedure Act and obviates the problems referred to in our comments with reference to a comparable amendment contained in S. 1663, made in the Department's analysis of such bill.

The last sentence of subsection 7(c) of the Administrative Procedure Act now provides that in rulemaking or determining claims for money, or benefits, or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence. Subsection 7(c) of the bill would delete the limiting language and would make this provision applicable to all proceedings subject to section 7. It would also vest the authority directly in the presiding officer rather than in the agency.

We recognize the desirability of shortening records and expediting proceedings where possible and have no objection to the expansion of the discretionary authority contemplated by the change. It is our view, however, that the authority should be vested in the agency rather than the presiding officer. It is felt the agency by proper exercise of discretion can avoid problems which might otherwise be encountered in some types of proceedings.

Subsection 7(d)

Subsection 7(d) of S. 1336 makes it clear that official notice may be taken of (1) facts of which judicial notice could be taken and (2) other facts within the specialized knowledge of the agency. The Department has no objection to the proposed change and believes it to be desirable.

Subsection 7(e)

Section 7 of S. 1336 includes a new subsection (e) covering interlocutory appeals. The subsection would permit a presiding officer to certify to the agency, or allow the parties an interlocutory appeal on, any material question, whenever he finds that it would prevent substantial prejudice to any party or would expedite the proceeding. No interlocutory appeal would otherwise be allowed, except by order of the agency upon a showing of substantial prejudice and after a denial of such appeal by the presiding officer. Provision would be made for a stay of the proceeding by the presiding officer or by the agency if necessary to protect the substantial rights of any party. The Department has no objection to the proposed new subsection 7(e).

SECTION 8—DECISIONS

Introductory language

Section 8 of the Administrative Procedure Act presently applies to all cases in which a hearing is required to be conducted in conformity with section 7. S. 1336 would change the language to read "In all adjudications subject to section 5(a)."

The Department has no objection to this change insofar as it applies to adjudicatory proceedings presently subject to the provisions of sections 7 and 8 of the act. Our objections to the broadening of the definition of "adjudication" and the broadening of the application of subsection 5(a) with respect to formal adjudications are stated elsewhere.

Subsection 8(a)

The Administrative Procedure Act presently provides that in cases in which the agency has not presided at the reception of the evidence two alternative procedures are available to the agency. The agency may provide for an initial decision by the presiding officer (or, in cases not subject to subsection (c) of section 5, any other officer qualified to preside at hearings pursuant to section 7), which decision, in the absence of either appeal to the agency or review by the agency, shall without further proceedings become the decision of the agency, or, on the other hand, the agency may provide that the entire record shall be certified to it for initial decision, in which event such officer shall issue a recommended decision (with certain exceptions relating to rulemaking and determining applications for initial licenses). S. 1336 would have the effect of requiring initial decisions by the presiding officer in all such cases "except where such officers become unavailable to the agency."

It has been the practice of the Department to utilize recommended decisions in cases subject to sections 7 and 8 of the act. It has been our view that such procedure results in more uniformity in the decisional process. However, in light of the expanding volume of formal adjudications and the need to relieve the judicial officer of the Department from any unnecessary work, the Department has been considering changing its procedure to utilize initial decisions where practicable without impairing the statutory program.

It is our view that the agency should be vested with discretion, as it is at present, to determine whether it should utilize recommended decisions in the various types of proceedings. It may also be desirable to change the last sentence of subsection 8(a) to clarify the fact that if the decision is remanded, reconsidered or reheard, the decision of the agency after remand, reconsideration or rehearing is the final agency action.

Subsection 8(c)

Paragraph (1) of the proposed new subsection 8(c) would specify the procedure for appeal within the agency from the decision of the presiding officer. It

would provide that "Any party may appeal the decision of the presiding officer by serving upon the agency and the other parties, within the time prescribed by agency rule after being served with the decision, written exceptions and the reasons in support thereof which shall state specifically and concisely the manner in which (A) prejudicial error was committed in the conduct of the proceeding; (B) the findings or conclusions of material fact were clearly erroneous; (C) the conclusions of law were erroneous; (D) the decision was contrary to law or to the duly promulgated rules or decisions of the agency; or (E) there was a novel question brought into issue." The remaining changes deal with what questions may be considered on appeal and what shall constitute the record for appeal.

It would appear desirable to add at the end of the sentence reading "The record for appeal shall include all matters constituting the record upon which the decision of the presiding officer was based" the language "unless limited by rule or order to matter relevant to the questions raised by the exceptions and any other questions raised by the appeal board, or the agency if it hears the appeal, and shall include any evidence taken on appeal." In the next following sentence the language should read "any fact or point of law" rather than "any question of fact or law." It is also suggested that the last sentence of paragraph (1) be changed to "On an appeal the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." This would retain full control of the proceeding in the agency.

The Department has no other objections to the proposed changes insofar as they apply to initial decisions. The language should be clarified, however, by expressly limiting the provision to initial decisions. See also our comments on appeal boards.

Paragraph (2) of the proposed new subsection 8(c) would provide that except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress, each agency shall establish one or more agency appeal boards; that, if an appeal board has been established, exceptions to all presiding officers reports shall be considered and determined by such board unless "a private party shall promptly file an application for a determination of the exceptions by the agency"; and that "If the agency denies the application, it shall be deemed to have considered and denied each exception and affirmed the decision of the presiding officer. If the agency grants the application, it shall determine the exceptions after considering the reasons therefor." Provision would also be made for oral argument before the agency appeal board upon request of any party.

It would appear that the purpose of establishing an agency appeal board would be to relieve the members of the agency from the burden of full agency review in all cases in which exceptions are filed. Under the proposed changes private parties have the choice of having their exceptions determined by the agency appeal board or applying for a determination thereof by the agency. When such an application is made, the agency would either have to grant the application and determine the exceptions after considering the reasons therefor, or it would have to deny the application, which would have the effect of affirming the decision by the presiding officer. Either of these alternatives requires a consideration of the merits of the issues by the agency.

Provision is also made for review of the action of the agency appeal board by the agency on the grounds that the action may be contrary to law or agency policy, that the agency wishes to reconsider its policy, or that a novel question has been presented. Under these circumstances there is serious question whether the purpose of relieving the members of the agency from a substantial workload would be achieved. It should also be noted that a different situation may exist with respect to executive departments exercising regulatory authority than is the case with regulatory commissions. Executive agencies can delegate the decisional function and under the definition of "agency" the officers or units which are so authorized to act would then become the agency. In this Department for many years, the decisional function with respect to formal adjudications subject to sections 7 and 8 of the act, has been delegated to the judicial officer, who exercises final authority. Executive departments do not have the problem of not being able to separate the decisional function from the policy-making function. We, therefore, do not believe that these proposed changes are necessary insofar as executive departments are concerned. While the

proposed language contains an exception from the requirement of the establishment of appeal boards where "the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed" the language does not clearly leave the matter to agency discretion and will result in needless and burdensome litigation. The establishment of agency appeal boards and the classes of cases to be considered by them should clearly be left to agency discretion.

In addition, it should be noted that under the proposed changes the complainant in a disciplinary action would be precluded from obtaining a review of a presiding officer's decision by the agency in lieu of the agency appeal board. The proposed language states that only a private party may apply for a determination of the exceptions by the agency itself. It is difficult to see why the complainant should not be afforded the same right as private parties. Also, an agency appearing as a party before another agency, as this Department does before the Interstate Commerce Commission and other agencies, would not be accorded the right to apply for a determination of the exceptions by the agency. Moreover, it would appear that a private party, in applying for a determination of the exceptions by the agency, would do so at his peril. The proposed amendment states that "If the agency denies the application, it shall be deemed to have considered and denied each exception and affirmed the decision of the presiding officer. If the agency grants the application, it shall determine the exceptions after considering the reasons therefor." This would preclude a subsequent appeal to the agency appeal board. In view of the fact that the agency may reject the application because it thinks the appeal board should handle the matter, rather than reject the application on the merits, it is not clear why the private party should be required to make such a choice.

Paragraph (3) of proposed subsection 8(c) provides that except where the agency simply affirms the decision of the presiding officer by denying the application for a determination of the exceptions, there shall be a ruling upon each material exception; that the record shall show the ruling and the reason therefor; and the decision of the presiding officer shall be affirmed, set aside, or modified to conform with such rulings or remanded with instructions. Although this change would not appear to be necessary, the Department has no objection to it.

Paragraph (4) provides that after the entry of the decision of the presiding officer or after the action of the appeal board, "the agency in its discretion may, within the time prescribed by agency rule, order the case before it for review but only upon the ground that the decision or action may be contrary to law or agency policy, that the agency wishes to reconsider its policy, or that a novel question of policy has been presented, and that the agency shall state in such order the specific agency policy or novel question of policy involved. On such review the agency shall have all the power it would have if it were initially deciding the proceeding, provided that if the agency raises any issue of fact it deems material, the agency shall remand the case with instructions for further proceedings before the presiding officer." It is essential for proper administration that an agency maintain full control of all proceedings. The agency should, therefore, be vested with full discretion to determine the grounds on which it may order the decision of the presiding officer or the action of the appeal board before it for review. It would also appear that the language of the last sentence of paragraph (4) should be modified. The provision that "if the agency raises any issue of fact it deems material, the agency shall remand the case with instructions for further proceedings before the presiding officer" should be changed to "if the agency determines that additional evidence is required with respect to any issue of fact it deems material, the agency shall remand the case with instructions for further proceedings before the presiding officer."

Paragraph (5) of the proposed subsection 8(c) would provide that the action on review or on appeal if no review is taken shall be on the record and be the final action of the agency except when the decision is remanded or set for reconsideration or rehearing. The Department has no objection to this provision.

SECTION 9—SANCTIONS AND POWERS

Subsection 9(a)

S. 1336 would transfer from subsection 9(b) of the present act to subsection 9(a) of the bill language requiring expeditious handling of proceedings involving applications for licenses. At the same time it would expand the application of the provision to all investigations and proceedings required by law. It would

also eliminate the present language in subsection 6(a) under the heading "Ancillary Matters" applicable to expeditious handling of proceedings.

The Department has no objection to the intent and purpose of the change; i.e., making applicable to all proceedings the same rule with respect to expeditious handling. However, it is suggested that it would be more logical to set forth such a provision in substitution for the present provision in subsection 6(a) under "Ancillary Matters" rather than include it in section 9 under the heading "Sanctions and Powers."

The inclusion of the provision that no investigation shall be commenced except within jurisdiction delegated to the agency and as authorized by law would not appear to be objectionable.

Subsection 9(b)

The proposed subsection provides that: "Publicity, which a reviewing court finds was issued by the agency or any officer, employee or member thereof, to discredit or disparage a person under investigation or a party to an agency proceeding, may be held to be a prejudicial prejudging of the issues in controversy, and the court may set aside any action taken by the agency against such person or party or enter such other order as it deems appropriate." The use of publicity to discredit or disparage a person under investigation or a party to an agency proceeding would constitute an abuse of authority and cannot be condoned. However, there is presently adequate authority available to deal with such an abuse. Certainly a court may set aside agency action where in fact there has been a prejudicial prejudgment of the issues. The inclusion of the provision in question would invite unnecessary and burdensome litigation to set aside agency action on the basis that publicity by the agency constitutes a prejudicial prejudging of the issues in controversy. It is recommended, therefore, that subsection 9(b) of S. 1336 be deleted.

SECTION 10—JUDICIAL REVIEW

The introductory language

The introductory language of section 10 of the Administrative Procedure Act presently reads "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." S. 1336 would substitute for such language the following: "Except so far as (1) statutes preclude judicial review or (2) judicial review of agency discretion is precluded by law." This change is a matter of serious concern to the Department, particularly in view of the scope of the definition of "agency action" which "includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." This definition includes innumerable actions in connection with programs of the Department not only in the regulatory field but in connection with agricultural conservation programs, land diversion programs, price-support programs, loan programs, management of national forests, and service and research programs, which involve the exercise of administrative judgment and discretion. The amendment would subject the bulk of these essentially discretionary actions to judicial review, thereby to a substantial degree substituting judicial judgment and discretion in broad areas where administrative judgment and discretion clearly have prevailed and should prevail. Refusal to issue or rule or amendment thereof would fall in this category. Our experience has failed to demonstrate any need for changing the present provision of the Administrative Procedure Act in this regard.

Subsection 10(a)

Subsection 10(a) of the Administrative Procedure Act presently limits the right of review; i.e., standing to sue, to any person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute. S. 1336 would greatly expand this right of review to include any person adversely affected in fact by any reviewable agency action. The amendment would constitute a major substantive change as to the right to review.

The Department of Agriculture strongly objects to this change. It considers the change both unnecessary and undesirable. The present language of subsection 10(a) was designed to restrict the right of review to those persons who, prior to the enactment of the Administrative Procedure Act, would have had such right of review. This clearly and expressly consists of two groups of per-

sons; i.e. (1) those who suffer legal wrong because of agency action, and (2) those who are adversely affected or aggrieved within the meaning of certain statutes, like 47 U.S.C. 402(b), which provide specifically for standing on a proper showing. These provisions of subsection 10(a) have been construed accordingly by the courts and there is no substantial legal question as to their meaning. (*Fahey v. O'Melveny & Meyers*, 200 F. 2d 420, 478 (C.A. 9), cert. denied, 345 U.S. 952; *Kansas City Power & Light Company v. McKay*, 225 F. 2d 924, 932 (C.A. D.C.), cert. denied, 350 U.S. 884.)

The proposed amendment would extend such standing to sue to many persons who do not now have standing. For example, electric power companies, which have heretofore been denied standing to sue the Rural Electrification Administrator on account of alleged illegality of loan to cooperatives because the companies suffered no "legal wrong" and were not "affected or aggrieved" within the meaning of the Rural Electrification Act, *Kansas City Power & Light Co. v. McKay*, *supra*, would, under the proposed language, be encouraged to litigate REA loans, with an anticipated paralyzing effect on the most important segments of the rural electrification program.

Also, under the Agricultural Marketing Agreement Act (7 U.S.C. 601 et seq.), only handlers who are subject to a milk marketing order, or in certain situations producers who have a property right in pooled funds under such an order, can now attack such an order of a provision thereof (7 U.S.C. 608c(15), *United States v. Ruzicka*, 329 U.S. 287; *Stark v. Wickard*, 321 U.S. 288). Collateral attacks cannot be made on such orders by others, as, for example, milk dealers or dairy farmers who are not regulated by the marketing order. (*United Milk Producers of New Jersey v. Benson*, 225 F. 2d 527; *Schofield v. Benson*, 236 F. 2d 719, cert. denied, 352 U.S. 976; *State of Minnesota v. Benson*, 274 F. 2d 764.) Under the proposed amendment, collateral attacks on such orders could be made by such persons.

This extension of standing to persons not regulated by a marketing order would seriously undermine the important marketing agreement and order program and the special statutory provisions now requiring an expert administrative review of such agency orders before recourse can be had to the courts. Although regulated handlers would still be required to pursue the exclusive remedy prescribed by section 608c(15) of the act, strangers to the order would not be required to pursue this statutory remedy and could get access to the courts to review these orders without such prior expert administrative review. This would result in the anomalous situation where a person directly regulated by an order would be required to pursue administrative remedies not required of persons unregulated by the order. It could also result in handlers seeking to bypass the exclusive remedy now provided for them by section 8c(15) by acting through another person to contest the order without initial recourse to such section. For example, a regulated handler probably could persuade a producer delivering milk to him to commence such an action as a "strawman" for the handler. This could only lead to the breakdown of the carefully devised plan which Congress has provided for the review of these "exquisitely complicated" marketing orders in the public interest.

We believe that the better approach is to provide for some special right to review in special statutes dealing with particular programs, as at present, rather than extend the scope of review indiscriminately to situations in which such right of review would not be appropriate.

Although the amendment would limit standing to sue to persons "adversely affected in fact" this would have little practical effect on standing because it would leave the question of the impact of the agency action on such person for decision at the trial of the review action. This would provide elements of confusion and doubt which the courts would have to resolve, probably on a case-by-case basis, to the detriment of many programs operated by this Department.

The inclusion in the proposed amendment of subsection 10(a) of the language "by any reviewable agency action" is merely repetitious of the restrictions already present in subsection 10(c) of the Administrative Procedure Act and would not serve to avoid or limit the extension of standing which we believe to be objectionable. Thus, a milk marketing order clearly is reviewable under subsection 10(c) and always has been, but subsection 10(a) should continue to limit the classes of persons who have a right to such review, particularly because of the special form of review which is prescribed for handlers subject

to an order, but which is not prescribed for potential collateral attacks by others on such an order.

Subsection 10(b)

The present subsection 10(b) provides that actions for judicial review, unless required to be brought in a court specified by statute, may be brought in any court of competent jurisdiction. S. 1336 would specifically confer jurisdiction upon the district courts of the United States to review "agency action reviewable under this act, except where a statute provides for judicial review in a specific court." Although it may be desirable to specify the U.S. district courts as the courts of review rather than "any court of competent jurisdiction" the terminology employed in the bill may give rise to the contention that the purpose and effect of the change are to extend jurisdiction of the courts to matters not presently within their jurisdiction. Moreover, the bill specifies that the district courts of the United States shall have "jurisdiction to protect the other substantial rights of any person in an agency proceeding." We question the need or desirability of this provision. It is felt that it could be susceptible of leading to confusion as to its intent, thereby lending itself to unnecessary litigation. This change also raises the question as to whether it conflicts with other provisions by allowing recourse to the courts at intermediate stages of the proceeding.

The proposed amendment also sets forth a venue provision whereas the present act does not contain a specific provision with respect to venue. The Congress in 1962 enacted Public Law 87-748 (28 U.S.C. 1391 (supp. V)) which contains provisions delineating the venue in civil actions against a Federal officer or agency. The amendment appears to expand the possibilities available to plaintiffs by adding any judicial district wherein the complainant has his principal place of business and also in suits involving real property, allowing the action to be brought in the district where the plaintiff resides. It is felt that this expansion of choice of forum is unwarranted and could only lend itself to encouraging forum shopping which is recognized as being undesirable. The provisions of Public Law 87-748 relating to venue provide adequate choice and, therefore, it is seriously questioned that the expansion of choice as proposed by the bill is either necessary or desirable.

The proposed amendment to this subsection would permit actions for judicial review to be brought against an agency by its official title. This would provide for a uniform rule applicable to all agencies and eliminate the problem of substitution of defendants where substitution of officers takes place. It is felt, therefore, that such a provision is desirable.

THE IMPACT OF S. 1336 UPON THE RURAL ELECTRIFICATION ADMINISTRATION
(REA)

REA was established on May 11, 1935, by Executive Order 7037 and was given statutory existence by Public Law 605 of the 74th Congress, approved May 20, 1936. Originally created to make loans to finance the furnishing of electric service to unserved persons in rural areas, its authority was expanded by Public Law 423, 81st Congress, approved October 28, 1949, to include the financing of telephone service in rural areas.

REA is a lending agency to the administrative head of which, the Administrator, appointed by the President and confirmed by the Senate, the Congress has entrusted the functions, powers, and authorities by it deemed requisite to achieve the agency's statutory purposes. Broad administrative discretion has been reposed in the Administrator, including the determination of terms and conditions relating to the expenditure of funds loaned and the security therefor. This is coupled with responsibility for finding and certifying that in his judgment each loan is reasonably adequately secured and will be repaid within the time agreed.

The wisdom of the Congress in entrusting such discretion to the Administrator and the success of the agency so established is demonstrated by its record of achievement. Farms electrified have multiplied ninefold since 1935, farm telephone service has more than doubled since 1949, as a result of the REA lending program and the stimulus it gave to non-REA-financed segments of the electric and telephone industries. More than 1,000 rural electric systems, and more than 800 rural telephone systems, all but very few locally owned and operated,

have received loans totaling more than \$6 billion, have repaid more than \$2 billion in principal and interest, and set an unparalleled record in having defaulted only to the extent of \$44,478 during the 30-year life of the program.

The REA program has drawn a consensus of support virtually unmatched from the millions of rural people who have benefited directly by receiving indispensable service otherwise physically or economically unavailable to them, the many millions more of Americans who have shared in the multibillion-dollar expenditures for products, equipment, and services associated with electric and telephone service, and from the Congress which has always shown interest and taken pride in its creation.

Opposition to and criticism of REA has been limited almost entirely to its electrification program and these have come from comparatively few investor-owned electric companies which in recent years have explored and exploited every possible means of blocking the sound development of the program, particularly by attempting to limit the Administrator's clear statutory authority to make loans for the generation and transmission of electric energy, an authority the prudent exercise of which has materially reduced the cost of electric service throughout rural America.

There is cause for concern that in trying to protect the interests of persons not parties to the transaction, steps could be taken which could injure the legitimate interests of citizens who are seeking to transact business with the Government under programs established by the Congress. Experience has shown that administrative and court procedures are used by such persons for delay and obstruction, sometimes very effectively to thwart the will of the Congress and the intent of its enactments.

If S. 1336 is enacted in its present form, the Congress will have placed in the hands of the opponents of the rural electrification program a weapon they have sought to destroy its effective operation. This would be accomplished by the utilization of the following devices and procedures which enactment of S. 1336 would for the first time since enactment of the Rural Electrification Act of 1936 and the Administrative Procedure Act in 1946 make available to them by the proposed changes in the Administrative Procedure Act.

PUBLIC INFORMATION

Section 3 of the present Administrative Procedure Act requires that agency information "except information held confidential for good cause found" be made available to "persons directly and properly concerned." Consistent with this requirement, Department of Agriculture Regulations, by which REA is governed, call for withholding of "information received in expressed or implied confidence in connection with a contract or loan." (1 AR 536 (13).)

Section 3 of S. 1336 would revise the present section 3 in the following respects which would materially and adversely affect the REA programs. Subsection (c) would require REA to "make all its records promptly available to any person" (instead of "persons properly and directly concerned") with certain exemptions as listed in subsection (e) and create a judicially enforceable right to the production of these records. This would have the effect of opening up to their business adversaries financial, technical, and operational data supplied by REA loan applicants for the sole purpose of enabling the Administrator to review and take appropriate action in accordance with the Rural Electrification Act upon their loan applications. Such a result would not contribute to achieving the objectives of the Rural Electrification Act; it would on the contrary seriously interfere with it. It would be tantamount to requiring a banker to expose his loan applicant's business records to the eyes of the applicant's most vigorous competitor, and thereby assist him in the destruction of the applicant's business.

The fourth exemption listed in subsection (e) does not adequately protect the loan applicant. It does not cover technical information supplied REA by a loan applicant. Further, the wording of the exemption relating to "privileged or confidential" information impliedly requires and could be interpreted to limit application to only certain specific matters which are now given judicial recognition as privileged or confidential. It is not broad enough clearly to exempt commercial, technical, and financial information submitted by the loan applicant and received by REA as privileged or confidential.

The fifth exemption in subsection (e) also falls short of furnishing a legitimate and necessary measure of protection to a loan applicant's submission in confidence of data which it would under no circumstances voluntarily disclose to an

adversary. Few if any letters or memorandums are restricted solely to matters of law or policy. Also, internal working papers prepared in REA which deal with matters of law, policy or fact are frequently not in the form of memorandums or letters. Inter-agency and intra-agency memorandums and letters which attempt to deal solely with matters of policy or law would be sterile and meaningless documents unless they related to specific fact situations. Exposure to the public eye of internal REA communications, in whatever form they may be, would stultify and suppress the free and frank interchange of ideas which is necessary for effective administration, or would result in a practice of oral communication with the loss of administrative effectiveness obviously involved in the absence of a written record.

RULEMAKING

Section 4 of the Administrative Procedure Act, as it now reads, exempts from the rulemaking provisions of the act "any matter relating to * * * public property, loans, grants, benefits or contracts." Accordingly, REA policies as expressed in bulletins and other memorandums to borrowers and others are not subject to the rulemaking provisions of the APA, which, in general, require (i) notice by publication in the Federal Register; (ii) the giving to the public of an opportunity to be heard and to participate in the rulemaking; and (iii) certain procedural details to be followed in the adoption of the rule, including notice of adoption by publication in the Federal Register and timing requirements.

S. 1336 would delete the exemption of "matters relating to public property, loans, grants, benefits or contracts." Accordingly, except for internal management or personnel matters, REA policy formulation and the issuance of bulletins and other guides to actions of borrowers and others would have to comply with the rulemaking provisions of the revised section 4. The time-consuming and burdensome formalities which would be imposed upon REA operations are inappropriate to the business type of operations conducted by REA, and would serve no purpose in view of the existing close relationships which have been built up by REA and the very limited segment of the public with which it deals. In the formulation of REA bulletins, there is frequent communication between REA and the groups concerned with REA loanmaking activities, namely REA borrowers and loan applicants, power suppliers and construction contractors and engineers. The exchange of ideas which takes place informally under the present system would appear to be of greater value in developing satisfactory policies than that which might result from cumbersome, expensive procedures satisfying the formal rulemaking requirements made applicable by section 4 of S. 1336.

Section 4 of S. 1336 would require REA to give interested persons an opportunity to submit matter for its consideration in rulemaking and to petition for the issuance, amendment, exception from or repeal of a rule. This provision, as applied to REA, would furnish program adversaries a device with which to conduct obstructive, dilatory tactics with respect to matters which the Congress has entrusted to the discretion of the Administrator. Past experience warrants prediction that this device would be used to the maximum to interfere with the exercise of this discretion.

ADJUDICATION

Section 5 of S. 1336 would subject REA's operations to the adjudication procedures therein set forth which, under the present law's definition of adjudication, do not apply to REA actions. S. 1336 would allow agencies like REA, in lieu of formal hearings with pleadings, records, and examiners, to adopt procedures in accordance with general rules which would use such concepts as "proceedings," "parties," "issues, facts, and arguments," "officers for conducting proceedings," and "decisions."

The definition of agency action seems broad enough to apply not only to the final loanmaking decision but also to many other REA determinations, including approval of wholesale power contracts and engineering and construction contracts. Conceivably, disputes in particular cases over interpretations of borrower contracts with third parties could become the subject of REA adjudication. The present flexibility in handling such disputes would then be replaced by procedures established by rules, in the Administrative Procedure Act sense, and such procedures would include the above-mentioned concepts relating to "proceedings" and the like.

These adjudication requirements, although not as rigorous as those prescribed under subsection (a) where adjudication is required by the Constitution or by

statute to be determined on the record after opportunity for an agency hearing, would afford new opportunities for delay and obstruction. The adjudication procedure could, and would reasonably be expected to, be manipulated by parties opposing the proposed REA action, to achieve their objectives of obtaining disclosure of information submitted to REA in confidence by applicants and of postponing REA action until the material upon which such action would be based had become so obsolete as to require redevelopment by the applicant and resubmission to REA. This could in turn touch off another round of adjudicative procedures with the same purpose and result.

Subjecting REA actions to the adjudicative procedure requirements would impose an additional heavy administrative burden on the agency and involve additional administrative expense.

JUDICIAL REVIEW

Section 10 of the Administrative Procedure Act gives to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute" the right to judicial review of agency action, except where precluded by statute or where "agency action is by law committed to agency discretion." Under existing law, electric power companies have heretofore been denied standing to sue the Rural Electrification Administrator on account of alleged illegality of loans to cooperative borrowers because the companies suffered no legal wrong and were not adversely affected or aggrieved within the meaning of the Rural Electrification Act. *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924 (C.A.D.C. 1955), cert. den. 350 U.S. 884 (1955), and *Iowa-Illinois Gas & Electric Co. v. Benson*, 247 F. 2d 22 (C.A.D.C., 1957), cert. den. 356 U.S. 949 (1958).

In the *Kansas City* opinion, the court stated—and these words of the court are highly pertinent here: "The statutory scheme before us clearly contemplates congressional, rather than judicial, review of the governmental activities * * *, all of which are nonregulatory * * *. The continuance of the defendants' activities is, therefore, subject to review by Congress acting each year on the appropriations sought by the defendants."

Section 10 of S. 1336 would give "any person adversely affected in fact by any reviewable agency action * * * standing and [he would] be entitled to judicial review thereof." Since only those actions would be excepted as to which "(1) statutes preclude judicial review or (2) judicial review of agency discretion is precluded by law," all agency actions not falling within the exceptions would presumably be judicially reviewable.

Under the proposed language, the companies would be encouraged to litigate REA loans, with an anticipated paralyzing effect on the most important segments of the rural electrification program. Subjecting the administration of the REA program and the REA Administrator's exercise of his statutory discretion to judicial review would amplify the opportunities for harassment and delay of the agency's operations to the point where its ability to function would be vitally impaired, even destroyed.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,

Washington, D.C., May 24, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department concerning S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

S. 1336 would make a great number of changes in the Administrative Procedure Act. The existing act has been in force with only minor amendments for some 18 years. During that time the various provisions of the act have been subjected to court scrutiny and interpretation, so that many obscure or ambiguous provisions of the existing act have been clarified. In view of the considerable body of case law that has been developed under the existing statute and the relative certainty that now exists with respect to the meaning of its provisions, we believe that only those amendments to the act should be adopted which experience under the present law has clearly demonstrated are desirable.

This is not to say that the Department opposes amendment of the act. Many provisions of S. 1336 are either desirable from our standpoint as drafted, or would present no particular problem to the Department. Other provisions, however, in our opinion will have unforeseen and broad undesirable effects which we believe warrant a recommendation that no change be made.

Perhaps the most striking possibility of such unforeseen and undesirable effects arises from the possible combined effect of section 1 and the last sentence of section 12(a) of the bill on the partial exemptions from the Administrative Procedure Act which are provided by express language of the Defense Production Act and the Export Control Act, both of which represent vital national security measures administered within this Department. Taken together the cited sections of S. 1336 as presently worded could require that in order to be effective to exempt from the revised procedural requirements proposed in this bill any statutory language of exemption must refer expressly to the act as it is styled in section 1, to wit "the Administrative Procedure Act of 1965." This difficulty might be remedied in part at least by deleting the limiting expression "of 1965" so that the term "this Act" in section 12(a) (last sentence) refers to a continuing body of statute known as "the Administrative Procedure Act." However, as we indicated in our letter of July 17, 1964, in commenting on a similar aspect of the committee print (April 20, 1964) of S. 1663 of the last Congress, we urge again that it be made absolutely clear that any existing exemptions contained in other statutes from the Administrative Procedure Act, enacted in 1946, are also exemptions to the same extent from the enactment proposed here.

The following are other comments on the various changes proposed in S. 1336. Because of the number and interrelationship of these changes we propose to group our comments largely by sections of the bill.

SECTION 1—SHORT TITLE

This section provides that the act may be cited as the Administrative Procedure Act of 1965. Except for the effect of this section in conjunction with the last sentence of section 12(a), which we have noted above, we have no comments on section 1.

SECTION 3—PUBLIC INFORMATION

Subsection (a)—The words "for the guidance of the public" after "agency" in item (D), line 16, should be restored. Although subsection (e) (5) provides that "interagency or intraagency memorandums or letters dealing solely with matters of law and policy" are exempted, we nevertheless feel that the above words should be inserted to preclude any interpretation which would require agencies to publish all policies or interpretations adopted for the benefit of its staff or other Federal agencies, whether necessary for the guidance of the public or not.

Subsection (b) would add to the list of materials which an agency is required to make available for public inspection staff manuals and instructions to staff that affect any members of the public. This should be clarified.

Our principal concern with this section is with respect to subsection (c) relating to availability of agency records. Subject to certain specific exceptions set out in subsection (e), subsection (c) provides that every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person. The subsection also confers on the U.S. District courts jurisdiction to enjoin the agency from the withholding of agency records and information and to compel production "of agency records or information improperly withheld." In such cases the court shall determine the matter de novo and the burden of proof to sustain its action is placed on the agency. In the event of noncompliance with the court's order, the court may punish the responsible officers for contempt.

We are in accord with the view that information in Government agencies should be available to the public, but only to the extent that making information available will not unduly disrupt the operation of Government, result in damage to innocent members of the public, or otherwise result in more harm than good. We believe a judgment on the merits of subsection (c) must involve a thoughtful balancing between its objectives on the one hand, and on the other, the public's interest in efficient and effective management of the Government's business.

Section 3(c) of the Administrative Procedure Act now provides that save as otherwise required by statute, matters of official record shall be available to "persons properly and directly concerned except information held confidential for good cause found." The determination at present of what persons are properly and directly concerned and what agency records are confidential for good cause found are left to agency discretion. Subsection (c) would remove these matters from agency discretion. The requirement that records be made promptly available to any person ignores such fundamental questions as the need to know, citizenship, and age of the individual. It would leave the agency defenseless against unnecessary and unreasonable demands.

We seriously question the desirability of removing this discretion from agencies and requiring them to make all their records available to anyone upon demand except within the framework of the exceptions in subsection (e). We think it would be disruptive to the conduct of the Government's business, particularly in view of the provision for private suit in district courts, to compel production of records in which the agency concerned would have the burden of sustaining its action and the responsible officers thereof be punished for contempt in event of noncompliance of the court's order. In order to sustain its burden in showing that its records contain matter exempt from disclosure under subsection (e), an agency would have to prove the contents of such records and thereby negate the intended protection of such records.

We are also concerned with the effect of subsection (c) on 35 U.S.C. 31, 32 pursuant to which the Patent Office investigates the character and reputation of attorneys and agencies desiring to practice before it, and on other matters relating to the Patent Office for which there exists a reasonable basis for confidentiality. Enclosed is a detailed memorandum setting forth the views of the Patent Office on S. 1336.

Subsection (e) also presents a number of problems with respect to specific activities of this department.

1. Subsection (e)(1) exempts matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Similar language is used (sec. 4 (h)) to exempt rulemaking from the requirements of section 4 (except the word "specifically" is omitted). Particularly where "specifically" is used, it is an unwarranted burden on the President to issue a succession of Executive orders specifically requiring particular matters to be kept secret. There is doubt whether the general order on safeguarding official information (Executive order 10501 of Dec. 15, 1953) would meet the test of "specifically requiring."

2. Subsection (e)(2) exempts from the provisions of section 3 matters related solely to "internal personnel rules and practices" of any agency. The present provision of the Administrative Procedure Act (sec. 3(2)) exempts matters related solely to the "internal management" of an agency. The proposed exemption is entirely too narrow and should be broadened to include matters relating to the "internal management" of an agency.

3. We assume that the exception in subsection (e)(3) for items "specifically exempted from disclosure by statute" is intended to preserve the protection now accorded information obtained in confidence from members of the public under such provisions as section 6 of the Export Control Act, section 705 of the Defense Production Act, and other similar statutory provisions. If the subsection is enacted we urge that the legislative history be made clear on this point.

4. Subsection (e)(4) exempts "trade secrets and commercial or financial information obtained from the public and privileged or confidential." In our opinion, the subsection should be amended so as to specifically exempt the records of loan and grant agencies from public disclosure, especially where the enabling legislation of such agencies clearly spells out what information is to be made public, as in the case with this department's Area Redevelopment Administration. At the very least, it should be amended so as to expressly exempt internal evaluations of applications for loans and grants from disclosure.

5. Subsection (e)(5) exempts "interagency or intraagency memorandums or letters dealing *solely* with matters of law or policy." Under this provision internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information. We believe this subsection should be amended to exempt also such portions of interagency or intraagency memorandums or letters

as deal with matters of law or policy. We believe that the provision as presently written would unduly inhibit agency personnel from freely expressing themselves, and consequently would result in decreased agency efficiency.

SECTION 4—RULEMAKING

Subsection (c) (2)—This provides that where rules are required *by the Constitution* or by statute to be made on the record, etc., the requirements of section 7 (“Hearings”) shall apply. The term “by the Constitution” is an extremely vague standard by which to determine whether rules are required to be made on the record. The Constitution does not mention any such requirement and in order to ascertain the meaning of the phrase it would be necessary to rely on a rather vague doctrine of “due process” and to analyze and reconcile various court decisions. We do not believe that this standard is a workable one. It appeared in the bill prepared last year by the committee staff members and after vigorous discussion at a seminar on the bill it was practically conceded by the staff that the phrase should be dropped.

Subsection (d)—This deals with emergency rules and provides for the issuance of an emergency rule without public notice and procedures, the rule to be effective for not more than 6 months. This appears to be a rather strict constraint on agency actions. The present act allows rules to be made where the agency finds that notice and public participation would be impracticable, unnecessary, or contrary to the public interest.

Subsection (h)—This deals with exemptions from the rulemaking procedures. The exemptions appear rather narrow. The first one of them applies to rulemaking *required by an Executive order* to be kept secret in the interests of national defense or foreign policy. Here again this could mean that the President would have to be called in every time one of these elements was deemed to be necessary to be exempted from the rulemaking procedures. The second exemption applies to rulemaking that relates solely to internal personnel rules and practices of an agency. This is narrower than the present exemption which applies to any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. It is our opinion that it would not serve the public interest in terms of the delay and expense involved, to require loan and grant agencies such as the Area Redevelopment Administration to adopt formal rulemaking procedures. While the fifth exemption in the proposed bill does cover rules of agency organization we are not sure that this is as broad as the present exemptions of agency management.

SECTION 5—ADJUDICATION

Subsection (a)—The subsection starts with the same phrasing as in subsection 4(c) (2), by applying the prescribed adjudication procedures to those cases which are required *by the Constitution* or by statute to be determined on the record after opportunity for hearing. Our comments on subsection 4(c) (2) apply as well here.

Subsection (a) (2)—This covers pleadings and other papers and the last sentence provides that to the extent practicable rules governing pleadings shall conform to the Rules of Civil Procedure or the Rules of Criminal Procedure for the U.S. district courts. This would appear to assimilate administrative procedures to judicial ones. Even though it has a qualification (“to the extent practicable”) we do not think it desirable that an act governing administrative proceedings should even be suggested to conform to judicial rules which cover a different theory, at least, of proceedings.

Subsection (a) (3)—We do not interpret this provision as requiring a prehearing conference in all agency proceedings, but rather, that the agency retains the discretion of when such prehearing conferences would serve a useful purpose. With this understanding, we support the provision.

Subsection (a) (5)—We are not convinced that the agencies’ regular hearing procedures are not adequate to permit abridged procedures in cases where this would be appropriate. We therefore question whether there is any need for this particular provision at all. In the event that it is decided to provide specifically for a modified hearing procedure, we believe that such procedures should be discretionary with the agencies. Accordingly, we suggest that lines 5 and 6 on page 14 be amended to read: “every agency may by rule provide”, etc. We further believe that section (a) (5) as presently worded in this bill is unduly vague.

Much of it appears to be designed to accomplish the objectives of the prehearing conference, yet the officer is required to make a decision.

SECTION 6—ANCILLARY MATTERS

We are strongly opposed to the provisions of subsection (b) relating to practice by attorneys before agencies insofar as it would apply to practice before the Patent Office. The enclosed memorandum from the Patent Office, previously referred to, states clearly the dangers involved in the proposed elimination of our qualification procedures for practice before the Patent Office.

Subsection (e)—This covers subpoenas. The first sentence provides that every agency shall by rule provide for issuance of subpoenas. The third sentence provides that agency subpoenas authorized by law shall be issued. We assume that the construction of this section would be that the section itself does not give legal authority to issue subpoenas but merely prescribes conditions under which subpoenas authorized by other law may be issued.

Subsection (c), page 18, lines 12-15—We believe it would be an improvement to add the following language to the last sentence of this subsection: “, unless a particular attorney is designated for service by the participant.” While this suggestion may appear relatively insignificant, we have had particular experience to indicate its practical importance.

Subsection (k), page 21, lines 5-10—We are concerned that this subsection could result in dilatory tactics. This could occur, for example, if a declaratory order would include decisions on interlocutory questions and if the agency's decision on such questions would constitute final action, appealable to the court.

SECTION 10—JUDICIAL REVIEW

This section starts with two exceptions: (1) where statutes preclude judicial review (this is in the present act); and (2) where judicial review of agency discretion is precluded by law. The second exemption is narrower than that in the present act which covers agency action which is by law committed to agency discretion. We oppose this exemption as it would encourage appeals from unfavorable decisions in an effort to prevail upon the court to substitute its discretion for that of the agency in situations not involving arbitrary or capricious action. Also the phrase “precluded by law” is rather vague because we are not aware of any law which expressly precludes judicial review; therefore, we would have to rely on some judicial construction of a statute to that effect. We do not believe that this is a satisfactory standard.

SECTION 12—CONSTRUCTION AND EFFECT

We urge again that it be made absolutely clear that any existing exemptions contained in other statutes from the Administrative Procedure Act, enacted in 1946, are also exemptions from the “Administrative Procedure Act of 1965.”

CONCLUSION

As the foregoing comments indicate, we have a number of reservations concerning various provisions of S. 1336. We are attaching, as indicated earlier, specific comments of the Patent Office.

The Department of Commerce does not recommend enactment of S. 1336.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of our report from the standpoint of the administration's program.

Sincerely,

ROBERT E. GILES, *General Counsel.*

PATENT OFFICE COMMENTS ON S. 1336

There follow the views of the Patent Office with respect to S. 1336, a bill “to amend the Administrative Procedure Act, and for other purposes.”

This proposal, by section 3(c), would make all the records of an agency “* * * promptly available to any person.” The exemptions to this direction are set forth in 3(e) of the proposal.

These exemptions include matters "(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;" and "(3) specifically exempted from disclosure by statute." Pursuant to 35 U.S.C. 122, applications for patents are kept in confidence. Pursuant to 35 U.S.C. 181-188 applications and patents relating to certain inventions, the disclosure of which might be detrimental to the national security, are kept secret. Certain agreements relating to the termination of a patent interference are to be kept secret with discretion in the Commissioner to make them available for good cause. Executive Order 9424 establishes a register of Federal property interests in patents and applications for patents with provision for restrictive examination thereof. It appears that under the proposed legislation, these restrictions would be covered by the described exemptions. Whether this material would be available to the Congress would, under 3(f) of the proposal, depend on the language of the statute or Executive order providing the basis for the secrecy.

There are a number of other classes of material in the records of the Patent Office which are not protected from public scrutiny by statute or Executive order which are presently not made available to the public. As will appear from the following description of this material, there are reasonable bases for treating this material in a confidential manner and safeguards against abuse of the authority to so treat the material. Examination of these items raises questions concerning a categorical directive as would be provided by S. 1336 which does not allow that distinction and choice of administrative action which appears proper and necessary in the circumstances.

1. The Secretary of Commerce by Executive Order 10930 was assigned responsibility for carrying out the functions set forth in Executive Order 10096 as they relate to the overseeing of agency determinations of the rights of the Government and its employees to the property in inventions made by Federal employees. These functions are to be performed by the Commissioner of Patents pursuant to a delegation of authority by the Secretary (Mar. 24, 1961, 26 F.R. 3118).

In the course of these determinations, it may be necessary for the employee-inventor and/or the employing agency to disclose in some detail the subject matter and circumstances of the discovery. This same information is or may become the substantive material in a patent application before the Patent Office (see 37 C.F.R. 300.7) which is to be held in confidence (35 U.S.C. 122).

For the reasons that provide the basis for the direction of 35 U.S.C. 122 relating to confidentiality of patent applications, the same information contained in the documents used in the determinations under Executive Order 10096 should be maintained confidential subject always to the conclusive discretion of the Federal Government and the employee-inventor acting jointly until such time as the right to the property in the discovery is resolved.

The program established by Executive Order 10096 for determination of rights to the property in an invention is not based on a specific statute directed to this end and neither the order nor a statute provides specifically for restricting access to such documents. The documents providing details concerning the discovery of an employee-inventor should, in our opinion, be kept confidential until a patent issues or is refused on the subject matter of the determination. Consistent with the treatment accorded patent applications, such documents have been kept confidential.

2. Section 31 of title 35 of the United States Code authorizes the Commissioner of Patents to prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants before the Patent Office, and to require them to show that they are of good moral character and reputation.

Papers received by the Commissioner in his efforts to carry out this function are held confidential to assure the availability of information and to protect a candidate for recognition to practice against unwarranted invasion of his privacy. These attorneys and agents are not "personnel" of the Office so as to come within the exceptions provided by subsections (3) (e) (2) and (3) (e) (6).

3. In the exercise of his authority to inquire into the qualifications of attorneys and agents to enable them to render valuable service, advice, and assistance (35 U.S.C. 31), in the presentation or prosecution of applications for patents, the Commissioner gives examinations to test these qualifications. By regulation, review of a determination by the Commissioner based on such an examination is

available by petition to the Commissioner (37 C.F.R. 1.341 (i)). By provisions of section 32 of title 35 of the United States Code, a person "so refused recognition" because of his failure to attain a passing mark may have recourse to the U.S. District Court for the District of Columbia to determine if the Commissioner had a reasonable basis for his determination. (See local civil rule 95.) Pending such an action before the court, the test papers are preserved in secrecy, a practice accepted by the court (*Cupples v. Marzall*, Comr. Pats., Jan. 9, 1952; 92 USPQ 169, 171). A contrary practice would be disruptive of the orderly operation of the Patent Office. These attorneys and agents are not "personnel" of the Office so as to come within the exceptions provided by subsection (3) (e) (2) and (3) (e) (6).

4. In the exercise of his authority to suspend or exclude, either generally or in a particular case, from practice before the Patent Office any agent or attorney shown to be incompetent, or guilty of improper conduct (35 U.S.C. 32, and see further 37 C.F.R. 1.348), the Commissioner receives complaints concerning alleged misconduct of agents and attorneys and makes inquiries and investigations of such complaints. These complaints may involve unsupportable allegations. Responses to inquiries may be given in confidence. All actions attendant upon such an investigation should, in our opinion, be kept confidential, certainly during the development stage. In the event of an appeal from the Commissioner's final decision, which is made with the procedural safeguards of the Administrative Procedure Act (37 C.F.R. 1.348), the court action involves additional considerations. These attorneys and agents are not "personnel" of the Office so as to come within the exceptions provided by subsections (3) (e) (2) and (3) (e) (6).

5. Pending applications for trademark registrations are promptly indexed with all the important information including a reproduction of the mark, date of use and use in commerce, date of filing and class of goods on which used. This index is available to the public as promptly as it can be assembled, about 3 to 4 weeks after receipt of the application.

The entire application is available upon publication of the market for opposition. Prior to such publication, which normally is made 5 or 6 months after receipt, the application is made available to examination upon written request. (37 C.F.R. 2.27.) This latter technique is used as a matter of administrative convenience to minimize disruption of the files. The essential information is available in the index.

We believe the public right to know is satisfied by the index and the availability of the application upon written request prior to publication and the continuation of the requirement of a written request during this period is needed in the interest of orderliness.

Section 6 of this proposal would establish the right of any member of a bar of the highest court of a State, possession, etc., to practice before any Federal agency including the Patent Office. Other requirements which may presently be imposed by an agency would be eliminated. The Patent Office presently, pursuant to 35 U.S.C. 31, requires an attorney to show that he has certain technical qualifications such as chemical or engineering training and further that he pass an examination addressed to knowledge of the laws of patent practice before he can represent others in the prosecution of a patent application.

Insofar as appearances before the Patent Office limited to trademark matters are concerned the Patent Office would interpose no objection to legislation for the general purpose of these proposals. No examination or application for recognition is required of lawyers. This practice is expressly allowed by rule 2.11 of the Trademark Rules of Practice of the Patent Office.

Appearances before the Patent Office in the prosecution of applications for patents present circumstances which are quite different from trademark matters and which, in our opinion, warrant an exception to the rule proposed by this bill.

From 1897 to 1922, the rule proposed by this bill was in effect. In 1922, attorneys-at-law were allowed to qualify for admission by filing proof that they were "possessed of legal and technical qualifications" which had theretofore been required of nonlawyers. This procedure was not found to be effective as an assurance of competency for this particularly demanding practice and in 1934 the examination procedure was adopted to assure a sufficient basic knowledge in scientific and technical matters and in the technical aspects of patent prosecution.

The U.S. Supreme Court in 1892 characterized the specifications and claims of a patent, particularly if the invention is at all complicated, as one of the most difficult legal instruments to draw with accuracy. Reference to this statement

was made by that court as recently as 1963 in *Sperry v. Florida*, 373 U.S. 379, 383. Section 112 of the patent laws requires an applicant to describe the invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same * * *." Lack of knowledge in this field on the part of the person drafting the application is damaging from the viewpoint of the inventors whose property rights in the invention may be jeopardized and from the viewpoint of the Department of Commerce where the prompt issuance of patents when warranted is a matter of grave concern not only to us but to the Congress and to the general public.

Major efforts are being taken by the Congress by large annual appropriations, and by the Commissioner of Patents to effect a more prompt issuance of patents and to lessen the period which presently exists between application and issuance. The Patent Office, on July 1, 1964, revised examining procedures to achieve these ends. Four major changes in patent examining procedures are involved.

The first requires each examiner to give priority to that application in his docket, whether amended or new, which has the oldest effective U.S. filing date. Under this new procedure it is anticipated that the examiner will be in a position to act on each amended application within 1 month of receipt of the applicant's response. The second major change calls for a more thorough first action on each new application coupled with an indication by the examiner of the existence of allowable claims or subject matter in the application if patentability exists. The third major change requires that, except in rare circumstances, all second actions on the merits shall be final. This, as well as the fourth major change, should shorten the time period required for disposal of an application by eliminating one or more actions which previously had been customary. The fourth major change aids in shortening the prosecution time by the setting of 4-month statutory periods for response in nearly all cases. This curtails the maximum statutory time for response by 2 months.

Through March of this year we have disposed of 75,797 applications for a reduction during fiscal 1965 of 10,721 applications from the backlog.

The demands which this technique makes on the attorney representing an applicant are obvious. Even more than in the past, to protect the interest of the applicant, it is essential that the attorney not only be well-qualified in the patent law and the regulations of the Office governing this practice but also that he have technical qualifications enabling him to understand the prior art in which the discovery is made. An unqualified practitioner facing these demands for prompt and thoughtful action may not only jeopardize the rights of the applicant but also, because of his lack of knowledge, jeopardize his standing in the profession generally as a result of well-meaning errors in this field. An essential role in the success of this procedure is a qualified, able attorney representing the applicant.

Examination of our records shows that about one-third of the attorneys who take the examination do not pass it. These are attorneys who have presumably made some effort to inform themselves on the subject before the test and who also consider themselves at the time of taking the test as equipped to represent others before the Patent Office.

Rule 342 of the Rules of Practice of the United States Patent Office in Patent Cases authorizes the Commissioner to recognize, for the purpose of prosecuting a specified application or applications, a person who can show that such recognition is necessary or justifiable. Most persons so recognized are lawyers but some are not. In 10 recent consecutive years such recognition was extended to lawyers, not otherwise entitled to practice before the Office, for the prosecution of only 38 applications. Petitions to allow such practice are rarely granted. We estimate that 10 are refused to 1 that is allowed. Thirty-six of these applications were abandoned and this at a time when the general figure for allowance for all applications was 60 percent. An informal investigation indicated that approximately 60 percent of these applications appeared to disclose patentable subject matter. An unusually large number were abandoned after the first rejection. They were not prosecuted with the usual vigor.

In 26 of the 38 cases, the claims were grossly informal, a large number of the drawings were faulty, and the number of insufficient specifications were excessive as were the number refused a filing date because of the omission of parts required by law. The time spent by examiners in assisting these representatives, as measured by the letters written, quadrupled by comparison with the usual instances of comparable complexity.

The study of these applications alone, in our opinion, provides a sufficient basis to warrant an exception for patent activities to any legislation, such as is here under consideration.

Section 122 of title 35 provides for secrecy of patent applications. Sections 181-188 of that title provide further for secrecy in the case of inventions, the disclosure of which might be detrimental to the national security. Leaving aside any questions of dishonesty, there may be honest misunderstandings as to the existence of an attorney or agency relationship. This is presently resolved by the requirement of a written power of attorney. Presumably, under section 6(b)(1) of S. 1336, the Patent Office would have to accept the mere personal appearance of a purported representative, or his mere say-so, before turning over documents for his perusal.

For these reasons we urge most strongly that the Department seek an exception to section 6 of S. 1336 authorizing the appearance of attorneys in matters relating to patents without the examination and registration techniques presently used, and that an extension be sought of the exemptions in 3(e) to take into account the circumstances described above which confront the Patent Office in its administration of the patent and trademark laws.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., May 17, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on S. 1336, 89th Congress, a bill to amend the Administrative Procedure Act, and for other purposes.

The purpose of the bill is as stated in the title.

The views of the Department of Defense on the revision of S. 1663, 88th Congress, prepared by the Subcommittee on Administrative Practice and Procedure, were submitted in a letter from me dated July 23, 1964. Although much of S. 1336 is similar in language and in apparent purpose to the subcommittee revision of S. 1663, there are enough significant changes to warrant careful selection in our repetition of those earlier views. Where, however, there are no changes we will repeat our comments of July 23, 1964, as appropriate.

First, we wish to reemphasize our introductory observations of last year that the Department's comments are addressed primarily to those provisions of the bill which, in the opinion of the military departments and agencies, could have a significantly adverse effect on the Department's operations. Representative examples are recited in the succeeding paragraphs of the extent to which the Department's administrative workload and operational costs would be immeasurably increased without any discernible improvement in its administrative procedures. This result may be due to the fact that the requirements of this bill are designed primarily for the activities of the regulatory agencies and thus prove especially unsuited for application to Department of Defense activities having quite different objectives.

For this same reason it is difficult to give precise meaning to provisions of the bill in the terms of Government agencies other than regulatory and therefore also difficult to predict the precise impact of the bill if enacted into law. For these reasons the Department is strongly opposed to S. 1336 and recommends that the Administrative Procedure Act continue the exemptions contained in the present law.

"With regard to the 'definitions' in section 2 of S. 1336 this Department defers for the most part to the views of the Department of Justice and the regulatory agencies most directly and significantly affected by the Administrative Procedure Act. With regard to section 2(d), however, the definitions of 'order' and 'adjudication' are objectionable insofar as they affect the procurement function. The Department of Defense supports Prof. Kenneth Culp Davis' recommendation to the subcommittee to exclude contracting and purchasing functions from the definitions. An excerpt from his testimony on page 272 of the July 1964 hearings on S. 1663 follows:

"Now I will speak just of one more subject, unless there are questions, and that is the definition of adjudication and order and opinion at the beginning of

section 2(d). The present bill follows the Administrative Procedure Act in its definition of adjudication which I think has always been unsatisfactory. Adjudication is any matter other than a rule. Well, what is any matter other than a rule?

"Does it include a Government contract, a purchase, a conversation between the administrator and a private party? Is that an adjudication? Is it a matter? It seems to me the words are altogether too broad. In my written statement I use the illustration if the President decides to go to his Texas ranch for the weekend, that is adjudication if you take the words of the statute as they are literally. I don't think it ought to mean that. I think we have to scale that down somewhat. Working with this kind of definition, which bobs up in so many places, is dangerous business, but I have attempted a new definition. I would propose that adjudication should be defined as agency process for determining the rights, obligations, or privileges of named private parties include licensing, granting of Government funds to private parties, and ratemaking for named parties, but excluding contracting, purchasing, and granting funds to State or foreign governments. This will bring the definition into line with what I think is the general understanding of the meaning of the term 'adjudication.'"

The S. 1336 revision is more objectionable than the broad definition previously used because "adjudication," being the process for formulating an "order" now includes any "processing * * * to determine the rights, obligations, and privileges of named parties" and "rulemaking" is not expressly excluded.

Keeping in mind that section 4 of S. 1336 would no longer exclude matters relating to public property or contracts, the result of enactment might be that not only will rulemaking by the Armed Services Procurement Regulation Committee become subject to section 4, but in addition, where a deviation from the regulation that affects contract obligations of named parties is being considered, the deviation action could become an "adjudication" under section 2(d), even though it is a discretionary determination of the Government, acting in a proprietary capacity.

Of perhaps greater impact is the potential effect of the broad definition on ordinary purchasing and contract actions. The July 23, 1964, report mentioned that the Department of Defense is involved in approximately 10.5 million contract transactions per year. These transactions involve innumerable "dispositions" that may or may not be considered "final," in determining the "rights, obligations, and privileges of named parties" on such questions as responsiveness of bids, responsibility of bidders, and contract performance problems.

While the definitions in the current act are also broad, their impact on these questions has not been severe. As Professor Davis' comments indicate, the general understanding of "adjudication" would have excluded purchasing and contracting functions under the act, but S. 1336 differs so markedly from the act in other related sections that the effect of the broad language cannot adequately be gaged.

The general effect of section 3 of S. 1336, if it were enacted, would be to greatly increase the volume of Defense material that must be published in the *Federal Register*; to make available for public inspection and copying many additional agency opinions, order, manuals, internal instructions, and interpretations of policy; and to require that all office records other than those specifically excluded by eight exemptions be made available to *any person*. A person whose request for the production of records or information is denied by the agency may under section 3(c) of S. 1336 bring action in a district court of the United States to enjoin the agency from withholding the records or information, and noncompliance with a court order to produce the records or information is specifically made a basis for a contempt citation against the responsible officials of the agency.

The introductory paragraph of section 3 of the Administrative Procedure Act (5 U.S.C. 1002) currently authorizes exceptions to the publication and availability requirements of the remainder of the section when "there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." These exceptions, stated in broad general language that leaves considerable discretion to the responsible officials of the agency, are considered by the Department of Defense to provide highly desirable authority for avoiding publication or denying availability to many records, rules, and opinions in which the public either has no legitimate interest or which require in the public interest nonpublication or nonavailability. An effort to eliminate this discretionary authority by sub-

stituting legislative categories of exemption from the general requirements seems likely to prove unsuccessful in view of the wide dissimilarity of functions and problems of various executive agencies.

By narrowing the area of discretion that can be exercised by the executive agency official in protecting from general exposure the records and information which he has in his custody and for which he is responsible, the bill threatens infringement of executive prerogatives constitutionally guaranteed by the separation of powers. The net effect of the bill is to attempt to substitute for discretion in the protection of information for which the executive branch is responsible, the discretion of the legislative branch, expressed in the language of the statute, and the discretion of the judicial branch, expressed in its interpretations of the imprecise language of the bill when deciding the cases over which it would gain jurisdiction under section 3(c).

In regard to the questionable constitutionality of such legislation, we note the views of the Department of Justice set forth in comments accompanying the letter of August 10, 1964, from the Assistant Attorney General, Norbert A. Schlei, Office of Legal Counsel, to the chairman of the Subcommittee on Administrative Procedure and Practice, Committee on the Judiciary, U.S. Senate. Although these views were expressed with respect to section 3 of S. 1663, 88th Congress, section 3 of S. 1336 appears to be sufficiently similar to that previous bill to necessitate the same constitutional objections. To a similar effect are the remarks of Assistant Attorney General Schlei which were made on March 30 of this year before the Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, on the proposed "Federal Public Records Law," H.R. 5012, 89th Congress, 1st session.

More specifically, section 3(a) of S. 1336 would require the publication in the Federal Register of a great mass of material of little or no interest to the public in general or to any substantial segment of the public. The Federal Register would become an unwieldy document of less value to members of the public frequently, significantly, or directly affected by the actions of Federal agencies than the version currently published. Much of the material, which may be excluded from publication under the introductory paragraph of section 3 of the Administrative Procedure Act because it involves a "function of the United States requiring secrecy in the public interest" or a "matter relating solely to the internal management of an agency," would have to be published under S. 1336 despite the damage this might do to the functioning of the agency, the extra administrative workload that would be imposed, and the lack of broad public interest in the material published.

An example of the undesirable consequences of section 3(a) of S. 1336 that would be of particular concern to the Department of Defense is its possible effect on court-martial actions against members of the Armed Forces who have violated general orders or regulations. At present, actual knowledge of a general order or regulation need not be alleged or proved in court-martial trials for failure to obey such an order or regulation (see Manual for Courts-Martial, United States, 1951, pars. 154a(4), 171). Assuming that such orders or regulations are "substantive rules of general applicability adopted as authorized by law" under section 3(a)(D) of S. 1336, then a member could not "in any manner be required to resort to or be adversely affected" by them unless they are either published in the Federal Register or unless he has "actual and timely notice" of their terms. Thus every general order or regulation would have to be published in the Federal Register unless the services are willing to gamble on their ability to prove, in event of violation, actual and timely knowledge of the order or regulation involved. Since it is probably safe to assume that few members of the Armed Forces will read the Federal Register and that persons outside the military departments have little interest in most such orders or regulations, this extra costly publication effort required by S. 1336 would almost certainly serve no legitimate interest.

S. 1336 would require the publication of "interpretations of general applicability" whereas S. 1663 applied to all "interpretations." Although this is an improvement over S. 1663, it is not a return to the provisions of the act, which apply to "interpretations formulated and adopted by the agency for the guidance of the public." If the provision in the act needs strengthening, i.e., if there are interpretations that an agency does not purposely adopt for the guidance of the public but are necessary for the public's guidance, it still would not follow that

all interpretations of general applicability should be published in the Federal Register. A modification might be made to require publication of "all interpretations adopted by the agency that are necessary for the guidance of the public."

S. 1336 contains a requirement that was in S. 1663 that "*the officers from whom * * * the public may secure information, make submittals or requests, or obtain decisions*" be published in the Federal Register. If the descriptions of central and field organizations and established places at which and methods whereby such information can be obtained are published, no need is seen for imposing the additional burden of naming all the different officers from whom the information may be obtained. If all of the different personnel from whom the myriad of pieces of information are to be obtained are separately listed and kept current, it would represent an expensive, time-consuming and unnecessary task. If only one focal point were named, it may represent an added cost of doubtful value to the public.

Section 3(b), S. 1336, adds a requirement, without any qualifying definition, to make "staff manuals and instructions to staff that affect any member of the public" available for public inspection and copying unless they are promptly published and copies offered for sale. This provision is objectionable since staff manuals and instructions to staff on countless courses of action may affect the public but should not necessarily be available to public inspection. Instructions such as special quality control procedures designed for individual cases to avoid receipt of nonspecification supplies and professional instructions pertaining to defense of or settlement of litigation are examples of instructions to staff that affect the public but that should not be open to public inspection. Yet, the section 3(e) exemptions are not broad enough to cover them.

Section 3(b) of S. 1336 is objectionable, as was 3(b) of S. 1663, in representing a vast expansion over the present act in the general requirements for making available for public inspection, without adequate exemptions, all statements of policy and interpretations that are not published in the Federal Register. In view of the publication requirements applicable to both substantive and procedural rules as well as statements of policy and interpretation that are adopted for the public's guidance (or necessary for the public's guidance) no need is seen for expanding the requirements of 3(b) of the act to such an indeterminate extent and then compounding the burden by requiring that "Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to *any matter* which is issued, adopted, or promulgated * * * and which is required * * * to be *made available* or published." [Italic supplied.]

In addition, the requirement for public inspection and copying imposed by section 3(b) of S. 1336 does not seem entirely consistent with section 3(a). For example, the "staff manuals and instructions to staff that affect any member of the public" and which must only be made available for inspection and copying under section 3(b) will frequently contain rules, statements, and descriptions which section 3(a) requires published in the Federal Register. Consequently, some greater effort to distinguish those matters which must be published and those which must only be made available to the public seems necessary. Moreover, the "statements of policy and interpretations" that must only be made available to the public under section 3(b) are not, as indicated above, entirely distinguished from the "statements of *general policy*" [emphasis supplied] which must be published under section 3(a) (D).

The authority in section 3(b) to delete identifying details from "an opinion, statement of policy, interpretation, or staff manual or instruction" made available to the public in order to prevent a "clearly unwarranted invasion of personal privacy" would help mitigate some of the damage that otherwise would result if the section were enacted. The requirement, however, that such deletions must be "fully explained in writing" imposes a serious administrative burden as the price of protecting privacy.

With regard to sections 3(c) and 3(e) of S. 1336 we note that they are substantially identical with sections 1(b) and 1(c) of H.R. 5012, 89th Congress. This is a bill "to amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records" and to which the objections of the Department of Defense were submitted on March 30, 1965, to the chairman, Committee on Government Operations, House of Representatives.

As we noted in that report of March 30, 1965, a provision such as subsection (c) is objectionable to this Department because it would require Defense officials

to carry the burden of justifying the withholding of information or records and to suffer the punishment for contempt in the event of noncompliance with a court order. This aspect of the proposed law ignores the fact that the ultimate responsibility for the conduct of the executive branch rests with the President. The employees of the executive branch work for the President and should not be subject to contempt of court when performing an official act in accordance with directives of an agency head. Certainly it is not conducive to good government to have a statute that purports to place a subordinate in the position of being in contempt of court in the performance of an official act; nor, as an alternative, furnishing documents in direct violation of an order of the agency head.

If, in fact, subsection (c) is intended to provide a contempt penalty for a subordinate who withholds information at the direction of the President or a department head, the subsection is of questionable legal validity. In this connection see *In re Timbers*. (226 Fed. 2d 501 (1955)), and cases therein cited.

In order to comply with requirements of sections 3(c) and 3(e) of S. 1160, if it were enacted, it would be necessary in each component of the Department of Defense to build a large staff whose duty would be to determine the availability of records and information, to facilitate its collection from a variety of storage sites, and to assist in defending against suits in U.S. district courts anywhere in the United States. Such an organizational requirement would be exceedingly costly. If such a bill is enacted, it should therefore include an authorization consistent with the "sense of the Congress" expounded in the act of August 31, 1951, chapter 376, title V, section 501 (5 U.S.C. 140) for user charges that would cover the full cost of acquiring and providing the information or record obtained.

We also note that section 3(c) of S. 1336 seems to suffer from a difficulty that is similar to that found in other bills dealing with the same subject; namely, the intended distinction, if any, between *record* and *information*. The fundamental legislative instruction in section 3(c) is an affirmative requirement that every agency "make all its *records* promptly available to any person" [emphasis supplied]; yet in the second sentence of the same subsection district courts of the United States are given jurisdiction to enjoin the agency from withholding "agency *records* and *information* and to order the production of any agency *record* or *information* improperly withheld from the complainant." [Emphasis supplied.] This inconsistency provides a basis for concluding that there could be no improper withholding of *information* under the statute, since the only obligation of the agency is to make its *records* available to any person. If there is no such obligation, an agency needs no specific authority to withhold *information* from the public, and the exceptions of subsection (e) need apply only to *records*.

Thus, subsection (c) of section 3 of the Administrative Procedure Act (5 U.S.C. 1002) governs the availability of "public records." The Attorney General's Manual on the Administrative Procedure Act (1947), page 25, concludes that internal memorandums are not considered "official records." Similarly, section 3(e) (5) of S. 1336 provides an exception to the availability requirements for some kinds of interagency or intraagency memorandums. Therefore, there are inconsistencies between the terms of the bill and subsection 3(c) of the Administrative Procedure Act and a further internal inconsistency within the bill, in that courts are given authority to require production of information presumably including internal memorandums, whereas internal memorandums are exempt from production under section 3(e) (5) of the bill and under section 3(c) of the existing Administrative Procedure Act, and the obligation to "make available" extends only to records under section 3(e) of the bill.

Subsection (e), in setting forth specific exceptions to the general requirements of the remainder of S. 1336 raises a host of unresolvable issues and problems. Section 3(e) (1), for example, authorizes an exception to the affirmative requirement of the bill only if "*specifically* required by Executive order." [Italic supplied.] Employment of this exception, therefore, apparently requires a Presidential decision in the form of an order that can be cited and interpreted by a subordinate. Whether an official forced to defend himself in a court action brought under section 3(c) need only cite the Executive order in justifying his decision to withhold or whether the order itself must be sustained is not determinable from the language. The phrase "by Executive order" seems to prevent delegation, and the word "specifically" invites claims of invalidity if any attempt to withhold information or records by category is made. The impossible burden that would be placed on the President if he were required

to make individual judgments in the case of every document that is to be treated as privileged is apparent.

Although the second exception for "internal personnel rules and practices of any agency" is desirable as far as it goes, it makes no provision for the many other kinds of internal rules and practices equally deserving of protection and of no legitimate interest outside the agency. Moreover, it raises a question concerning the status of matters which cannot satisfy the requirement of relating "solely to personnel rules and practices" but involving other matters as well. It appears to be the intent of the provision to give no protection to those portions of records which relate to internal rules and practices of an agency when they are mixed with other information. An example of the kind of internal management rule that would receive no protection under section 3(e)(2) of S. 1336 is found in DOD Directive 4105.46 which prescribes the permissible price latitudes for DOD negotiators in cost-plus-fixed-fee contract negotiations. The undesirability of making such information generally available is obvious, but S. 1336 provides no basis for protecting it.

The exception in section 3(e)(4) for "trade secrets and commercial or financial information obtained from the public and privileged or confidential" is difficult to interpret. Requiring that trade secrets and commercial or financial information obtained from the public be privileged or confidential before they are entitled to protection begs the question of how that kind of information achieves the status of privilege or confidentiality, if not by this subsection. Such information, in whole or in part, may be afforded a privileged or confidential status by reason of the criminal penalties under section 1905 of title 18, United States Code, imposed on officers and employees of the United States for its unauthorized disclosure. If so, then it presumably falls within section 3(e)(3) of S. 1336 for matters "specifically exempted from disclosure by statute." Should the intent be, however, to provide protection for all information of this type obtained from the public with the understanding or assurance that it will be protected as privileged information, regardless of whether it comes within the criminal provisions of 18 U.S.C. 1905, then section 3(e)(4) should be redrafted to say so clearly.

Section 3(e)(5) recognizes the necessity for protecting interagency and intra-agency memorandums. The reason for limiting this exception to those memorandums dealing "solely with matters of law or policy" is, however, not obvious. It is a well-accepted maxim that no large organization can function effectively if communications from subordinates to superiors or between subordinates are subject to general public scrutiny. For agency decisions by superiors to be made with the benefit of full, frank, and open discussion, and recommendations by and between subordinates, these comments and recommendations must have the protection of privileged information. Otherwise, every memorandum would be carefully written with a view toward the possible impact of its exposure to the public. The inhibiting influence of such a requirement is inevitable. Yet exception 5 of paragraph 3(e) apparently would limit this privilege to exclude memorandums that contained any mixture of fact with law or policy. The difficulty of writing a memorandum of law or policy without including factual matters would have the effect of either denying the privilege to many memorandums that should be protected or promoting artificial memorandums splitting, with factual memorandums cross-referenced to policy or legal memorandums on the same subject. The extra burden of the second possibility would cause unjustifiable increases in administrative costs. Memorandums dealing with both law and policy would also not fall within exception 5 of paragraph 3(e) and would have to be split before qualifying for the privilege.

Although the exception provided by section 3(e)(6) is highly desirable, the burden in the event of legal challenge of proving in a Federal court that revelation of the record or information would constitute a "clearly unwarranted invasion of personal privacy" is a heavy one. Discretion of the agency to determine what is "clearly unwarranted" when privacy is invaded would be subject to the review of any district court judge before whom an action for production of the record or information was initiated. Furthermore, unless some provision is made for examination of the information or record by the court in camera, such as that in section 3500, title 18, United States Code, the invasion of privacy would occur in the course of the very litigation that attempts to prevent it.

Again, the exception provided in section 3(e)(7) for investigative files indicates recognition of the necessity for protecting such information, but the limitation

on the protection significantly reduces its beneficial effect. There are many investigative files compiled and held by the Department of Defense for other than "law enforcement purposes" which nevertheless require the same protection. For example, investigative files compiled for the purpose of determining whether an individual is to receive a personnel security clearance for access to classified information often contain highly personal and sometime prejudicial information (perhaps even inaccurate) that should not be available to the general public. The reasons for this are much the same as for those which justify the privilege for investigative files compiled for law enforcement purposes. They include, among other things, the protection of privacy, an interest expressly recognized as valid under section 3(e)(6). The necessity of treating such files as privileged has been endorsed by several Presidents of the United States and has generally been respected by Congress. (See, for example, President Truman's memorandum of March 13, 1948, addressed to all officers and employees in the executive branch of the Government, who are directed to decline to furnish information, reports, or files dealing with the employee loyalty program.)

Other investigative files such as aircraft accident investigation reports also contain invaluable information that is obtained only by the assurance that it will be treated as privileged. Judicial recognition of the necessity for protecting such information in aircraft accident investigation reports is found in such cases as *Machin v. Zuckert*, 316 Fed. 2d 336 (C.A.D.C. 1963), where the legitimate interests of the Government in promoting air safety was recognized by the court as a valid reason for denying to the litigants access to the accident report. Other inspection and survey reports of investigation are also dependent on full and frank exchanges between investigators and the persons questioned, and the continued protection of the information obtained in the course of these exchanges is absolutely essential to the continued flow of information vital to the effective and efficient management of the Defense Establishment.

Some additional examples of the kinds of information or records which the Department of Defense now considers it essential to treat as privileged but which might not receive protection under S. 1336 are the following:

1. Reports of proceedings pertaining to the conduct of, or the manner of performance of duties by, military and civilian personnel and the names of persons who participated in the investigation or adjudication of any particular case.

2. All reports, records, and files pertaining to individual cases in the military, civilian, and industrial security programs, including the names of individuals who participated in the consideration and disposition of any particular case and the decisions made.

3. Examination questions and answers to be used in training courses or in a determination of the qualifications of candidates for employment, entrance to duty, advancement, or promotion.

4. Information as to the identity of confidential sources of information and information furnished in confidence.

5. Information which is, or reasonably may be expected to be, connected with any pending or anticipated litigation before any Federal or State court or regulatory body, until such information is presented in evidence or is determined to be appropriate for public disclosure.

6. Advance information on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, which would provide undue or discriminatory advantages to private or personal interests.

7. Preliminary documents pertaining to proposed plans or policy development when premature disclosure would affect adversely morale, discipline, or efficiency.

8. Conversations and communications between personnel of the Department of Defense, including defense contractors, and between such persons and representatives of other Government agencies, which are merely advisory or preliminary in nature and which do not represent any final official action, and documentary evidence of such contacts.

The requirement of section 3(d) of S. 1336 that agencies keep records that will be available for public inspection of final votes in "every agency proceeding" could, in view of the very broad definition of agency proceeding in section 2(g) of the Administrative Procedure Act, be construed as applicable to a wide variety of broad activities of the Department of Defense. Such agency proceedings as courts-martial would probably be excepted under section 3(e)(3), since section 851 of title 10, United States Code, specifically requires secret ballots

in courts-martial; but whether military selection boards, discharge review boards, records correction boards, and various military and civilian personnel security boards would also be excepted from the requirement of publicly recorded voting is not certain. If the votes of these "agencies" on individual cases are considered "matters * * * related solely to the internal personnel practices" of the agency, then they come within the exception of section 3(e)(2). If not, making the voting record of each member publicly available is likely to subject them to individual pressures and criticisms that ought to be borne by the collegial body itself or the agency after it takes final action in the proceeding. Moreover, it could have the unfortunate effect of encouraging "voting for the record" and of discouraging dissenting or minority votes of personal conviction.

The Department of Defense appreciates the desirability of facilitating the availability of public information and endorses this objective. However, in view of the wide dissimilarity of functions and problems of the various executive agencies, there is a serious question whether a single statute of general applicability can achieve effectively this intended result.

The Department notes with interest that several of the eminent legal experts serving as members of the Board of Consultants and Review of the Administrative Procedure Act, established by the Senate Subcommittee on Administrative Practice and Procedure, indicated their serious reservations about many of the provisions of S. 1663, 88th Congress, that are comparable in purpose and in language to S. 1336. We found particularly realistic and wise the comments of Marvin E. Frankel and Walter Gellhorn of the Columbia University Law School which begin at page 678 (as pars. 3, 4, and 5 of those comments) of the hearings of July 21, 22, and 23, 1964, before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 88th Congress, 2d session.

In associating himself with the comments of Professors Frankel and Gellhorn, Prof. Clark Byse of the Harvard Law School stated in his letter of July 1 to the chairman of the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate (appearing on p. 593 of the hearings of July 21, 22, and 23, 1964) several observations which this Department would endorse as equally applicable to S. 1336. These include the comment that:

"It is my judgment that improvement in the administrative process is more likely to be achieved by detailed, on-going studies by an administrative conference than by legislative enactment of S. 1663."

And the statement:

"Because it does not appear that the proponents of the changes proposed by S. 1663 have used the 'method of patiently pursuing the facts and preparing remedial measures in light of the specific evil disclosed,' I hope that the subcommittee will proceed with caution."

Even Prof. Kenneth Culp Davis of the University of Chicago, a vigorous proponent of revision of many portions of the Administrative Procedure Act, indicated his opposition to much of section 3 of S. 1663, on which section 3 of S. 1336 appears to be based. The reasons for this opposition are set forth on pages 245 through 249 of the hearings of July 21, 22, and 23, 1964, *supra*. Of particular interest are the following comments of Professor Davis:

"But section 3(c) in its present form will do little if any good, and it will do an immense amount of harm. It will prevent agencies from receiving confidential information in writing from private parties, and for that reason it will not have the effect of opening up the confidential information to the public. It will cause working papers within an agency to be destroyed, but it will not cause them to be made public. It will cause exchanges of ideas and false starts to be made orally instead of in writing, but the effect will not be to make anything of this sort public * * *."

"The public interest will suffer when administrators are forced to transact the public business without written records. The public will gain little or no increased information."

The limitation in section 4, "Rulemaking," on the exemption for military, naval, or foreign affairs functions to those "required by Executive order to be kept secret for the protection of the national defense or foreign policy" can be interpreted as confining the exception to only those military, naval, and foreign affairs functions which are formally "classified." Many such functions which are not classified are nevertheless so peculiarly military as to make application of the rulemaking procedure inappropriate, if not completely unworkable. For example, bearing in mind the broad definition in section 2 of "rulemaking," would

it be wise to subject to the requirements of notice, formal consultation, and hearing the issuance of regulations governing such widely diverse military functions as the operation of the Reserve officers' training program in civilian educational institutions, the determination and designation of vital industrial facilities in support of military mobilization production programs, the implementation of the Defense scientific and technical information program, or the choice between commercial or military transportation facilities for military supplies or personnel? Such regulations govern military functions which do not necessarily seem to fall within the exceptions of section 4(h). Yet subjecting the promulgation of such regulations to the formal requirements of rulemaking is not likely to be of benefit to anyone either within or outside the Department of Defense.

Section 4 of S. 1336 would immeasurably broaden the rulemaking requirements because it has deleted the "internal management" exception which the act, S. 1663 (original), and S. 1663 (revised) all contained, and which has made clear that the vast bulk of regulations pertaining to supply management and other internal management regulations are not subject to the rulemaking requirements. While the S. 1663 and S. 1336 revisions have redefined rule to exclude agency statements of "particular applicability," neither that change nor the exception in 4(h) of S. 1336 for "rulings of particular applicability" are adequate in view of the deletion of the internal management exception. Whatever else such a bill would be interpreted to mean, if passed, it would probably be considered that much that had been exempted as internal management would no longer be exempt. The exception currently in the act for agency management and for public property and contracts should be retained.

Section 4(c)(2) of S. 1336 puts back, as does section 5(a), the words, "required by the Constitution," which the subcommittee revision of S. 1663 had deleted. In view of the constantly changing norms of procedural due process and the opportunity to comply with changing norms without necessarily applying Administrative Procedure Act requirements, it would seem preferable that the procedures to be made applicable when Congress itself has not directly or indirectly made the act applicable, should be determined in the light of the particular rulemaking or adjudicative function involved. The consequence of a failure to follow this course may be to invalidate proceedings that comply with constitutionally required safeguards but not with all of the requirements of the act.

Section 4 of S. 1336 also would delete the provision in the present section 4 of the act which exempts any matter relating to "public property, loans, grants, benefits, or contracts." It would also delete the exemptions currently provided in that section for general statements of policy, rules of procedure or practice, and any situation in which the agency for good cause finds that notice and public procedure is impractical or unnecessary. The effect of these deletions would be to apply the rulemaking requirements, i.e., notice and hearing, to the issuance of regulations governing the procurement of property and services by the Department of Defense.

The Department is opposed to the above changes on two grounds: (1) They are unnecessary within the spirit and context of the act; and (2) they would unduly encumber and delay the issuance of such regulations.

In the area of procurement, Defense activities are governed by procedures set forth in the Armed Services Procurement Act (now ch. 137 of title 10, United States Code) and the armed services procurement regulation which is issued by the Office of the Secretary of Defense pursuant to section 2202 of title 10, United States Code. The latter is found in the Code of Federal Regulations commencing at 32 CFR 1.100. The military departments and the Defense Supply Agency also issue regulations implementing the above, as do subordinate commands and activities of those agencies. All of these regulations involve the function of buying property and services necessary to support the Department of Defense mission. They prescribe, for example, the types of contracts to be utilized, particular contract clauses to be used, procedures to be followed in awarding contracts, in administering Government property, in terminating contracts, in financing contractors, and in determining the allowability of costs. They concern an area in which the Government is acting in its role of a contracting party, rather than as a sovereign laying down rules to govern the conduct of its citizens or in dispensing benefits. Accordingly, a formal procedure which would require notice and hearing in formulating regulations in this proprietary area would not appear to be within the basic scope and objective of the Administrative Procedure Act.

Procurement regulations are amended and supplemented on a continuing basis. The Armed Services Procurement Regulation Committee, which is comprised of representatives of the Office of the Secretary of Defense, the military departments, and the Defense Supply Agency, meets for all-day sessions at least twice a week. Its agenda involves numerous proposed changes to the regulation. Revisions to the regulation are promulgated by the periodic issuance of revisions and procurement circulars. While many of the matters treated might fall within the exceptions provided in section 4 of S. 1336 as "minor exceptions from, revision of, or refinement of rules which do not affect protected substantive rights," it would be difficult, because of the indefiniteness of those terms, to segregate those which come within the intended coverage of the rule-making requirement. A similar problem would exist with respect to implementing regulations issued by the military departments and subordinate procuring activities.

In explaining the reasons for the exceptions currently provided in section 4 of the act for matters involving, among others, public property and contracts, the report of the Senate Judiciary Committee on S. 7, 79th Congress, which was enacted as the Administrative Procedure Act, stated:

"The exception of proprietary matters is included because the principal considerations in most such cases relate to the mechanics and interpretations of policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rulemaking procedures they will adopt in a given situation within their terms." (S. Rept. No. 752, 79th Cong., 1st sess.)

The Department of Defense has complied with the intent of the Congress as indicated in the above-quoted language. Industry views are often solicited prior to the issuance in the Armed Services Procurement Regulation of a procurement regulation or a change thereto. This is accomplished through the solicitation of the written views of the various industry associations which represent defense contractors. These associations include, among others, the National Security Industrial Association, the Electronic Industries Association, the Aerospace Industries Association, the American Ordnance Association, the U.S. Chamber of Commerce, the Associated General Contractors of America, the Automobile Manufacturers Association, the Machinery & Allied Products Institute, the National Association of Manufacturers, the Shipbuilders Council of America, the Strategic Industries Association, and the Western Electronic Manufacturers Association. The Department has also established a Defense Industry Advisory Council which is composed of representatives comprising a cross section of defense industry. The Council is frequently consulted on procurement policy matters. Through such close coordination with industry, industry views are received and considered. At the same time formal notice and hearing procedures are avoided which would unduly delay the timely issuance of necessary regulations.

The reasons for which the Congress exempted contract and public property matters from the formal requirements of rulemaking in the Administrative Procedure Act of 1946 are equally sound today. The Department is unaware of any demand for the removal of this exemption. The Department recognizes the need for consultation and coordination with industry in appropriate situations. It is opposed, however, to the imposition of mandatory procedural requirements which could so hinder and delay the issuance of regulations that procurement policy and procedures would be unresponsive to changing defense needs.

Section 5: Adjudication, of S. 1336 deletes the following specific exceptions to the required procedures contained in the present section 5 of the act:

"* * * (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which any agency is acting as an agent for a court; and (6) the certification of employee representatives—"

In contrast, S. 1336 would require the prescribed adjudication procedures:

"(a) In those cases of adjudication which are required by the Constitution

or by statute to be determined on the record after opportunity for an agency hearing—”

Not only does Section 5: Adjudication, as contained in S. 1336, delete the desired military and other exceptions in the existing act, but section 5(a), as contained in S. 1336, would, in addition to those cases required by statute, enlarge the requirement for adjudication to those cases required by the Constitution. This broadened requirement would include every type of case in which a court of law determines that administrative “due process” requires a hearing despite the absence of a statutory requirement. Deletion of the military exception in section 5 and the addition of a constitutional requirement would have an adverse impact, particularly on the Department’s administration of its own military and civilian personnel. This would constitute an undesirable departure from the basic purpose of most of the other provisions of the act which are aimed primarily at the relationships of the Government (particularly the regulatory agencies) with members of the general public.

This section could be construed as giving the right of statutory adjudication procedures to any military member or civilian employee, probationary or otherwise, in almost any type of personnel action, ranging from discharge to reassignment or failure to be selected for promotion. Congress has already spelled out carefully, in other laws, the minimum procedural rights to be granted in many types of personnel actions. In addition, the Department has in many instances granted procedural benefits to its personnel beyond those prescribed by law. Because of the great variety in the character of personnel actions, all factors must be carefully weighed before deciding upon the procedures for a particular type of action. The Department of Defense considers that it would be a serious mistake to extend statutory adjudication procedures to many personnel actions. This would not only increase materially the costs to both Government and the individuals concerned, but could also hamper personnel administration to a degree which would seriously impair the accomplishment of the basic mission of the Department of Defense.

The adjudication requirements of section 5 of the act were limited to cases required by statute alone to be determined on the record, and there was also an express exemption for “any matter subject to a subsequent trial of the law and facts de novo in any court.” There is also no counterpart in the act to section 5(b) of S. 1336 imposing general procedural requirements of an indeterminate nature on “all other cases of adjudication * * * .”

The section 5(b) provisions on procedure “in all other cases of adjudication,” while seemingly innocuous in requiring only basic fairness and promptness, are susceptible to interpretive expansion and, in view of the broad definition of adjudication discussed above, are objectionable as being ambiguous and of doubtful value.

Section 6: Ancillary Matters, would extend to “any person appearing * * * before any agency or representative thereof” the right to be “accompanied, represented, and advised by counsel” not only in any “proceeding” but also in any “investigation.” The term “investigation” is not otherwise defined. It might be construed to include any investigative process—from required reporting of official activities in formal data-gathering investigations by a regulatory agency, to mere casual questioning and informal inquiries within the Department of Defense. So construed, the proposed extension of a right in every instance to be “accompanied” and “represented” by counsel would seriously obstruct the administrative and operational processes of the Department and its components.

Within the military, the responsibility and power of a commander to “investigate” matters within his jurisdiction and to obtain official information from his military personnel are an inherent and absolutely necessary function of command. Without it, a military unit could not operate effectively. In this connection, it should be observed that the rights of individual military personnel against self-incrimination are adequately protected by article 31, Uniform Code of Military Justice and by decisions of the U.S. Court of Military Appeals which clearly establish the right to consult with counsel in any investigation, formal or informal, in which such personnel may be involved as a suspect or as an accused and from which criminal liability may flow. In addition, military personnel are free to consult with counsel at any time concerning their rights, privileges, and obligations. Extension of this “right” to include the physical presence of counsel throughout any period of interrogation, however informal and however brief, would seriously encumber and hamper normal military administrative processes.

Under section 6(c) of the present act, subpoenas are issued when "authorized by law." The proposed section 6(e) provides for the issuance of subpoenas "[u]nless otherwise provided by statute * * *." This constitutes a broadening of the subpoena use which could, in many proceedings under the jurisdiction of the Department of Defense, result in extensive administrative burdens and undue procedural delays. Instead of the blanket extension of subpoena power provided in the proposed section 6(e), the desirability and feasibility of a broadened subpoena power should be evaluated against the particular needs of each type of adjudication or rulemaking proceeding for which the Department is responsible, and any extension in a particular type of proceeding should be based upon evidence of likely advantage to all affected parties.

Section 6(h) of S. 1336 now reads similarly to S. 1663 (original) in providing for depositions and discovery being available unless the agency deems it impracticable except that now there is the qualification, "and otherwise provides for *depositions and discovery* by published rule." [Italic supplied.] The S. 1663 (revised) provision is better since it provides for depositions and discovery "to the extent an agency shall find it practicable."

The proposed section 6(j) adds a provision designed specifically to cover proceedings or actions otherwise exempted by the act. The effect of this amendment is to increase the applicability of the act to the Department and the Armed Forces by requiring rules of procedure to conform to the procedures of the act "to the greatest extent practicable." Modifying existing rules of procedure now coming within the national defense exception with the sole objective of making them conform more closely with the other provisions of the bill would require a great deal of costly and time-consuming effort that is not likely to result in general improvement of procedures. Existing procedures of the Department of Defense have been developed, often with the knowledge, acquiescence, or approval of Congress, and they more nearly satisfy the interests of the parties concerned than would a procedure based upon requirements of the act that are designed primarily for the regulatory agencies.

The Department notes that the procedural requirements imposed by section 8 of S. 1336 seem to have been designed with the view toward their application by the regulatory agencies and other traditional administrative bodies. Any extension of these general procedures to the adjudication by the Department of Defense would be objectionable, since the specialized procedures which have been developed for these functions is deemed to provide more expeditious and equitable procedures.

Special mention should be made of section 8(c)(2) of S. 1336, since the comparable provision of S. 1663, as revised by the Subcommittee on Administrative Practice and Procedure, seemed preferable. By contrast, this section of S. 1336 is comparable with the original language in S. 1663. Under it, the result could have been that an appeal to an appeal board would have been permitted where the exceptions would be fully considered; but if the appeal were made to the agency and the agency denied the application for an agency determination, that would be the end of the case, even though there might be error, when the case was not considered of sufficient importance to be decided by the agency itself. A similar effect is possible, although it is doubtful that the drafters intended any such results, in view of the provision of S. 1336 that:

"If the agency denies the application, it shall be deemed to have considered and denied each exception and affirmed the decision of the presiding officer."

There is no longer a provision that the agency either determine all exceptions or assign them to the board for determination.

Section 9(b): Publicity, seems too broad in providing that an agency action can be set aside simply because any officer or employee or member (irrespective of whether he acts on behalf of the agency) issues publicity to discredit or disparage a person under investigation or party to a proceeding. In addition, the provision is unnecessary because it restates a rule of evidence commonly applied and places undue special emphasis on one particular aspect of evidence considered. Although the rule of statutory construction "*expressio unius est exclusio alterius*" (the express mention of a thing implies the exclusion of another different thing), would not be entirely applicable, the false implication could arise that this subsection was inserted because it was congressional intent to give greater import to this matter than to other evidentiary factors. For these reasons, subsection (b): Publicity, should be deleted.

Section 10, "Judicial Review," would confer "standing" upon any person "adversely affected * * * by any reviewable agency action." This would effect a significant change in the law. It would create a right to review without requiring the complainant to show that he has suffered a "legal wrong," or that he has been adversely affected or aggrieved by the agency action "within the meaning of any relevant statute." The amendment could thereby overturn a sophisticated body of rules for judicial review that has been carefully developed by the courts. See, e.g., *Kansas City Power and Light Co. v. McKay*, 225 Fed. 2d 924 (D.C. Cir.), *cert. den.*, 350 U.S. 884 (1955), and cases cited therein. Furthermore, from the particular point of view of the Department of Defense, the definition of the term "order" in the bill is so extremely broad that it is conceivable that disappointed bidders for Government contracts might seek judicial review of decisions not to make awards to the complainants. [The Department of Defense in the performance of its functions is involved in approximately 10.5 million contract transactions per year. The possibility of subjecting a procurement process of this magnitude to attempts to obtain judicial review at the complaint of persons "adversely affected" is a matter of deep concern to the Department of Defense.

For the reasons set forth above the Department of Defense is strongly opposed to the enactment of S. 1336. It is hoped that the length and detail of this report will suggest to the committee, not only the great concern of the Department of Defense about this bill, but also the extreme complexity of the issues which it raises. Accordingly, it is recommended that the alleged inadequacies of the present act be brought to the attention of the Administrative Conference of the United States. This newly created body (Public Law 88-499) is particularly well suited to consider the problems which stimulated the introduction of S. 1336 and to propose revisions of the Administrative Procedure Act that are realistic in their accommodation of the legitimate interests of all affected parties.

The Bureau of the Budget advises that, from the standpoint of the President's program, there is no objection to the submission of this report.

Sincerely yours,

L. NIEDERLEHNER,
Acting General Counsel.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
May 20, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

S. 1336 is in a number of respects similar to S. 1663, introduced in the 88th Congress, on which we reported unfavorably and commented in detail on February 28 and August 4, 1964, and in some aspects is patterned after S. 1070 of the 86th Congress, on which the Department also reported unfavorably on March 1, 1960. S. 1336, as a whole, appears considerably improved over its earlier versions, and apparently has taken into account some of our specific objections to S. 1663. Nevertheless, the bill, in our view, fails to overcome certain important basic defects which previously have been pointed out, and in addition, has added specific features which we cannot favor.

The bill would extensively revise the Administrative Procedure Act, and would change the act's fundamental design, both in substance and detail. The bill would expand the scope of the act, require the institution of new procedures in many instances, and repeal or seriously qualify existing exceptions, thereby extending its requirements, restrictions, and controls to virtually the entire spectrum of governmental responsibility, including many administrative functions heretofore excluded from such overall limitations. It would also inject the rules on pleading and practice of the Federal courts into the administrative process and would broaden judicial control over that process and over executive action in general to a substantial and, in our view, unwarranted degree. The result would be broad-scale formalization of most administrative responsibility.

Among the more troublesome features of S. 1336 are proposed sections 3(b) and 3(c) which would require all agencies to make available to all persons (with

limited exceptions) all agency documents and records for random inspection, regardless of whether the person seeking access to the material has a legitimate interest in the subject matter, and would make this requirement enforceable by injunction under procedures peculiarly burdensome to the Government. Although access to documents and records should be made as free as possible for those legitimately concerned, we believe that an unlimited license to the merely curious could seriously impede the orderly and efficient administration of the Government.

The bill would also repeal the existing exception from rulemaking procedures under section 4 "for matters relating to agency management * * * public property, loans, grants, benefits, or contracts," and would eliminate existing authority whereby notice and public procedure can be dispensed with in rulemaking subject to section 4 where "impracticable, unnecessary, or contrary to the public interest." For administrative adjudication required to be made after opportunity for hearing on the record, the bill (secs. 5, 7, 8), instead of allowing the greatest play for informality and flexibility consistent with the nature of the proceeding and the presence or absence of counsel, would go in the opposite direction by requiring that pleading and practice conform, so far as practicable, to the Rules of Civil Procedure or the Rules of Criminal Procedure for the Federal courts, and by imposing other new requirements. This would result in a very undesirable extension of formalism in the administrative process; particularly is this the case in such matters as the approximately 20,000 hearings held every year in the social security program, where the character of the claims and of the claimants demands the highest degree of informality compatible with fairness. Moreover, in situations in which adjudication is not required to be determined on the record after opportunity for an agency hearing, the bill (proposed sec. 5(b)) would appear to require the establishment of formalized procedures; this, when coupled with the sweeping definition of "adjudication" contained in proposed section 2(d) and with the proposed deletion of existing exceptions to section 5, would extend formalism and its consequent delays to an impracticable range of activities without, so far as we can determine, any compensating advantage. In short, the bill, as was the case with respect to S. 1663, appears to be based on an assumption with which we cannot agree, that at every turn in the administrative process a lack of fairness prevails, the remedy for which is uniform restriction and increased formalism.

We would more readily understand the alleged need for more formalism in the administrative process if all administrative responsibilities were adversary in nature, such as they commonly are in ratemaking, licensing, or regulatory proceedings. But the facts indicate otherwise; a very substantial proportion of administrative actions are not truly comparable to these formal proceedings. For this reason, there seems little question that, were S. 1336 adopted, procedures which have worked well and to the public benefit for years will needlessly be disrupted or made more cumbersome, to the ultimate detriment of both the public and the Government as a whole. This would be especially regrettable in the case of this Department whose many thousands of beneficiaries in the social security program would be likely to suffer rather than benefit from any delays and other procedural complexities engendered by the bill.

We do not believe, moreover, that there has been any demonstration of the need for a general overhaul of the act such as S. 1336 provides. To be sure, few would hold that the Administrative Procedure Act is not susceptible to improvement, although there are strong differences of opinion as to the direction in which improvement must be channeled. But in view of the present act's carefully worked-out exceptions, limitations, and qualifications, change in the direction of converting the act into a comprehensive and detailed group of procedures applicable to the vast and diverse activities of governmental and regulatory functions does not seem warranted. As stated in our report of February 28, 1964, on S. 1663:

"If the administration of any specific program—or category of similar programs—gives evidence of needing legislative correction or improvement, legislation fashioned specifically for that program or category of programs would be a far more effective device for bringing about the necessary changes than an amendment to the Administrative Procedure Act, and would avoid injury to other program for which different administrative procedures would be more suitable. This was done, for example, when the Senate Judiciary Committee in 1962, in response to President Kennedy's recommendations, worked out amend-

ments to the new-drug provisions of the Federal Food, Drug, and Cosmetic Act which eventually became law as Public Law 87-781."

We are not suggesting that there are not individual amendments that should be made in the Administrative Procedure Act even now. It may be that, after the permanent Administrative Conference of the United States (established by Public Law 88-499, 5 U.S.C. 1045-1045e) has been organized, its studies will from time to time bring to light various deficiencies in administrative procedures that call for other amendments of the act. This approach, however, is to be distinguished from the general overhaul proposed by this bill.

Thus, while S. 1336 may contain some desirable features, we are constrained to recommend against its enactment. (More detailed comments prepared by our staff with respect to S. 1336 will be transmitted to you in the form of a staff memorandum in the near future.)

We are advised by the Bureau of the Budget that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

WILBUR J. COHEN, *Acting Secretary.*

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., July 8, 1965.

HON. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR EASTLAND: Your committee has requested this Department's report on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

A number of the changes in the Administrative Procedure Act made by the bill appear to be beneficial to the public and the Government. We think, however, that there are many more changes which will have adverse effects on the programs of this Department and will not be beneficial to the public. We are unaware of the need for many of these changes which fail to recognize that the functions and responsibilities of the program agencies differ from those of the regulatory agencies. We agree that administrative procedures should be as uniform as possible, but we doubt that they can be entirely uniform. While the bill provides some exceptions from otherwise strict procedures, these exemptions are not adequate. They do not erase the problems that this bill will create, if enacted, for this Department. We therefore recommend against the enactment of S. 1336.

This Department's comments on the principal changes in the Administrative Procedure Act which this bill makes are enclosed.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

D. OTIS BEASLEY,
Assistant Secretary of the Interior.

SECTION-BY-SECTION COMMENT ON SOME OF THE CHANGES MADE BY S. 1336 TO THE
ADMINISTRATIVE PROCEDURE ACT

SECTION 1. TITLE

This section provides a new title for the act; namely, "Administrative Procedure Act of 1965."

SECTION 2. DEFINITIONS

Subsection (b) of the act now provides, among other things, that the term "rule" includes agency statements not only of general applicability but also of particular applicability. S. 1336 has deleted the reference to statements of particular applicability.

S. 1336 adds to the definition of "rule" a statement that the term "includes any exception from a rule". We interpret this to apply only to exceptions of general applicability and future effect. We do not interpret it to apply to ad

hoc waivers of a rule by the Secretary of the Interior which are granted without a formal proceeding to relieve a party from a particular inequity or hardship. S. 1336 adds a new definition to the act, namely a definition of the term "opinion".

Subsection (g) is new. It defines the terms "agency proceeding" and "agency action". The latter includes situations where the agency fails to act.

We do not object to any of these changes.

SECTION 3. PUBLIC INFORMATION

This section of the act now begins with two general exception clauses. These except any function of the United States requiring secrecy in the public interest or any matter that relates solely to the agency's internal management. S. 1336 deletes these clauses. We think this is undesirable.

Subsection (a) of this section now provides that no one shall in any matter be required to resort to unpublished organization or procedure. The bill expands this provision by requiring that no one shall, in any manner, be required to resort to, or be adversely affected by, any unpublished matter that is required to be published, unless he has actual and timely notice thereof. This amplification is desirable.

Subsection (b) of this section of the act now directs each agency to publish or, pursuant to a published rule, make available for public inspection, all final opinions or orders in the adjudication of cases and all rules. Confidential opinions and orders where good cause is shown, and when they are not cited as precedent, are excepted.

Subsection (c) of this section now directs that matters of official record shall be made available to anyone properly and directly concerned, except as otherwise required by law. A further exception to this provision is concerned with confidential records.

The bill substantially revises both of these subsections.

S. 1336 amends subsection (b) by directing that every agency shall make available for public inspection and copying (1) all final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, (2) statements of policy and interpretations adopted by the agency and not published in the Federal Register, and (3) staff manuals and instructions that affect the public, unless these materials are published and offered for sale. In order to prevent a clearly unwarranted invasion of personal privacy, the agency may delete identifying details, but it must justify such action in writing.

S. 1336 revises subsection (c) of this section of the act by directing that all records shall be made available to any person. This revised subsection also transfers from the executive branch to the judicial branch the authority to determine whether particular information is or is not excepted even though the determination involves an exercise of judgment or discretion which is permitted by the legislative rules set forth in subsection (e).

The bill adds to this section of the act two new subsections (e) and (f). The first lists eight categories of matters that are excepted from the operation of this section of the act. The second provides that only the information that is specifically exempted by this section may be withheld.

Recently, the Department of Justice advised the Committee on Government Operations of the House of Representatives that H.R. 5012 which contains provisions similar to the provisions in subsections (c) and (e) of section 3 of S. 1336 contravenes the separation of powers doctrine and would be unconstitutional, since they impinge upon the constitutional authority of the Executive to withhold documents in the executive branch where, in his discretion, he determines that the public interest requires that they be withheld. For similar reasons, the Justice Department also advised the House committee that the provisions transferring such authority to the judicial branch would also be unconstitutional. We concur in the views of the Department of Justice.

The following technical deficiencies in subsection (e) of section 3 of S. 1336 are listed for your information:

1. The reference to internal personnel rules and practices does not cover investigatory files relating to personnel actions. It should cover them.

2. The reference to matters specifically excepted from disclosure by statute is ambiguous in its application to a statute that prohibits a Federal official from disclosing particular information unless authorized by law.

3. The reference to trade secrets, etc., apparently contains a drafting error. The words "and privileged or confidential" should be "which is privileged and confidential."

4. The reference to memorandums and letters dealing solely with matters of law or policy does not expressly include working papers, preliminary drafts, and records of advisory committee meetings.

S. 1336 also adds a new provision to subsection (b) of this section of the act which directs this Department and other agencies to maintain and make available for public review a current index on any matter issued, adopted, or promulgated after enactment of this bill and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction affecting any member of the public can be relied upon, used, or cited by an agency against a private party unless indexed and made available or published or unless such party had actual and timely notice thereof.

We agree with the objective of this provision which is to provide a centralized and orderly system of locating decisions and other similar matters of an agency. We doubt, however, that an index can be administered by agencies, such as this Department, in a manner that will adequately accomplish this objective. The diversity of program matters handled by this Department, and the number of field officers throughout the United States handling them, portend a difficult and costly task of administration. Before legislating such a procedure, we strongly recommend that a comprehensive study be made of the need for such procedure in all agencies and of the cost of instituting and maintaining an adequate index system in each agency.

SECTION 4. RULEMAKING

The introductory clause of section 4 of the act now excepts from public participation procedures involving defense and foreign affairs functions of the United States, and matters relating to agency management, and proprietary functions. The revised section deletes this clause.

The deletion of the exceptions relating to proprietary functions, namely public property, loans, grants, benefits, and contracts, is unwise. These exceptions, while they do not relieve this Department from rulemaking procedures imposed by other laws, are highly important to the operations of this Department because of our many management responsibilities relating to the administration of the public lands and acquired lands.

The exceptions in the present act are explained as follows:

"The exception of proprietary matters is included because the principal considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rulemaking procedures they will adopt in a given situation within their terms" (S. Doc. 248, 79th Cong., p. 199).

The term "public property" covers all real and personal property of the United States. Consequently, the rules governing the public lands of the United States, such as rules relating to the sale or lease of these lands or of mineral, timber, or grazing rights therein, and the areas administered for park and fish and wildlife purposes, are excepted from the requirements of section 4 of the act. The rules governing property held by the United States in trust or as guardian, such as Indian property, are also excepted. (See H. Rept. 1980, 79th Cong.)

In addition, this Department has major program responsibilities in the marketing of electric power and in the administration of water resource projects. In a letter to your committee dated June 18, 1964, on a similar bill, S. 1663, the Chairman of the Tennessee Valley Authority said:

"The impropriety of subjecting this type of program (i.e., the disposition of electric energy) to rigid rulemaking requirements is (now) recognized in the Administrative Procedure Act. Section 4 expressly excepts from the rulemaking requirements any matters involving public property loans, grants, benefits, or contracts. Since the electric power which TVA (and the Department of the Interior) sells is public property, this provision exempts such sales from

the rulemaking process. The proposed revision (in S. 1336) would eliminate this exception. We think it is essential that this exception be retained."

This Department concurs in this statement. To subject the administration of our power marketing operations which supply energy to great areas of the Nation to the APA rulemaking requirements, could result in a complete disruption of our program. Similarly, the administration of the various types of water supply contracts for the delivery of water from Federal reclamation projects for agricultural, municipal, industrial uses could also be impaired. In some cases, the water might even be wasted pending the outcome of the procedures.

Program operations of this sort simply cannot be successfully administered through what amounts to a series of lawsuits. No private operation of this character could survive under such a regimen. The Government in this type of activity is no different.

The term "grants" includes, in addition to subsidy programs, various grant-in-aid programs; such as our Federal aid in fish and wildlife restoration programs, the recently enacted Federal aid in commercial fisheries research and development program, and the land and water conservation fund. Rulemaking with respect to these programs is also excepted by this section of the act.

We are unaware of any need to delete any of these exceptions in section 4. It is the policy of this Department to afford the public an opportunity, to the maximum extent feasible, to participate in the rulemaking process before the adoption of rules and regulations which are to be published in the Federal Register, even though such participation may not be required by the act. This is in accord with the congressional policy stated. This policy, however, recognizes that the executive branch must have some discretion relating to "what, if any, public rulemaking procedures" it will adopt. We believe the present approach is sound and entirely satisfactory. We therefore are opposed to this change.

The revised section 4(a) adds a new provision authorizing an agency to provide a means by which persons interested in rulemaking may submit suggestions for agency consideration prior to the published notice of rulemaking. This could be especially helpful in cases where there is intense public interest; such as in the publication by this Department of the annual regulations governing the taking of migratory waterfowl.

The revised and redesignated section 4(b) changes the present act by providing that notice of proposed rulemaking must be published in the Federal Register, even though all persons affected thereby are named, or are personally served, or have actual notice thereof. Notice in such circumstances obviously would serve no useful purpose, and the change is undesirable.

Subsection (c) establishes the procedures to be followed by the agency after notice.

Subsection (d) provides for emergency rulemaking. An agency can, if it finds that rulemaking without notice and other procedures is necessary in the public interest, issue an emergency rule effective for a period of 6 months. This period can be extended an additional year, if the agency, during the initial 6-month period, begins a rulemaking proceeding, including notice.

We believe that it would be unwise to provide categorically that the only way an emergency rule can be renewed is to initiate a rulemaking proceeding. The head of an executive department should be authorized to omit the rulemaking procedures and to issue a rule effective without limitation as to time in exceptional instances in which the public interest would be served.

In the administration of the mandatory oil import program under Presidential Proclamation 3279 (24 F.R. 1781) as amended, there have been several occasions when it was impossible to give notice of proposed rulemaking or to delay the effective date of rules as published in the Federal Register. This results from the nature of the program which requires that statistical information be accumulated to the very latest possible moment before levels for oil imports based upon demand-supply relationships, especially residual fuel oil to be used as fuel, are established. The levels for residual fuel oil to be used as fuel are established annually on April 1. The balance of the program is on a 6-month basis commencing on January 1 and July 1.

The subsection (e) provides that each agency shall maintain a rulemaking docket which shows the status of all proposed rulemaking. This procedure would have no practical value in the Department of the Interior. It would probably result in increasing our administrative costs without any comparable benefit to the public.

Subsections (f) and (g) relating to "effective dates" and "petitions," respectively, are similar to subsections (c) and (d) of this section of the Administrative Procedure Act.

Subsection (h) provides that the provisions of section 4 of the bill do not apply to five categories of rulemaking. These categories are similar to those listed in section 3(e) of the bill. As we have indicated above, we think that the exemptions now in the introductory clause of the Administrative Procedure Act are adequate. We believe they should be continued or, at the very least, the exemptions in this subsection should be broadened to cover proprietary functions of the Government.

SECTION 5. ADJUDICATION

Section 5 of the Administrative Procedure Act now applies to every adjudication that is required by statute to be determined on the record after opportunity for an agency hearing, with six named exceptions. The bill deletes these exceptions. We think they should be retained. No convincing reason has been offered for deleting them, and the reasons for including them are still valid. The reasons were:

"The first, where the adjudication is subject to a judicial trial *de novo*, is included because whatever judgment the agency makes is effective only in a *prima facie* sense at most and the party aggrieved is entitled to complete judicial retrial and decision. The second, respecting the selection and tenure of officers other than examiners, is included because the selection and control of public personnel has been traditionally regarded as a discretionary function which, if to be overturned, should be done by separate legislation. The third exempts proceedings resting on inspections, tests, or elections because those methods of determination do not lend themselves to the hearing process. The fourth exempts military, naval, and foreign affairs functions for the same reasons that they are exempted from section 4; and, in any event, rarely if ever do statutes require such functions to be exercised upon hearing. The fifth, exempting cases in which an agency is acting as the agent for a court, is included because the administrative operation is subject to judicial revision *in toto*. The sixth, exempting the certification of employee representatives such as the Labor Board operations under section 9(c) of the National Labor Relations Act, is included because these determinations rest so largely upon an election or the availability of an election." (S. Doc. 248, 79th Cong., p. 202.)

Section 5(a)(1) of the bill relates to notice. This provision is similar to the existing notice provision in section 5(a) of the act.

Section 5(b) of the act relates to pleadings and other papers. This provision now directs that they conform to the practice and requirements of pleading in the district courts of the United States, except where the agency finds conformity impracticable. Section 5(a)(2) of the bill directs the agency to adopt rules of pleading in conformance of civil or criminal rules of procedure for the United States district courts. We are opposed to this change.

The rules of civil procedure are far more intricate than the rules established by this Department. Our rules have operated successfully for a number of years. There is little need for requiring such a detailed mass of rules on parties appearing in matters before this Department. Many of these parties, especially in Indian matters, prefer to handle these cases without benefit of counsel. In the type of hearing before examiners of inheritance in Indian probate matters, the requirements of formal pleadings, including the application of court rules, would hinder the handling and completion of the Indian probate work. To conform the Department's rules to the rules of civil procedure will invite unnecessary litigation on procedural issues.

Section 5(a)(3) is new. It provides for a prehearing conference in the discretion of the agency or the presiding officer. We believe it is desirable.

Section 5(a)(5) also is new. It allows the agency to provide for abridged hearing procedures "for use in such proceedings as the agency may designate by rule or order." These procedures are only required to be such as to promptly inform the agency and the parties as to the issues, facts, and arguments involved and to provide for the making of a record. This abridged procedure could serve a useful purpose.

The bill redesignates the present section 5(c) of the act as section 5(a)(6). The principal purpose of the present section 5(c)—

"* * * is to assure that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and

deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives." (H. Rept. 1980, supra.)

Subsection (A) of this section of the bill continues, with some technical changes, the provision now in the act that prohibits an officer, employee, or agent engaged in the performance of investigative or prosecuting functions from participating or advising in a decision or agency review. The bill excepts a "member of an agency" from this prohibition.

This provision as construed by the court in *Columbia Research Corporation v. Schaffer*, 256 F. 2d 677 (1958) has caused this Department some concern. The court, after quoting section 5(c) of the act, entered summary judgment for the plaintiffs holding:

"* * * when the subordinate is prosecutor and his superior is judge, it appears to us reasonable to suppose that the prosecutor will be disposed to select such cases as he believes will meet with his superior's approval, and that his discretion may be exercised otherwise than if each was responsible to the postmaster only by a separate chain of authority. It is of course true that under any possible system of administration in the end there will be the fusion of prosecutor and judge, subject only to the supervision of the courts; but it makes much difference whether it be reserved to the highest level of authority: i.e., to the 'agency' itself and it is fairly obvious that Congress had just this in mind at the end of [5 U.S.C.] section 1004(c) it provided that the subsection should not apply to the 'agency' or to any of its 'members.' There alone was the fusion to be permissible."

On a petition for rehearing the court subsequently held that the action must abate and the former judgment was withdrawn for lack of timely motion for substitution of new defendant where the original defendant resigned as postmaster. The opinion, if applied in a similar case in the future, would substantially affect public land appeals of this Department. In these appeals, the Solicitor of this Department, pursuant to a delegation of authority (24 F.R. 1348), has the function of deciding these appeals finally on behalf of the Secretary. The field attorneys, who are subordinate to the Solicitor, engage in both investigating and prosecuting functions in these cases initially.

Thus, they would fall into the purview of the *Columbia* case. If S. 1336 is enacted, we believe that the provisions of section 5(a)(6)(A) of the bill should be revised to make it clear that it applies only to persons who personally act in two capacities rather than persons who merely occupy positions that involve the commingling of the investigative or prosecuting functions and the deciding functions.

Section 5(a)(6)(B) of the bill is unduly restrictive. It effectively denies to presiding officers and members of appeals boards, other than a member of an agency, the opportunity to consult with anyone on any fact in issue unless upon notice and opportunity for parties to be heard. Read literally, this prohibition extends to discussions between an appeals board member and any staff member of the board. It would effectively prevent the board from having any staff to assist it.

Section 5(a)(7) is new. It authorizes an agency, when there is a finding that speedy action is necessary to preserve the public health or safety, or where otherwise authorized by law, to waive the notice and other procedural requirements of section 5. Provision is also made for immediate judicial review of this action unless an agency hearing is conducted in accordance with the act. We believe that the section should be expanded to permit emergency action when necessary to protect public property.

Subsections (b) and (c) of section 5 are new. The first directs the agency by rule to provide procedures designed to inform the agency and the parties of these issues, facts, and arguments involved. It also provides that subject to appeal and review, the decision of the presiding officer shall constitute final agency action. The second directs the agency to provide for the consideration of offers of settlement. We think that the provisions of subsection (b) are undesirable.

SECTION 6. ANCILLARY MATTERS

Subsection (a) of the bill relates to appearance and is similar to subsection (a) of this section of the act.

Subsection (b) is new. It provides that anyone who is a member in good standing of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before an agency. It spe-

cifically provides that the bill does not grant or deny anyone, not a lawyer, the right to appear or represent others before an agency. It also recognizes the agency's right to discipline persons appearing in a representative capacity. It specifically recognizes that a person may be prohibited from acting in a representative capacity by statute, such as the conflict of interest laws, or by regulation. We would not object to the enactment of this subsection of the bill.

If enacted, this subsection will not substantially change our policy which permits all attorneys who are admitted to practice before the courts of any State, territory, or the District of Columbia to practice before the Department without filing an application for such privilege.

Subsection (c) is new. It provides for service on attorneys or others who represent a participant in any matter before an agency. While we think that this provision is unnecessary, we do not object to it.

Section 6(c) of the act has been redesignated by the bill as section 6(e). This provision of the act now makes agency subpoenas available to private parties to the same extent as to agency representatives, provided the agency has authority under another statute to issue subpoenas. The Administrative Procedure Act does not grant authority to issue subpoenas.

S. 1336 directs agencies to provide by rule for the issuance of subpoenas and to issue them on request in an adjudication. When objection is made by anyone as to scope or general relevance, the agency or presiding officer may quash or modify the subpoena. Thus, at least as to subpoenas in adjudications, the bill grants authority to issue subpoenas. We think this is desirable.

The bill, however, does not authorize the issuance of subpoenas in a rulemaking proceeding. In such proceedings, the subpoenas must be authorized by law. We interpret this to mean by other statutes. When so authorized they shall be issued on request upon a showing of general relevance and reasonable scope of the evidence sought. We think this is desirable.

Subsection (g) is new. It describes how an agency shall compute a period of time prescribed or allowed by the Administrative Procedure Act, or by any other statute administered by the Administrative Procedure Act, or by agency rule or order.

Subsections (a) and (i) are also new. They relate to depositions and discovery and consolidation.

Subsection (j) is new. It directs that an agency proceeding or action exempted, because the national defense or foreign policy is involved, from the procedures of the Administrative Procedure Act shall be governed by the procedures of the Administrative Procedure Act to the extent practicable.

Subsections (k) and (l) relate to declaratory orders and summary decisions respectively.

We think that these provisions are desirable.

SECTION 7. HEARINGS

The bill adds to subsection (a) of the act authority for the agency to assign another presiding officer to replace a presiding officer who is disqualified or otherwise becomes unavailable.

The bill adds to subsection (d) of the act a provision which permits official notice of all facts of which judicial notice could be taken and of other facts within the expertise of the agency.

These latter two provisions could be helpful.

S. 1336 adds a new subsection (e) to this section of the act which permits a presiding officer to certify to the agency, or allow the parties an interlocutory appeal on, any material question in the proceeding, if he finds that such action would prevent substantial prejudice or expedite the hearing. An agency can provide for such appeal on a showing of substantial prejudice and after denial by the hearing official. The proceeding may be stayed pending the outcome of the appeal.

We are uncertain as to whether or not an agency decision on an interlocutory appeal is a declaratory order within the meaning of section 6(k) of the bill. If it is a declaratory order, then it is immediately reviewable by the court. It might result in prolonging the entire proceedings.

SECTION 8. DECISIONS

S. 1336 revises subsection (a) of this section of the Administrative Procedure Act. This subsection now provides for intermediate and final decisions. It prescribes who must make them. Where the agency has not presided, the hearing

officer shall initially decide or the agency can require that the record be certified to it for initial decision.

The bill provides that the one who hears will also decide unless he is unavailable to the agency. Where there is no appeal or agency review, the decision is final and becomes the agency decision.

House Report No. 1980, 79th Congress, 2d session, May 3, 1946, which accompanied S. 7 (the Administrative Procedure Act), stated in respect to the present language in the act:

"The provision that on agency review of initial examiners' decisions it has all the powers it would have had in making the initial decision itself does not mean that initial examiners' decisions or recommended decisions are without effect. They become a part of the record and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. In a broad sense the agencies' reviewing powers are compared with that of courts under section 10(e) of the bill. The agency may adopt in whole or part the findings, conclusions, and basis stated by examiners or other presiding officers."

As is stated in the Attorney General's Manual on the Administrative Procedure Act (1947), p. 83:

"In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature."

The review powers of the agency, comparable in a broad sense to those of a court under section 10(e) of the act are limited only by the requirement that findings be supported by substantial evidence. In other words, the agency may, subject to the admonition that it should consider the opportunity afforded the examiner to weigh the credibility of a witness, substitute its judgment for that of the examiner so long as there is substantial evidence in the record to support its findings. This reviewing power differs significantly from that of a court under the substantial evidence rule. The courts are without authority to substitute their judgment for that of the agency whose decision or order is under attack. This is true even though the court may not necessarily agree with the findings and conclusion of the agency provided that, upon a review of the whole record, they are supported by substantial evidence and are not contrary to law.

Substantial evidence does not mean the preponderance or weight of the evidence. Of course, there must be "more than a mere scintilla," but, if there is, it need be only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197. And the reasonable mind is not tested by the weight that the average person would give the evidence. "[T]he weight to be given it is peculiarly for the body experienced in such matters * * *" *I.C.C. v. Louisville & N.R. Co.*, 227 U.S. 88.

S. 1336 would change this time tested principle. It limits the agency's power of review to the precise record presented and prohibits the setting aside of a presiding officer's initial decision unless his findings of "material fact were clearly erroneous." Thus, in reviewing an initial decision, the agency no longer is permitted to exercise all the powers it has in making an initial decision or to substitute its judgment on the evidence for that of the presiding officer. Only in cases where his findings of fact are unsupported by the weight of the evidence can he be overturned. The agency's reviewing power is limited, under the bill, by the clearly erroneous doctrine. It could no longer disagree with the hearing examiner and make a different finding of fact based only upon something more than a mere scintilla of reliable evidence in the record. He could only be overturned if the evidence preponderated against his finding. Thus, the agency's ultimate responsibility to make the decision would be limited, and its expertise would become, in major part, vested in a subordinate officer. The agency could no longer apply its own judgment. In 1889 Secretary Vilas of this Department in commenting on the principle of review by superiors of decisions of their subordinates said "Such a theory makes the subordinate the superior, and inverts the order of authority and administration." *Smith v. Custer et al.*, 8 L.D. 269 (1889). Such an erosion of administrative responsibility should not be permitted.

Subsection (c) of the bill is new. It provides that any party may appeal to the agency a decision of the presiding officer; that the appeal is limited to five specified grounds; that an appeals board be established unless such a board is clearly unwarranted by the number of proceedings or is otherwise established by statute; that the board members be hearing examiners or agency members; that oral

argument is mandatory if requested; that the board will decide exceptions, unless the private party requests the agency to do so; that an agency denial of the request will be considered as an affirmation of the presiding officer's decision; and that the agency may, in its discretion, review on three limited grounds the decision of the presiding officer or the board.

While the bill provides a means by which an agency may avoid the establishment of an appeals board, we think that it is too narrow an exception. We think that this Department could not easily avoid establishing such a board, whether needed or not. This provision seems to require the use of an appeal board in every case and to preclude the use of a procedure which provides for an appeal to go directly from the presiding officer to the agency. The agency should have discretionary authority to adopt such procedures if it wishes. Under the bill, the appellant can appeal directly to the agency from the decision of the presiding officer but the agency cannot order the direct appeal. The agency can order the case before it for review on limited grounds, but in such instances it does not have the full powers of an appeals board.

This provision also precludes an administrative review of a decision by a presiding officer prior to action by an appeals board. In our land appeal cases we have found that such administrative review serves a useful purpose and makes unnecessary a number of formal appeals. The Administrative Procedure Act does not prohibit the use of such procedure, and the revision should not do so.

The provision also makes oral argument before the appeals board mandatory when requested by any party. We believe oral argument should be discretionary. Mandatory oral argument would serve no useful purpose in most of the cases before this Department. Where it is useful, the Department can provide for it, as is the case now.

SECTION 9. SANCTIONS AND POWERS

S. 1336 adds to this section of the act a new subsection (b) relating to publicity. It permits a court upon review to set aside any action taken by an agency against a person where publicity to disparage or discredit a person has been issued. While we do not object to the provision, we think that the court's authority to act in such cases should be limited. The party should not be allowed, because of bad judgment on the part of the agency, to gain or keep an interest in any public property, such as the public lands, unless he is otherwise entitled to the property and it is in the public interest.

SECTION 10. JUDICIAL REVIEW

The Administrative Procedure Act now provides for judicial review of agency action unless (a) precluded by statute or (b) agency action is by law committed to agency discretion. The latter provision recognizes that there are many statutes which merely authorize agencies to act, such as in the granting of loans to commercial fishermen pursuant to the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742c). In such cases, the agencies' discretion is complete and the refusal to act is not reviewable.

S. 1336 changes this latter exception by excepting cases where "judicial review of agency discretion is precluded by law." We interpret this provision to mean that the statute authorizing the discretionary act must expressly preclude judicial review of such act. No such express provision is found in most of the program authorities of this Department, such as the Fish and Wildlife Act of 1956. We think it would be contrary to the intent of that legislation and to public policy to permit the courts to review every fishery loan application that the Secretary refuses or other program matters that require the exercise of judgment on the part of the Secretary, if they are to be successful. We are opposed to this change in section 10 of the act.

Section 1 of the act of June 25, 1910, as amended (36 Stat. 855, 25 U.S.C. 372), provides that when any Indian to whom an allotment of land has been made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment, the Secretary of the Interior shall ascertain the legal heirs of such decedent and his decision thereon "shall be final and conclusive." Such administrative decisions would, under section 10(c) of S. 1336, appear to be made subject to judicial review. We are opposed to such a proposal. We believe that the nature of Indian probate matters of the kind described require that they continue to be confined to an administrative hearing and decision by officers of this Department sub-

ject only to the present judicial review for fraud or other extraordinary circumstances.

Sections 11 and 12 of the bill relate to hearing examiners and statutory construction, respectively, and will not directly affect the programs of this Department.

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, June 15, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your request for the views of the Department of Labor on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

Since the enactment of the Administrative Procedure Act in 1946 the problems with which the Federal Government deals have grown increasingly more complex. This Department is in complete sympathy with the efforts being made by your committee to modernize the Administrative Procedure Act and make other needed changes in the act. The changes proposed in S. 1336 are, I am sure, intended to simplify and expedite the business of Government and, at the same time, preserve and protect the rights and interests of individuals.

After carefully reviewing the proposal, however, we are of the opinion that some of the amendments could cause further delays and complications in administrative proceedings, require substantially increased personnel and costs, and severely handicap the Department in the administration of many of its programs. We, therefore, must oppose S. 1336 in its present form.

Specific comments directed to the features of the bill which seem particularly to affect the Department's activities and its administrative practices are included.

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

DEPARTMENT OF LABOR'S COMMENTS ON S. 1336

Section 2—Definitions

Although section 2(c) of the proposal which defines "rule and rulemaking" omits the present reference to "rates" and "wages," it is our understanding that the bill is not designed to include wage determinations made pursuant to the Davis-Bacon and Walsh-Healey Acts within the definition of adjudication. We believe that the legislative history should make plain this intent.

Section 3—Public information

This Department supports the principle of providing citizens with maximum disclosure of information by their Government. It is our view that Government agencies should operate in a goldfish bowl. We have therefore readily responded to request for information by individual citizens and have cooperated fully with congressional committees seeking information. For the past several years, our disclosure policies and practices have been under study for the purpose of improving and refining them wherever possible. In our experience, the present law has served well to protect both the citizens' right to know and the need for limited withholding of information in order to assure adequate performance of our statutory duties. We have, however, the following specific comments for your consideration:

(b) Agency opinions and orders: This provision requires that all agencies make available for public inspection and copying staff manuals and instructions to staff that affect any member of the public unless such materials are promptly published and copies offered for sale. Our staff manuals and instructions frequently contain detailed information on enforcement methods and procedures. They could be used virtually as a guidebook by those seeking to evade statutory requirements. Indeed, they would encourage such evasion by demonstrating the most effective means of escaping detection. As we note in connection with our discussion of section 4, there is also the possibility that publication of staff

manuals and enforcement methods and procedures would be considered "rule-making" and therefore subject to the notice requirement and other applicable procedures.

We are uncertain as to the relationship between the required availability of staff manuals and the exemption in section 3(e) for inter-agency and intra-agency memorandums relating solely to law or policy and for materials relating to the internal personnel policies and practices of the agency. Although our enforcement methods and procedures affect the public, they also reflect the Department's enforcement policies and contain interpretations of the law.

Section 3(b) also provides that when an agency publishes or makes available an opinion, statement of policy, interpretation or instruction, it may delete identifying details in order to prevent a clearly unwarranted invasion of personal privacy. We believe that this provision is in the public interest. However, the section also provides that any such deletions must be fully explained in writing. Would not this requirement tend to discourage protection of individual privacy?

Section 3(b) requires the indexing of *all* materials to be made available or published. A substantial amount of the vast quantity of materials which this subsection would require to be indexed involve routine application of well-established principles or policies where no novel questions of law, fact, or policy are presented. These are routine materials not particularly useful to the public. Would the work and cost required for indexing all such materials be warranted for the benefit intended?

(c) Agency records: Section 3(c) would require every agency to make all its records available to any person, with certain exceptions specifically enumerated in section 3(e). (For our comments on the exceptions see pp. 3-5.) It would authorize a trial de novo in a Federal district court with the burden of proof on the agency denying access to its records. In view of the difficulties with the exemptions discussed in connection with 3(e), protracted litigation and many possibly conflicting interpretations in the district courts could result before the requirements imposed by section 3 are made clear to responsible Federal officers.

(e) Exemptions: The exemptions in this subsection apply to the requirements for publication in the Federal Register (a), to the provisions relating to the availability of agency orders and opinions (b), and agency records (c), as well as to new subsection (d) which relates to agency proceedings. These exemptions replace existing provisions permitting agencies to withhold publication or availability of materials for good cause. In addition, the present exclusion in section 3 for matters "requiring secrecy in the public interest" is narrowed to those "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."

While we agree that it is in the public interest to make materials publicly available to the greatest extent possible, we believe that each agency must be allowed to retain some measure of authority over its own records.

This subsection appears too inflexible. In our view it would be impossible to anticipate at this time all specific items which should be justifiably withheld in the public interest. This provision may disrupt programs of the Department of Labor. We would favor retention of existing provisions permitting agencies to withhold information for good cause, and the present exclusion for matters requiring secrecy in the public interest.

In addition, section 3(e) (4) is intended to exempt from the disclosure requirement trade secrets and commercial and financial information obtained from the public and privileged or confidential. The term "commercial and financial" may well not include wage and employment data, industrial injury statistics, social and economic data, and other information furnished the Department in confidence. The Department operates under arrangements which provide in many cases for the voluntary submission of statistical data from all over the country. This information, as well as information in connection with other programs of the Department, is obtained with the understanding that portions of it will not be publicly disclosed or identified in any way. Disclosure of this information would jeopardize the entire statistical and other operating program of the Department and thus make it impossible to carry out the functions which we are required by law to perform.

Disclosure of information obtained upon a pledge of confidentiality would hamper operating programs by reducing the quantity and reliability of the information which we receive. Furthermore, publication of information identifying or attributable to identified claimants or beneficiaries would deter persons

from exercising their rights under our programs. The exemptions in subsection (e) would also not appear to apply to information from State employment security agencies revealing details of employers' business operations which the State agency, in turn, obtained from employers.

Section 3(c)(5) would exclude from the disclosure requirement "interagency or intra-agency memorandums or letters dealing *solely* with matters of law or policy." There are far more numerous instances of internal directives or memorandums dealing with mixed questions of fact and law, policy formulations made with respect to given factual situations, and factual memorandums formulated with an eye toward the implementation of law or policy. The availability of such information to public disclosure, especially where the conclusions are only tentative, would inhibit the development of legal or policy positions within the Department and impair our enforcement programs. We recommend that all internal directives and internal or interagency memorandums should be free from required disclosure.

Section 4. Rulemaking

The proposed section 4 would omit the present exclusion from the Administrative Procedure Act rulemaking procedures for any matter relating to public property, loans, grants, benefits, or contracts. The removal of these exemptions creates many difficulties for the Department of Labor. For example, the administration of the State employment services and unemployment insurance programs are financed entirely from Federal funds. Other programs such as those under the Trade Expansion Act and Manpower Development and Training Act are federally financed in their entirety (i.e., allowances and administration) though administered in part through State agencies. The bill provides exemptions for internal personnel rules of a Federal agency and for other matters of internal management. The policy reasons underlying these exemptions would also seem to apply to State functions financed through Federal funds. The absence of exemptions covering these State functions would create great practical difficulties in administering the programs. Moreover, we question the need for applying section 4 requirements to rules directed at State agencies.

Removal of the exclusion for contracts, grants, loans, and benefits would subject wage determinations under the Davis-Bacon Act to the rulemaking procedural requirements of the Administrative Procedure Act. Aside from the additional administrative burdens and costs which this would impose on the Department of Labor, it would involve inestimable difficulties for contracting agencies and agencies administering federally assisted programs.

Each year the Department of Labor issues over 40,000 wage determinations under the Davis-Bacon and related acts. These determinations are necessary prior to the submission of bids on Federal and most federally assisted construction work so that potential bidders will be aware of the nature and extent of their minimum wage obligation. Requiring notice and opportunity to present statements, as well as the other requirements of the section, would cause serious delays for agencies engaged in construction contracting. Necessary construction work and allocation of funds for federally assisted construction could be delayed for weeks or months. The cost of the program would be greatly increased.

Procedures have been established with respect to the issuance of wage determinations under the Davis-Bacon and related acts which are designed specifically to meet the needs of that program. These procedures were adopted after extensive hearings by the General Subcommittee on Labor of the House Committee on Education and Labor on the administration the Davis-Bacon Act and related laws (see hearings June 6 to Aug. 7, 1962). These include procedures for appeal of wage determinations to a wage appeals board in the Department of Labor.

The deletion of the exceptions from section 4 could also lead to unnecessary delay in the promulgation of rules that relieve restrictions or grant exceptions from statutory or regulatory requirements. Subjecting such determinations to the full requirements of section 4 would seem unnecessary.

4(b) Notice: The proposed section omits existing provisions permitting an agency to suspend application of the notice requirement of the act where there is a finding that "notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." In its place, a new subsection (d) is added which permits the promulgation of emergency rules which are effective for 6 months and may be renewed for a year by the commencement of rulemaking proceedings prior to the expiration of the rule. We would favor retention of the existing provisions.

This proposed omission and also the omission of the present exclusion for general statements of policy could be read to require rulemaking procedures before an agency may promulgate staff manuals. As we have stated in our discussion of section 3(b) we believe that such a requirement would severely handicap the Department in carrying out its statutory responsibilities.

(c) (2) Procedures: This provision would require the officer who presided at a hearing to make a recommended decision, unless the agency finds upon the record that due and timely execution of its functions requires otherwise. Although it may be helpful to have the views of the presiding officer in the case of certain adjudications where demeanor evidence is involved, we question the need for such a requirement in rulemaking situations where the central issue is that of agency policy.

Section 5. Adjudication

Subsection (a): This subsection omits from the requirements of the adjudication provisions the present exclusion for the certification of employee representatives. Section 5(a) would require these procedures for cases of adjudication which are required by the Constitution or by statute to be determined on the record after opportunity for an agency hearing. The elimination of this exclusion would subject the certification of employee representatives by the National Labor Relations Board to the requirements of the adjudication provisions. Such a result would have a profound impact on our national labor policy. Each year the Board handles more than 2,000 certifications. Subjecting these certifications to elaborate procedures could seriously impede the mechanism designed by Congress to achieve harmonious labor relations. We believe that the present exclusion should be retained.

(a) (2) Pleadings and Other Papers: This provision requires agencies to establish procedures for pleading which conform to the Federal Rules of Civil or Criminal Procedure to the extent practicable. In our view, rules of procedure should be designed to meet the particular needs and subject matter involved in agency hearings. These needs may differ widely from agency to agency and even within individual departments. It would appear desirable that agencies be permitted to fashion rules of procedure to meet their own particular problems.

(a) (3) Prehearing conferences: We suggest that the word "shall" in section 5(a) (3) be changed to "may" in order to make clear that prehearing conferences are permissive and discretionary rather than mandatory in all cases. Such conferences are designed to make adjudication procedures simpler and more effective, and the administrative agency should be in a position to forego such conferences where it believes that they are unnecessary.

(a) (6) Separation of functions: This section would prohibit agency employees engaged in "advocating functions of an agency in any case" from participating or advising in the decision, or in agency appeal or review pursuant to section 8, except as witness or counsel in public proceedings. We believe that this prohibition is reasonable if limited to those who act as advocates in the administrative proceedings and to that extent, we have always followed it. However, the limitation would not appear desirable for those who have defended or will defend the agency's actions in the courts.

Section 8. Decisions

(c) (2) Appeals boards: This provision requires that agencies must establish appeals boards unless clearly unwarranted by the number of proceedings in which exceptions are filed or agency appellate procedures have been otherwise provided by Congress. It also would require that these boards be composed of agency members, hearing examiners, or both. We believe that appeals boards can be useful in expediting adjudications. However, their composition and need should be left for determination by the agency. Creation of such boards as a matter of statutory requirement may be too inflexible in relation to the subject matter with which the agency will be dealing.

(c) (4) Agency review: We believe it is desirable to permit an agency discretion to review upon its own motion, questions of fact decided by the appeals board since the agency is ultimately responsible for its decisions.

Section 10. Judicial review

The present provision confers a right of review on persons "suffering legal wrong because of any agency action, or aggrieved by such action within the meaning of any relevant statute." The new provision would confer standing

and a right to judicial review where any person was "adversely affected in fact by any reviewable agency action." In addition, the new provisions would narrow the present exception for situations where "agency action is by law committed to agency discretion." Under the proposed section 10, an exception would be provided where "judicial review of agency discretion is precluded by law." This section would greatly expand the scope of judicial review.

While it is difficult to estimate the full implications of this new language, it appears that among other things it would permit individual workers or employers to challenge decisions by the Secretary of Labor approving or withholding certification of State unemployment insurance laws, provide judicial review of Davis-Bacon wage determinations, grants or refusals to authorize minimum wages under section 14 of the Fair Labor Standards Act, and, possibly, review of decisions to refer an individual to a manpower training program.

The changes in section 10 would also subject to judicial review the Secretary's determination of the amount of administrative grants to be made to the several States for the administration of their employment security programs. These matters which inevitably involve the reconciliation of multitudinous and often conflicting factors raise problems which seems almost impossible of judicial resolution.

Also, the type of review required by section 10 would not provide that speedy and expeditious final determination of issues which is essential for programs which involve not only administrative grants but also annual determination of the availability of tax offsets.

As noted in connection with our discussion of section 4, to provide this type of review in the case of thousands of Davis-Bacon wage determinations made each year by the Labor Department would result in a procedure so costly and burdensome that implementation of this important labor standards program would come to a halt. Confusion would be created with respect to the obligations and allocation of funds. In the past, congressional committees directly concerned with the Davis-Bacon and related laws have satisfied themselves that judicial review of these wage determinations cannot be provided. As the General Subcommittee on Labor of the House Committee on Education and Labor stated in its report on the administration of the Davis-Bacon Act (June 1963 committee print, 88th Cong., 1st sess., p. 15) :

"The Davis-Bacon and related acts involved over 46,000 project determinations a year with over a million individual wage determinations. With such a tremendous amount of determinations and with the need to proceed with construction promptly, judicial review would not be appropriate to such a situation. The subcommittee found that the Davis-Bacon Act and its administration involves not merely the application of a set of legal provisions, but also very serious problems of industrial relations where the actual experience in the local area many times influenced the way the law would be applied. To engraft judicial review upon the everyday working of the Davis-Bacon Act wage determination process would impair its vitality and create difficult industrial relations problems by delaying construction and bring instability into Government construction programs."

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., May 11, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1336, to amend the Administrative Procedure Act.

The proposed bill would amend in several important respects each one of the sections of the Administrative Procedure Act (5 U.S.C. 1001-1011). The amendments are largely similar to those proposed by S. 1663 and S. 1666 in the 88th Congress which were given extensive consideration in reports to, and testimony before, the Subcommittee on Administrative Practice and Procedure by this Department and my many other Government agencies.

After careful review of the revisions which are now incorporated in S. 1336 we find that our basic objections to legislation of this scope have not been met, In the attached memorandum I am setting forth our reasons for these objections as they relate to the following principal sections of the bill: 3, 4, 5, 6, 9, and 10.

The problems created by these sections are so substantial that it seems unnecessary to attempt to deal with the merits of each individual revision of the APA proposed in the legislation.

Our objections are not made lightly. This Department undertook a Department-wide survey of the effects of the amendments proposed in S. 1663 and S. 1666 on the operations of its various bureaus and offices which are "agencies" within the meaning of the Administrative Procedure Act. Our report to you on February 11, 1964, indicated that the conclusion to be drawn from these studies was that S. 1663 would not improve present administrative procedures in a significant way but would rather impede and burden the administrative process without providing corresponding benefits to the public. The April 1964 revision of S. 1663 also received Department-wide consideration and was the subject of the General Counsel's testimony before the subcommittee on July 22, 1964. He there reviewed the probable consequences in public expense, complexity of the procedures, unjustifiable disclosures of large areas of private information, and impediments to law enforcement. The ill effects of the public disclosure requirements were extensively illustrated in our report and testimony on S. 1663.

For the reasons stated in the attached analysis and in our prior presentations concerning the proposed legislation of this character the Treasury Department is opposed to the enactment of S. 1336.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH, *Acting General Counsel.*

TREASURY DEPARTMENT COMMENTS ON CERTAIN MAJOR CHANGES PROPOSED BY
S. 1336 IN THE ADMINISTRATIVE PROCEDURE ACT

S. 1336 proposes numerous substantive changes throughout the Administrative Procedure Act. The Treasury Department has provided the Subcommittee on Administrative Practice and Procedure with its comments on many of these revisions as they appeared in the original and revised versions of S. 1663 in the 88th Congress. This report, therefore, concentrates on the revisions in those sections of S. 1336 which have the greatest impact on the operations and responsibilities of the Department. These sections are: section 3, "Public Information"; section 4, "Rulemaking"; section 5, "Adjudication"; section 6, "Ancillary Matters"; section 9, "Sanctions and Powers"; and section 10, "Judicial Review."

Section 3—Public information

Section 3, like its predecessors in S. 1666 and S. 1663 in the 88th Congress, embodies the basic features outlined below which we consider to be detrimental to the public interest in effective national security, in efficient law enforcement, in protection of personal privacy and in the economical operation of Government.

1. The Government must operate within the straitjacket of required disclosure of all operations and records not covered by the specific minimum exceptions. There is to be no room for discretion as to nondisclosure except for the special area permitted to the President in matters of national defense and foreign policy. Even there, the President is required to define this area in advance (subsec. (e)). Besides its damaging consequences, this feature of the section appears objectionable as an effort by Congress to impose its discretion for that constitutionally placed in the Executive for the effective enforcement of the laws.

2. The specific exemptions do not cover many Government matters which the courts and Congress have previously recognized as protected against indiscriminate disclosure. These matters include internal advisory communications underlying and preceding decisions reached by an agency with respect to the law and facts before it; instructions to its staff on methods of law enforcement; trade secrets developed from Government research and processes; monetary stabilization and fiscal management arrangements; personal information revealed by applicants for Government licenses and other privileges, and financial information relating to individuals which result from Government transactions such as the sale of securities, but which is not information "obtained from the public."

3. Millions of agency actions within a single operating agency alone, such as the Treasury Department, which come within the definition of "adjudications," thousands of statements of policy not of general applicability and hundreds of provisions in staff manuals and instructions to staff are all to be indexed, and indentifying details are to be deleted with individual justification for each deletion. Specialized staffs would be required for the preparation of this material and a large expansion would be required of Government printing facilities and paper requirements (subsec. (b)). And, as we have repeatedly pointed out, this extraordinary expense to the public would in no sense be justified by any advantage which the public would gain from the expenditure.

4. The courts are to give top priority over all other actions, even those to be expedited under statutes recognizing their public interest, to any person disappointed in obtaining Government records, regardless of how frivolous or unjustified his demand for records might be (subsec. (c)). Under this provision normal rules of judicial procedure are to be reversed against the Government. The plaintiff does not need to prove any right to, or need for, the information, and any private litigant may avoid the discovery rule (34) of the Federal Rules of Civil Procedure with respect to Government papers, which rule requires a showing of need, by following the route of forced disclosure under this section.

Section 3 is basically unacceptable, in our opinion.

Section 4.—Rulemaking

Certain of the additional provisions to govern rulemaking create problems of law and administration which should be noted.

Subsection (c) (2) calls for rulemaking on the record where required "by the Constitution." It is well settled that the Constitution does not require an opportunity for a hearing or decision on the record of a hearing in enacting legislation or in performing the quasi-legislative function of rulemaking.¹ This legal principle is clearly applicable to rulemaking under the proposed legislation in view of the clarification of the term "rule" in the definition section. Section 2(c) limits the term "rule" to any agency "statement of general applicability and future effect." A rule is, therefore, a quasi-legislative promulgation, since general applicability and future effect are the hallmarks of legislation.² Consequently, the reference to the Constitution at this point has no real meaning and may result in much fruitless litigation, to the expense and inconvenience of both the Government and those seeking to challenge the validity of a rule.

The added requirements in subsection (c) (2) of providing a recommended decision and permitting exceptions to it, except where action without such decision is imperative and unavoidable, would add unnecessary and inappropriate delay and expense in most rulemaking. Rules usually affect large numbers of persons, only a few of whom would have the time and resources to present their views repeatedly with respect to any given rule, and thus gain advantage in influencing agency rulemaking. In this respect rulemaking differs from adjudication in which named persons have the responsibility for pressing their special interest at all stages of the proceeding. Where only particular interests are concerned with a rule, the Department does provide additional opportunities to comment on the proposed text. This should be a matter of agency discretion.

The provision for emergency rules in section (d) would condemn them to a 1-year life in spite of their readoption after formal notice and hearing. This is an artificial and entirely unreasonable limitation upon the duration of a rule which originally had to be issued under the emergency provisions.

Exemption (1) in subsection (h) would exclude only those matters required by Executive order to be kept secret in the interest of the national defense or foreign policy. As is true of this same requirement in exemption (1) of section 3, this places an unwarranted burden on the President by requiring continuous specification of all such matters.

The Treasury Department again raises the objection (as it did against S. 1663, as revised) to the omission of the exemption for "public property, loans, grants, benefits, or contracts." In the alternative, the Treasury again urges the addition of the more limited exemption of "any matter relating to the monetary or fiscal

¹ *Superior Oil Company v. Federal Power Commission*, 322 F. 2d 601, 609 (9th Cir. 1963) cert. denied, 377 U.S. 923 (1964); *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 694 (9th Cir. 1949) cert. denied, 338 U.S. 860 (1949), rehearing denied, 339 U.S. 945 (1950); *United States v. Bodine Produce Co.*, 206 F. Supp. 201, 204 (D. Ariz. 1962); *Senior Citizens League, Inc. v. Dept. of Social Security of Washington*, 38 Wash. 2d 142, 288 P. 2d 478, 492 (1951).

² *Ibid.*

operations of the United States." The vast monetary and fiscal operations of the Treasury are carried on under extensive regulations; these operations may be said to relate to public property, loans, grants, benefits, or contracts, and thus if no suitable exemption is provided, the proposed rules dealing with these operations would be subject to notice and public participation. But many of these fiscal and monetary regulations must be adopted, in the public interest, without advance notice, and often the proposed regulations are not of sufficient public interest to justify the imposition of section 4 requirements. For example, the regulations governing the administration of foreign currencies here and abroad and by other Government agencies would in no way benefit from public participation in the promulgation of such regulations.

Section 5—Adjudication

This section has been substantially revised from section 5 in the original and revised versions of S. 1663. The revision now presented removes a number of our principal concerns with this section as it was being considered during the 88th Congress. There remain two matters which give difficulty.

Under the separation-of-functions provision, subsection (a) (6) (B), no presiding officer or member of an agency appeal board shall consult with any person or agency on any fact in issue unless upon notice and opportunity for all parties to participate. This is an extreme position and one which we think is unnecessary to the preservation of impartiality. As Prof. Kenneth Culp Davis, a consultant to the subcommittee, pointed out in his testimony before the subcommittee last July, the presiding officer should be cut off from communicating with those in the agency who are engaged in investigating, prosecuting and advocating functions but he should not be cut off from the agency's specialists. He should be able to obtain from them technical knowledge which he may need with respect to questions of fact or law.³

The provision for emergency action in subsection (a) (7) permits agency action without notice or other procedures upon a finding that immediate action is necessary "for the preservation of the public health or safety or where otherwise provided by law." This Department again recommends that emergency action be permitted for the preservation of the "public health, interest, or safety," following the text with respect to the immediate revocation of licenses in section 9(c). This Department is confronted from time to time with matters requiring emergency action with respect to such matters as foreign assets control and foreign transactions control in which immediate action is necessary in the public interest. The availability of injunctive or other judicial relief, and the requirement for an immediate hearing after such action, are sufficient to protect private interests in these emergency situations.

Subsection (b) sets forth the procedures to be followed in "all other cases of adjudication except those involving inspections and tests." These procedures would consequently apply to the millions of informal adjudications made annually by customs officers in appraisal and liquidation of entries. These adjudications do not need to be made, and should not have to be made, through a proceeding "conducted" by an officer after informing the agency and the parties of "the issues, facts, and arguments involved." These adjudications, like those made by the Internal Revenue Service in the assessment of taxes, are subject to a trial of the law and facts de novo in court, which provides full procedural and substantive protection of private rights. Subsection (b) should include a second exception for those adjudications "subject to a trial of the law and facts de novo in any court."

Section 6—Ancillary matters

The Treasury Department's most serious concern with this section is the effect of Subsection (b) : Practice by Attorneys, in abolishing the enrollment to practice before the Internal Revenue Service. Congress provided authorization for such enrollment in 1884 (5 U.S.C. 261) and its Subcommittee on Administration of the Internal Revenue Laws in 1952 called for more careful enrollment of the tax bar. The Department maintains that there is no demonstrated need for abolishment of this enrollment, while on the other hand there are positive reasons for its retention.

It will be recognized by all that representatives of persons having business before the Internal Revenue Service should be held to a standard of competence

³ Hearings before Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1663, July 21, 22, and 23, 1964, at pp. 262, 263.

and ethical behavior. In the sensitive area of tax matters the standard of practice should be uniform to aid in the reasonable and efficient administration of the tax laws. Since there is a great disparity among State licensing authorities in their treatment of attorneys whose conduct is corrupt and since the Service's access to attorneys' tax returns is a substantial aid in administering its tax practice, it is entirely appropriate that the Department promulgate enrollment requirements to insure that uniformity. In view of the foregoing, we believe that the provision of subsection (1) which would extend the privilege to practice before the Internal Revenue Service to virtually all members of the bar is unjustified and unsound.

We believe section 6(b)(1) takes a dangerous tack when it permits the mere personal appearance or signature of the attorney or his filing of a paper to constitute representation of his ability and authority to act for a person whom he names. Since subsection (2) specifies that the provision shall not be read to prevent an agency from requiring a power of attorney before transferring funds to the attorney for his client, it must be implied that it does prevent the agency from requiring a power of attorney in all other circumstances. This being the case, the Internal Revenue Service would have to accept, without more, the bald assertion of an attorney that he has authority to represent someone else. While it is true that any improper conduct on the part of an attorney or one misrepresenting himself to be an attorney is subject to sanction, after discovery, this is of little consolation to the taxpayer whose affairs have been revealed without his consent. A requirement that whenever any person represents himself to be an attorney the agency must accept this representation seems singularly unwise in the light of recent experience in the District of Columbia involving a nonlawyer practicing fraudulently.

Subsection (c) appears to be unconstitutional in its provision that a client who employs an attorney may submit a communication to the Government only through the attorney and is precluded from submitting his communication either directly or through another representative of his choice, say his accountant.

Subsection (d) on investigations provides that every person who submits data or evidence shall be entitled to retain or procure a copy or transcript thereof. The subsection omits the further provision in section 6(b) of the Administrative Procedure Act that in a nonpublic investigatory proceeding the witness may, for good cause, be limited to inspection of the official transcript of his testimony. This omission would permit a serious handicap to law enforcement for the reason explained in the Attorney General's manual on the Administrative Procedure Act (at pp. 66-67). Before or during a prosecution a witness may make his copy of the transcript available to a defendant and thus prejudice the Government's case. The defendant's right to see the transcript of a prior statement of a witness in criminal proceedings is now adequately covered by a specific statute (18 U.S.C. 3500).

Subsection (e) provides for the automatic issuance of subpoenas in any adjudication without any preliminary showing of general relevance and reasonable scope of the evidence sought, as is presently required in the Administrative Procedure Act. The Administrative Procedure Act requirement should be maintained in order to avoid unreasonable subpoenas and the need for their subsequent consideration by the presiding officer.

Subsection (h) would make depositions and discovery available to the same extent and in the same manner as in civil proceedings in the district courts unless otherwise provided by agency rule. As pointed out in the discussion of the court procedure under section 3 of the bill, the discovery rule of procedure would have little further application to Government papers as they would be made available to anyone without good cause shown unless they were covered by the specific exemptions in section 3. In any case, the requirement that the rules of civil procedure be the norm in any and all administrative proceedings, including rulemaking, is contrary to recommendation No. 30 of the Administrative Conference of the United States which realistically recommended that each agency adopt rules for discovery "to the extent and in the manner appropriate to its proceedings." We adhere to that recommendation.

Section 9—Sanctions and powers

(b) Publicity: Gratuitous public statements made by an agency or its officials for the purpose of punishing or penalizing a person with business before the agency cannot be countenanced. There can be no disagreement on that score. It is equally clear that the legislative cure should be appropriate to

the malady and on that basis we object to this provision in its present form as falling short of that standard.

It seems contrary to logic and established principles of law to provide that the pivotal event upon which the court is to act is a finding of intent to disparage or discredit on the part of an agency in making a public utterance, without more. On such principle is that an act which is not the proximate cause of an injury is not wrongful; another is that a technical wrong has no significant legal effect unless the complainant sustains damages. Section 9(b) appears to ignore the question of whether or not the utterance actually resulted in disparagement or discredit. Even more importantly, it provides for no finding that the publicity influenced the agency to take action adverse to that party. We consider, therefore, that the thrust of this subsection is misdirected. Furthermore, the subsection invites use by a party to defeat an unfavorable agency decision through a claim that some public statement of an agency was intended to disparage him.

If subsection (b) is retained, it should provide in clear terms for a finding by the reviewing court that a public utterance was made with an intent to discredit or disparage on the part of an agency or its officials, that injury was caused to the complainant's reputation⁴ and that adverse agency action resulted. This finding would be the condition precedent for the exercise of judicial discretion in declaring a rebuttable presumption of prejudging. The value of such an amendment is that a complainant could not utilize section 9(b) to gain a favorable decision where he has sustained no injury to his reputation, and where no prejudging has occurred. To permit the agency an opportunity to rebut the presumption of prejudging is a reasonable and effective method to prevent abuse of the publicity provision.

In addition, we wish to point out the possibility that section 3 and section 9(b) may be essentially at cross-purposes as they are presently composed. An agency or its officials might make available to the public records which were disparaging to a party, while conforming to the requirements of the public information provision. In this event, any disparaging intent by the agency would appear to be irrelevant.

Section 10—Judicial review

This section contains two critical changes to which this Department particularly objects. The first such change is in the phrasing of the initial exemption. A first reading of this substitute might indicate that the effect of the two provides for judicial review of agency action "Except so far as * * * (2) agency action is by law committed to agency discretion." The revision would substitute for this clause (2) "judicial review of agency discretion is precluded by law." A first reading of this substitute might indicate that the effect of the two provisions was the same, on the supposition that the same concept was merely expressed differently. If there is no change in meaning, the change is undesirable. But it is still more undesirable if it is intended to mean that the discretion of a court should ever be substituted for that of the agency in a matter within the agency's discretion. It should be noted that agency action which is discretionary may be judicially reviewed to determine if it is arbitrary, unreasonable, capricious or within the area of discretion conferred. We can see no valid reason for providing any further review for discretionary agency action.

The second critical change is in the definition of the person who has standing to sue based upon agency action. Here again the present text of the Administrative Procedure Act has come to have an accepted meaning after the benefit of much litigation. We know that persons who have no complaint other than an indirect economic effect from the agency action have no right to attack that action collaterally. The revision would reverse this principle of standing to sue and allow any person "adversely affected in fact" to obtain judicial review of the agency action. As this Department stated with respect to a similar proposed revision in section 10 of S. 1663, as introduced, administrative determinations will remain in constant controversy between the persons directly affected and those indirectly affected. The true parties in interest in any agency determination would be confronted with a long period in which they would be uncertain whether they could rely on that determination, since the determination

⁴The immediate source of the publicity provision seems to be recommendation No. 47 of the report on "Legal Services and Procedure" included in Hoover Commission reports (vol. 2, 1955). Apparently, the Commission's chief concern was damage to the reputation of a complainant (pp. 80-81).

could be subjected to attack by any business competitor, supplier, customer or even taxpayer who might show some adverse effect reaching him from that determination.

The Department believes that the need for revision in these two cardinal provisions with respect to judicial review has not been shown, and that the effect of the revisions in preventing the finality of agency action and in encouraging excessive litigation would be damaging to all concerned with the administrative process.

FEDERAL AVIATION AGENCY,
Washington, D.C., May 12, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of March 24, 1965, requesting our views on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

We note that the definition of "rule" in section 2(c) does away with particularized rulemaking. We are strongly opposed to this change. As we pointed out in our December 7, 1963, report to your committee, this Agency is engaged in a great deal of particularized rulemaking in connection with prescribing operations specifications for air carriers. Operations specifications are detailed safety requirements tailored to fit the specific operation of an air carrier. They prescribe such things as weather minimums for particular operations and time limitations for inspections of airframe and engine components. They are rather voluminous, and subject to frequent change. Particularized rulemaking is well suited to the solution of the type of issue involved in these cases and is beneficial to air carriers seeking operations specifications changes.

Operations specifications can be established and amended quickly and efficiently through particularized rulemaking conducted by this Agency. On the other hand, if these cases were handled as adjudications, the process would become unnecessarily complicated. First, it would be necessary to process many of these cases in accordance with the provisions of section 5(b). That section is not clear, but if it is interpreted as requiring a hearing, the procedure would be unduly time consuming and inappropriate for this type of decisionmaking. In addition, it appears that instead of the administrative process being terminated upon issuance of a decision by FAA, the Agency determination would be appealable to the Civil Aeronautics Board. Proceedings before the Board would involve a formal hearing and issuance of a determination on the record. We do not believe that such formal procedure is warranted for these cases, and we doubt the wisdom of removing to the CAB the final decisionmaking authority on these technical matters which are peculiarly within the expertise of FAA.

Section 3(b) contains a new provision requiring that every agency index and make available for public inspection and copying all staff manuals and instructions to staff that affect any member of the public. This is a broad, sweeping provision, for almost any instruction could be construed to have some effect on members of the public. We believe that the index for such manuals and instructions would be so large, and subject to such frequent changes, that it would be unduly burdensome to compile, and impossible to keep current.

Section 3(c) requires that every agency make all its records promptly available to any person. Section 3(e) lists eight exemptions to these requirements, and to the requirements of section 3(b). These exemptions include matters related solely to the internal personnel rules and practices of any agency, and inter- or intra-agency memorandums or letters dealing solely with matters of law and policy. We are opposed to these changes and recommend that the existing provisions of section 3 be retained. It is our belief that agencies are in the best position to determine the precise consequences of releasing a given document and should at least retain initial discretion to decide what records should be disclosed. We doubt that it is possible to compile a list of specific exemptions that will serve to protect the public interest to the extent possible under a system whereby responsible governmental officials can judge each case on its own merits.

As for the specific exemptions in section 3(e), we find those in paragraphs (2) and (5) particularly inadequate. We believe agency heads

should be permitted to refrain from disclosing all materials dealing with internal agency deliberations. The exemptions in paragraphs (2) and (5) protect only matters dealing solely with internal practices or matters of law or policy. These provisions would be of little practical value in cases where letters and records contain a mixture of these matters and other data. Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency or the executive branch would not be protected by the proposed exemptions. This would create problems in obtaining candid reports at various levels in an organization or in the Government, and would be detrimental to efficient staff operation.

Section 4(c)(1) requires oral presentation of public views in rulemaking proceedings unless the agency finds such presentations inappropriate or unwarranted. We believe the present law authorizing, but not requiring, oral presentation should be retained. As we noted in our December 7, 1963, report, the only effect of the amendment will be to add another step (a finding) to rulemaking proceedings. Section 4 is revised to alter the criteria for determining when rules may be made without public notice and comment. Paragraph (h) of that section permits agencies to bypass notice and comment when processing * * * "(3) advisory interpretations and rulings of particular applicability;" and "(4) minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights." We do not understand the scope of the terms "advisory interpretations and rulings," "rulings of particular applicability," and "protected substantive rights," as used in paragraphs (3) and (4). We recommend the clarification of these terms in the legislative history of the bill so that Government agencies will have a clear outline of the requirements for notice and public procedure.

Paragraph (4) of section 4(h) permits agencies to bypass notice and comment in the case of certain exceptions from, revisions of, or refinements of rules, but apparently would not permit such abbreviated procedure in the case of a new rule involving matters having no substantial impact on the public. We believe that paragraph should be revised to exempt such rules.

The provision on declaratory orders is transferred from section 5 to section 6 thereby making it applicable to matters not required by statute to be determined on the record after opportunity for an agency hearing. In addition, instead of authorizing agencies to issue such orders in their sound discretion, the proposal requires agencies to "act upon requests" for such orders. The intent of this change is not clear. If its purpose is to remove the decision to issue an order from the sound discretion of the agency, we oppose the change for the reasons set forth in the discussion of the existing law in the Attorney General's Manual on the APA. If the change is intended only to insure that the person making the request receives a reply explaining the disposition of his request, we believe a specific provision to this effect should be inserted and the format of the remainder of the section be patterned after the existing law.

Section 10 is amended by deleting the words "agency action is by law committed to agency discretion" from section 10(2) and substituting therefor the words "judicial review of agency discretion is precluded by law"; and by expanding section 10(a) to permit the right of review to any person adversely affected in fact by any reviewable agency action. If the change to section 10(2) is intended to be substantive in nature, we do not understand its purpose. If, on the other hand, the change is meant to be editorial, we recommend that the existing section be retained in order to preclude the presumption that the change is a substantive one.

The change to section 10(a) permits persons to seek judicial view who now are not deemed to have a sufficient legal interest in agency action to give them standing to request review. Apparently, a person would have standing to seek review of agency action directed toward a third party and having only an inconsequential or unrelated effect on the petitioner. For example, a person concerned over the economic impact of the entry of a new competitor in his line of business would have standing to attack the grant of a license to that competitor even though such grant might be based only on safety considerations. Relaxing the rules to permit such proceedings is of doubtful value, and it could result in officious and burdensome litigation that may unnecessarily restrain the conduct of Government operations.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. HALABY, *Administrator.*

FEDERAL COAL MINE SAFETY BOARD OF REVIEW,
Washington, D. C., April 7, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: Reference to your letter dated March 24, 1965, requesting a report of this agency on S. 1336, the Board has directed that the following report be submitted thereon.

S. 1336 would amend the Administrative Procedure Act in various detailed respects.

The proceedings of this agency are specifically exempt from the requirements of the Administrative Procedure Act under section 213 of title II of the Federal Coal Mine Safety Act (30 U.S.C. 1958 ed. § 483, 66 Stat. 709). Therefore, the proposed bill amending the Administrative Procedure Act is inapplicable by its terms to the operations of the Board. In view of its inapplicability to this agency, the Board has no comments to offer on the individual provisions of S. 1336.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

By direction of the Board.

Sincerely yours,

ROBERT J. FREEHLING,
General Counsel.

COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON S. 1336, 89TH
CONGRESS, AMENDMENTS TO THE ADMINISTRATIVE PROCEDURE ACT

S. 1336 contemplates a very broad and detailed revision of the Administrative Procedure Act. A number of the changes proposed are desirable ones, some are simply of a clarifying nature and others would have no particular impact upon the Commission's functions. Some of the proposed changes we believe to be undesirable. Because of the scope of the changes, our comments, in the interest of brevity, will concentrate primarily on those revisions which are of the greatest significance to the Commission, and which present us with problems.

SECTION 2—DEFINITIONS

The definition of "rule" in subsection 2(c) would be revised to delete agency statements of "particular" applicability and future ratemaking. The Commission believes that these changes are unsound, and strongly urges that the definition of "rule" retain the references to "particular applicability" and future ratemaking.

Ratemaking.—Future ratemaking calls for the exercise of legislative—rather than quasi-judicial—functions. *Arizona Grocery Co., v. Atchison, T. & S. Fe Ry.*, 284 U.S. 370, 389 (1932). In a license revocation, the facts as to wrongdoing are obviously of crucial importance. In the future ratemaking, while the facts are important, the primary function is policymaking for the future. In a revocation proceeding where the credibility of a witness may be very crucial in determining facts in issue, it is highly desirable for the one resolving such issues to observe the demeanor of the witness. Such considerations are not commonly appropriate when making policy for the future. We therefore, believe that ratemaking should continue to be treated as rulemaking in the act. The proposed change would, in particular, have two undesirable consequences.

First, making ratemaking adjudication would bring into play revised section 8, which requires that the one who presides at the hearing must also make the initial decision. This means that the Commission could not, as at present, have the case heard by an examiner and certified to the Commission for decision.

It is obviously undesirable to require the Commission to preside itself at lengthy ratemaking proceedings and, since ratemaking is basically a policymaking function, it may be desirable for the agency to decide a rate case directly after the evidence has been taken by an examiner. Since the proposed bill would limit the right of agency review of an examiner's decision,¹ the agency's capacity to handle ratemaking cases would be impaired.

Deletion of the word "particular," in the definition of "rule" would raise a serious question whether the Commission could continue its present practice.² We cannot stress too strongly that were the Commission required to hold adjudicatory hearings in effectuating the very numerous channel shifts it makes each year, the result, based upon past experience, would be not only substantially added costs to the Government and the interested parties but, more important, lengthy delays in achieving important public interest goals.

There is no need for such drastic revision of existing procedures (assuming that it is intended). In our experience, rulemaking proceedings, even where of particular applicability, have worked well, giving interested parties full opportunity to present their views and affording the agency the means to reach a fair and speedy determination of the public interest. See, e.g., *WIRL Television Corp. v. U.S. and F.C.C.*, 253 F. 2d 863 (C.A.D.C., 1958); *Transcontinent Television Corp. v. U.S. and F.C.C.*, 308 F. 2d 339 (C.A.D.C. 1962). Finally, the point which we have made at the outset is equally applicable here: The critical element in such proceedings is not "who did what?" but rather the policy to be followed; such policy is more appropriately left, in the usual case, for determination by the agency, rather than an examiner.³

SECTION 3—PUBLIC INFORMATION

Section 3 of the bill substantially rewrites present section 3 of the Administrative Procedure Act. While the Commission agrees with the underlying purposes of this section—that agencies should operate publicly, we believe that the general standards of section 3 of the Administrative Procedure Act have worked well and that the Commission has fairly complied with them. We are opposed to several features in this section of the bill and believe that certain aspects regarding its scope need clarification.

Subsection 3(b): The requirement that an agency make available for public inspection and copying "staff manuals and instructions to staff that affect any members of the public," is too broad. We are in accord that in many instances standing instructions should be made public. Thus, the Commission is in the process of revising its broadcast program forms and we expect to make public the standing instructions to the staff on the use of the information required to be submitted by these forms.

On the other hand, some types of instruction to the staff should not be made public. For example, in deciding comparative licensing cases, the Commission

¹ Inasmuch as sec. 409 of the Communications Act presently allows the Commission to certify the record to itself in adjudicatory cases upon a finding on the record that due and timely execution of its functions requires it, and since we assume that S. 1336 would not supersede this provision (see our comments on secs. 8 and 12), it appears that under the bill, the Commission could still certify the record to itself for decision in rate cases (which would become adjudicatory)—but before doing so it would have the additional burden of making the finding required by sec. 409.

² In *Loganport Broadcasting Corp. v. U.S. and F.C.C.*, 210 F. 2d 24 (C.A.D.C. 1954), it was urged that the Commission's proceeding leading to a television table of allocations was adjudicatory in nature—not rulemaking as claimed by the Commission. The Court, in rejecting the argument, stated (at p. 27):

"To be sure the overall plan would vitally affect later individual adjudications. But rulemaking is not transformed into adjudication merely because the rule adopted may be determinative of specific situations arising in the future. See *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D. N.Y. 1953). A 'rule' is defined in sec. 2(c) of the Administrative Procedure Act as: '* * * 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. * * *' [Emphasis added.] Clearly, the instant plan had a future rather than a present or past effect."

³ We also point out that there are already existing safeguards to deal with any abuse of the "particular applicability" provision. Thus, in *Philadelphia Co. v. Securities and Exchange Commission*, 84 U.S. App. D.C. 73, 175 F. 2d 808, certiorari granted and judgment vacated as moot 337 U.S. 901, a particular proceeding, claimed to be rulemaking, was held by the court to be adjudicatory in character. In that case an action of the SEC, revoking an exemption under the Public Utilities Holding Company Act previously granted to the appellant, was denominated a general rule by the agency. The court held the purported rule invalid (as to the particular appellant only) because the requirements for adjudicatory hearings had not been met.

may issue instructions to its staff to draft an opinion granting one of a number of competing applications. Nevertheless, until its decision is released, these instructions are subject to change. Obviously, each preliminary instructions cannot be made publicly available where they are purely a part of the inter-agency process of decision.

In connection with its investigating, inspecting and monitoring activities to enforce the Communications Act, the Commission maintains a comprehensive set of instruction manuals for guidance of its personnel which would apparently also be required to be made available for public inspection under this subsection. To the extent these manuals repeat standards to be met by licensees, these standards are already set out in rules available to the public. However, manuals also contain detailed directions to the staff which are of an internal nature, which, if publicly available, could well impede or reduce the effectiveness of the investigating, inspecting and monitoring activities. Such instructions, in our view, should not be made publicly available.

Finally, "staff manuals and instructions to the staff" would include many intra-agency memorandums. The objections to broad disclosure of such material will be discussed in connection with subsection (e).

Indexing: While the Commission appreciates the possible value to the public of the index which would be required by this subsection, we do have some reservations regarding it.

As to "* * * statements of policy, and interpretations adopted by the agency and affecting the public," which would have to be indexed and made available for copying, we believe some clarification is needed. In many cases, the Commission's staff sends out letters interpreting the applicability of the Communications Act or Commission rules to a particular set of facts. Generally speaking, such interpretations do not involve the making of new policy, but merely cite existing policies previously enunciated. It could be argued, however, that such interpretations are within proposed subsection 3(b), thus requiring indexing of the letter in which they are set out. If this interpretation were accepted, agencies would have to index a large part of their correspondence, even though much of this material would be ultimately unimportant or cumulative in nature. A point of diminishing returns would soon be reached, thus undercutting the value of an agency's index.

Therefore, the Commission believes that the indexing requirement, as it applies to interpretations or statements of policy, should be clarified, either in the body of the bill (through the use of language such as "formally adopted" or "adopted by direction of the agency") or through the legislative history.

We also question the usefulness of proposed subsection 3(b), generally prohibiting reliance upon unindexed opinions, etc. Agency rules, both procedural and substantive, must be published in the Federal Register under subsection 3(a), and the last sentence of that subsection fully protects parties in the event of any agency failure in this respect. In the case of opinions, orders, statements of policy or interpretations, the agency need not, in any event, cite or rely upon them in any particular decision. It can always, if it wishes, simply repeat or follow reasoning embodied in such materials which is pertinent to the matter under consideration. Under the proposed subsection 3(b), if the agency had decided a case on the same day or a few days earlier similar to one under consideration, it could not cite the decided case as a precedent, even if it were directly controlling, if, because of insufficient time, that earlier case has not been indexed. We do not perceive what is gained, in the example given, by requiring the agency to issue a lengthy opinion (rather than citing the controlling case as is the custom in courts) or, as an alternative, delaying a decision until an earlier case is indexed.

We think such examples could be multiplied. We suggest that the sanction embodied in the last sentence of subsection 3(b) is not an effective one nor is it needed. Rather, reliance should be placed upon the agency discharging its responsibility for indexing (subject to periodic review by the appropriate congressional committees).

The presence of the last sentence of subsection 3(b) is also unclear as to whether the index must be retroactive. The language of the penultimate sentence requires indexing of matters "adopted * * * after the effective date of this Act." While this appears designed to eliminate a retroactive indexing requirement, the broad and stringent provisions of the last sentence relating to use of orders, etc., as precedent seems to make a retroactive index a practical necessity. If it is not intended to require retroactive indexing, then the last sentence (unless

deleted entirely as we recommend) should also include language to show that it applies only to opinions, etc., "issued, adopted, or promulgated after the effective date of this Act." If retroactive indexing is required, agencies will need to be given a reasonable time and sufficient funds to comply with such requirement.

Subsection 3(c): We have two observations to make concerning this subsection.

By requiring every agency to make all of its records, except those containing eight specified categories of information set out in subsection (e), promptly available to any person, this bill would substantially enlarge the categories of material and records which would be open to the public. We believe that S. 1336 goes too far in this direction.

We believe that in the absence of good cause shown, it is sound public policy to exclude from public inspection matters prepared by agency personnel for use within the agency, such as memorandums and reports, as well as interagency memorandums, letters, and reports of investigations. See, generally, "Attorney General's Manual on the Administrative Procedure Act," pp. 24-26.

Secondly, the proposed enforcement procedure also appears to be undesirable. It reverses the normal presumption that a Government agency has acted properly and in accordance with law. We also believe that, with respect to this Commission at any rate, there is no need for creating a new cause of action in the district courts. A Commission refusal to make records available for public inspection should be reviewable by a person aggrieved in the same manner as other agency actions under section 402(a) of the Communications Act, 47 U.S.C. 402(a), and the Judicial Review Act of 1950, 5 U.S.C. 1031-1042. The latter statute contains ample provisions to insure a full and fair review of the agency's actions, without the time-consuming and unnecessary resort to de novo trial of the entire matter. The statute limits resort to the courts, properly we think, to those substantially affected by an agency order. If there were to be a different standard as to standing to seek review, amendment of the above-cited provisions would be required.⁴

Subsection 3(e): As stated in our discussion of subsection 3(c), we believe that the provisions for public disclosure in S. 1336 are too broad or, conversely, that the categories of information exempted from public disclosure by subsection 3(e) are in some instances either too narrow or need clarification.

Subsection 3(e)(5), exempting from disclosure "interagency or intra-agency memorandums or letters dealing solely with matters of law and policy," would be difficult to interpret and would not protect all intra-agency memorandums. Most intra-agency memorandums of necessity deal with both facts and law or policy. Furthermore, subject to provisions of law governing separation of functions (sec. 5(c) of the Administrative Procedure Act; sec. 409(c)(1) of the Communications Act), the Commission should be able to receive memorandums and working papers from the staff without the need for disclosing such working papers. It is important to the effective functioning of the Commission that members of its staff who are called upon for advice and assistance may respond upon a confidential basis. If staff memorandums are to be examined almost routinely outside the Commission, staff advice and suggestions will inevitably be inhibited. We stress that our position is not premised on any desire to permit agencies to decide cases upon extraneous or incorrect bases (indeed, we must set out the factual and legal bases of all our actions and these bases are subject to review by the courts). Rather, our aim here is simply to permit the most effective and full exchange between the agency members and their staff—the very same type of exchange permitted, for example, between judges and their staffs. The same considerations apply to correspondence and memorandums exchanged with the executive branch (e.g., the Bureau of the Budget) or with other agencies (e.g., the Federal Trade Commission).

Subsection 3(e)(4) recognizes the necessity of protecting the confidentiality of trade secrets and "commercial or financial information" obtained by the agency from the public and "privileged or confidential." The Commission receives information, which by rule is not available to the public, pertaining to such matters as reports, contracts, maps, etc., in connection with the valuation of common carrier property (47 U.S.C. 213); contracts relating to foreign wire or radio communications whose disclosure would place American communication companies at a competitive disadvantage (47 U.S.C. 412); and certain technical data

⁴ Adoption of a different standard allowing any person to obtain review, irrespective of his interest or aggrievement, would raise serious legal and policy questions. Cf. dissenting opinion of Douglas J., *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 18 (1941).

furnished the Commission by manufacturers of radio equipment (Commission rules, § 0.417, 47 CFR 0.417). We believe it would be undesirable to make all of this information automatically available to any person, rather than retaining the Commission's present discretion. It is not clear, however, whether the phrase "commercial or financial information obtained from the public and *privileged or confidential*" [emphasis supplied] is broad enough to include all the above-described information.

We are also concerned with the meaning of subsection 3(e)(7), which exempts from public disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." It is not clear at what point letters, memorandums, complaints, etc., become an "investigatory file" within the meaning of this provision. If this provision is not intended to apply until an investigation is undertaken by the Commission staff, then the complaint initiating an investigation would have to be made public upon request. Such a result would be highly undesirable. For example, the Commission has received confidential information in the past from broadcast station employees who charged that the station was being operated in violation of the law or Commission rules or policies. Such information might not be forthcoming if it could not be supplied, initially at least, on a confidential basis.

Should S. 1336 be adopted, we also suggest that a ninth category be added to exempt from the broad disclosure provisions of S. 1336 all material in adjudicatory cases, the procedure for which is governed by sections 5, 7, and 8 of the act.

SECTION 4—RULEMAKING

This section would add some desirable features to the Administrative Procedure Act. Specifically, the provision which confirms an agency's right to consult informally with interested persons prior to notice of proposed rulemaking is desirable inasmuch as it permits an agency to avail itself of private expertise in various fields.

There are, however, certain provisions in this section which the Commission believes to be undesirable.

Subsection 4(c): Among other things, this subsection affords interested persons "an opportunity to present [views] orally unless the agency determines that oral argument is inappropriate or unwarranted."

We do not believe that there should be any Government-wide presumption in favor of oral argument in the case of rulemaking. Whatever the experience of other agencies, we have not found such argument to be presumptively useful in rulemaking proceedings. Rather, we have afforded oral argument only in specific instances representing a small percentage of our rulemaking proceedings. We suggest retention of the present language.

In addition, if our suggestion that ratemaking be continued to be treated as rulemaking be adopted, then subsection 4(c)(2) of the bill would prevent the Commission's Common Carrier Bureau from issuing a recommended decision in ratemaking cases.

As we pointed out above in discussing section 2, our Common Carrier Bureau now prepares recommended decisions. To preserve this worthwhile procedure we would suggest that the bill be amended to permit issuance of a recommended decision by any responsible officer.

Subsection 4(d): This subsection would permit an agency to issue an emergency rule without the notice and procedure provided by subsections (b) and (c) in any situation in which it finds such action is "necessary in the public interest." We suggest retention of the present language of subsection 4(a) of the Administrative Procedure Act (i.e., "* * * notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

While we have rarely used this authority, there have been instances where such notice was impracticable or unnecessary, but where the situation could not be described as one where the rule's adoption without notice was "necessary in the public interest." We would also suggest that rather than requiring notice and rulemaking to extend an "emergency rule" beyond 6 months, the rule be regarded as finally adopted, and parties be permitted to file petitions for reconsideration thereof (cf. sec. 405 of the Communications Act of 1934, 47 U.S.C. 405). This would have the advantage of avoiding unnecessary rulemaking proceedings.

Subsection 4(h): In recasting the exceptions from the notice requirements of subsection 4(a) of the Administrative Procedure Act, subsection 4(h) of the bill eliminates the present exemptions for rules of agency procedure or practice. We strongly urge that this exemption be continued. The Commission

recognizes that notice and public procedure are appropriate in some instances with respect to rules of practice and procedure; it has accordingly employed such procedures where it believed that a useful purpose would be served thereby. But in the great majority of cases, the Commission has adopted or revised its rules of practice and procedure without notice and the procedures specified in section 4(b) of the Administrative Procedure Act. Experience would indicate that, with but a few isolated exceptions, affording notice in these cases would have accomplished nothing but delay. With regard to those few exceptions, petitions for reconsideration (see sec. 405 of the Communications Act, 47 U.S.C. 405) afforded ready and full opportunity to bring to the agency's attention any matters which interested persons believed should be considered by the agency. In other instances, instead of employing notice and public procedures, the Commission held a series of conferences with representatives of the bar group interested in the proposed procedural changes and issued rules after they had been refined by the process of conferences. In short, we believe that there should be no compulsory requirement for notice and section 4(b) 4(c) of S. 1336 procedures with respect to rules of practice or procedure—that rather the matter should be left to the discretion of the agency based upon its evaluation of what procedure is appropriate as to the particular rule under consideration.

Section 4 of S. 1336 also removes from section 4(a) of the Administrative Procedure Act the exemption from the notice and public procedures requirement of that section for "general statements of policy." Although we recognize that "general statements of policy" may be defined as rulemaking under the present Administrative Procedure Act and S. 1336, we do not believe it is desirable to require the Commission to resort to the comparatively lengthy procedures of notice and opportunity for interested parties to comment every time it wishes to issue a policy statement.

Policy statements, unlike other "rules," do not have the force of law and do not subject persons to any of the sanctions applicable to violation of a rule.⁵ They do not determine future proceedings as do formal rules. It is highly desirable that agency views be made public as quickly as possible, and the requirement that policy views be expressed only after rulemaking proceedings would have only the effect of delaying announcement of such views even where they were in fact being brought to bear in individual proceedings. Rule-making procedures, although sometimes desirable for policy announcements, should not be made mandatory.

SECTION 5—ADJUDICATION

Subsection 5(a)(5): Permits modified or abridged hearing procedure "* * * by consent of the parties in such proceedings as the agency may designate." The Communications Act (sec. 309(e), 47 U.S.C. 309(e)) presently entitles a party to a "full hearing." Thus, a question of interpretation may be raised as to the type of hearing required. We believe it should be made clear that the agency may use abridged procedures and that a "full hearing" requirement, such as under section 309 of the Communications Act, may be waived.

Subsection 5(a)(6): We have already set out our objection to these provisions as they apply to ratemaking proceedings. In addition, we are concerned whether the last sentence in subsection 5(a)(6)(A) might, in some instances, be construed to preclude the Commission from receiving the assistance of its staff, such as the General Counsel. This advice is now permitted under a 1961 amendment to section 409(c) of the Communications Act (47 U.S.C. 409(c)). For example, the word "advocating" in this subsection raises the question whether the General Counsel, if he "advocated" the Commission's position in court, would be barred from advising the agency in any remand proceeding. We do not so interpret subsection 5(a)(6)(A), but believe it should be amended to read "before" in lieu of "for" in line 24 in order to remove any doubt.

SECTION 6—ANCILLARY MATTERS

Subsection 6(e): The Commission believes that this section is too broad in the following respect. It changes the present requirement of a statement of "general relevance" and "reasonable scope" before a subpoena can issue in ad-

⁵ Cf. *Airport Commission of Forsyth County, N.C. v. CAB*, 300 F. 2d 185, 188 (C.A. 4) (1962).

judicatory cases, and apparently parties would now be entitled in such cases to have them issued as of right, subject, of course, to being quashed. The present requirement (i.e., a statement or showing of general relevance and reasonable scope of the evidence sought prior to issuance of a subpoena) is, in our opinion, more conducive to the orderly conduct of adjudicatory cases.

Subsection 6(g): We suggest that language such as "or a day upon which the offices of an agency are closed for any part of its ordinary business hours," be added to include any contingency not covered by "half holiday."

Subsection 6(h): As to discovery procedures, the Commission has under study a similar recommendation of the administrative conference. Because our study of this matter is not complete, it would be inappropriate to attempt to offer definitive comments at this time.

Subsection 6(k): By deleting the phrase "in its sound discretion" this subsection now makes it mandatory that an agency act upon requests for declaratory orders. The Commission believes the agency should be allowed some discretion in this area because declaratory orders are not suitable in many situations and are subject to possible abuse.

SECTION 7—HEARINGS

Subsection 7(b): This subsection is desirable. We would suggest, however, that the officer's authority be made subject to, or in accordance with, any rules formulated by the agency.

Subsection 7(e): This section would limit interlocutory appeals. We have some questions as to the appropriateness of across-the-board treatment in this area. The Commission, for example, in 1964 considered the question of limiting interlocutory appeals and decided against any limitations. The reasons for our decision are set forth in Report and Order FCC 64-400, a copy of which is enclosed. As will be seen, such appeals are heard by the employee review board (and thus do not constitute additional workload on the agency members), have not been too numerous, and have been allowed in order to avoid a serious error necessitating a remand at a later date, with all the consequent delay and detriment to the public interest. In short, we believe that the best approach to interlocutory appeals is to give agencies discretion to tailor their procedures regarding such appeals to their own needs.

SECTION 8—DECISIONS

Subsection 8(a): The present subsection 8(a) provides that the record may be certified to the agency for initial decision. Section 409(a) of the Communications Act provides that cases of adjudication (as defined by the Administrative Procedure Act which have been designated for hearing are to be decided by the person conducting the hearing, except where such person becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably requires that the record be certified to the Commission for initial or final decision. In view of the provisions of section 409(d) of the Communications Act (47 U.S.C. 409(d)),⁶ it would appear that the Commission would still retain the authority to certify the record to itself for decision upon the foregoing finding. If there is any doubt on this question, it should be clarified, either in the statute or the legislative history. We believe that the foregoing authority is useful and should be available to the Commission.

Subsection 8(c): Subsection 8(c) permits an appeal to the agency from an initial decision only upon five listed grounds. We think that the list is too restrictive and probably unnecessary. Thus, under S. 1336, a party could not seek review on the ground that an established policy should be changed or abandoned. We think the right to seek review should not be fettered. Furthermore, by making the standard on findings of fact whether or not the findings are "clearly erroneous," the proposal would substantially change existing law. Under present law, the agency may make its own findings upon the record as a whole, *Universal Camera v. N.L.R.B.*, 340 U.S. 474; *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, and it is not restricted to overturning only those findings of an examiner which are "clearly

⁶ Sec. 409(d) provides that the provisions of sec. 409 (a), (b), and (c) supersede those of the Administrative Procedure Act, to the extent there may be a conflict.

erroneous." We believe that the responsibility of an agency, or reviewing board, is such that no change should be made in the present standard of review of an examiner's decision. We therefore recommend deletion of the language of subsection 8(c)(1) following the word "thereof" in line 24 on page 25 through the first eight words on line 6 of page 26.

For the same reasons we believe the last sentence of subsection 8(c)(1), which limits review to the questions raised by the exceptions to be undesirable. This problem can adequately be dealt with by agency rule which preserve the agency's discretion. In this connection, we believe it would be desirable for the act to continue to make clear, as the Administrative Procedure Act now does, that when an examiner's decision is on review before the agency, the agency may raise any issue it deems relevant, whether or not the parties raised the question on exceptions. This would clearly preserve the agency's ability to serve the paramount public interest. This point is of particular importance in the communications field, where the statute has been enacted primarily to protect the public interest rather than to adjudicate conflicting claims of private parties. See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138.

Further, under subsection 8(c)(4), the agency could not, on its own motion, order the case before it for review, except where it finds that the decision is contrary to law or policy, that it wishes to reconsider the policy, or that a novel question of policy is involved. Again, we do not think there should be any limitation upon the agency's right to call a case before it for review.

As pointed out above, the agency (or review board) should have plenary power to review rather than being dependent upon the parties to raise issues before it. The requirement in subsection 8(c)(4) that an agency remand a case before it on review to the presiding officer if the agency raises any issue of fact it deems material, is also undesirable. Just as an agency should, in our opinion, have plenary power to review cases on its own motion, it should also have the option to resolve any issues of material fact, provided that the record contains adequate evidence on the issue. Of course, a remand to the examiner would be necessary where additional evidence is needed. To hamstring the agency in this respect could cause unnecessary and burdensome delays in the hearing process.

Appeals boards: The revised statute provides in subsection 8(c)(2) for the establishment of appeal boards, "except where specific appellate procedures are provided by statute." We interpret this language to exempt the Commission from the remainder of the provisions of subsection 8(c) dealing with appeal boards, since Congress in 1961 (Public Law 97-192) amended the Communications Act to provide a detailed scheme for a Commission review board (see sec. 5(d), Communications Act, 47 U.S.C. 155(d)). We would hope that the proposed statute would be made clear on this score, since the Commission, on the basis of experience, has found its review board provisions to be highly successful and desirable.⁷

SECTION 10—JUDICIAL REVIEW

Section 10: Under existing law, judicial review may not be had where "agency action is by law committed to agency discretion." The introductory clause of section 10 would subject agency actions involving agency discretion to judicial review unless such "review of agency discretion is precluded by law." The impact of the proposed change is difficult to assess because we are not sure what it is aimed at or what need exists for making the change. In the absence of more information, we would prefer that the settled law in this area not be disturbed.

Subsection 10(a): Under the present law any person directly and substantially adversely affected or aggrieved may appeal final Commission actions, 47 U.S.C. 402 (a) and (b); *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470; *National Broadcasting Co. (KOA) v. F.C.C.*, 76 U.S. App. D.C. 238, 241, 132 F. 2d 545, 548, aff'd. 319 U.S. 239; see also *National Coal Association v. F.P.C.*,

⁷ In the event S. 1336 is construed to change any of the procedures of the Commission's review board, we would have objections to the appeal board procedures. As one example, mandatory requirement for oral argument before the agency was expressly deleted from the Communications Act in the 1961 amendments. We think the reasons for its deletion are equally applicable to the Commission's review board and the requirement in subsection 8(c)(2) for mandatory oral argument before the review board should be deleted.

89 U.S. App. D.C. 135, 191 F. 2d 462; *Seaboard & Western Airlines v. Civil Aeronautics Board*, 87 U.S. App. D.C. 64, 181 F. 2d 515, cert. den. 339 U.S. 963. The Commission would not be affected by the deletion from section 10 of the grant of standing to those "suffering legal wrong," because those aggrieved have standing and they are a wider category. However, the change in language from "adversely affected or aggrieved by such action within the meaning of any relevant statute" to "adversely affected in fact by any reviewable agency action" is not clear. We are aware of no need for changing the long-established standards in this area which have been judicially construed and approved. At the least, the legislative history should make clear just what change is intended through use of the new language.

Subsection 10(b) : Inasmuch as subsections 402 (a) and (b) of the Communications Act (47 U.S.C. 402(a)(b)) expressly provide for judicial review of final Commission actions in a specific court (i.e., U.S. Courts of Appeal) the provisions of subsection (b) giving the district courts jurisdiction to review agency action would not be applicable to this Commission.

We believe it should be made clear that the provision in subsection (b) giving the district courts "jurisdiction to protect the other substantial rights of any person in an agency proceeding," is not meant to overturn the established law as to exhaustion of administrative remedies and, with certain exceptions developed by the courts, the preclusion of interlocutory appeals.

SECTION 12—CONSTRUCTION AND EFFECT

The Commission believes that the last sentence of subsection 12(a) should be clarified either in the bill itself or the legislative history.

As we have pointed out previously, some of our procedures (e.g., subsection 5 (d) and section 409, 47 U.S.C. 155(d), 47 U.S.C. 409) would be in conflict with the present Administrative Procedure Act, except for the provision in subsection 409(c) of the Communications Act which states that the provisions of that section and subsection 5(d) shall be held to supersede and modify the Administrative Procedure Act to the extent they do conflict.

The authority given the Commission under these two sections is highly desirable and we would be opposed to its removal.

Since the last sentence of subsection 12(a) of the bill could be interpreted to repeal all existing legislation inconsistent with the Administrative Procedure Act as amended by S. 1336, we believe Congress should qualify the last sentence to make clear that existing legislation expressly exempting certain procedures from the present Administrative Procedure Act would also exempt these laws from the Administrative Procedure Act as amended.

(Adopted June 4, 1965. See attached separate views of Commissioner Lee Loevinger; Commissioner Wadsworth not participating.)

SEPARATE VIEWS OF COMMISSIONER LEE LOEVINGER ON S. 1336, 89TH CONGRESS, AMENDMENTS TO THE ADMINISTRATIVE PROCEDURE ACT

Concern about the procedure of the Federal administrative agencies has been widespread at least since 1938, when Attorney General Homer Cummings, at the direction of President Roosevelt, appointed a committee to study administrative procedures. The reports of this committee were the subject of extensive hearings and consideration in Congress in 1941, but the subject was pushed aside for more urgent matters during the war. In 1945, Congress resumed consideration of legislation in this field and the Administrative Procedure Act was finally adopted by both Houses of Congress without a dissenting vote and became law on June 11, 1946.

There has now been two decades of experience under the Administrative Procedure Act. It is evident that the provisions of that act were reasonable, practical, and limited in scope. While much improvement in administrative procedure was effected by the 1946 act, the area and activity of administrative law have continued to expand since 1946 and further consideration of and progress in this field is appropriate and timely. This was recognized by President Kennedy and the administrative agencies themselves in establishing the temporary Administrative Conference which was set up by an Executive order in 1961. In December 1962, the Administrative Conference rendered a final report containing a number of specific and detailed recommendations.

In my view, S. 1336 is an attempt to modernize and improve the Administrative Procedure Act in the light of two decades of experience and the extensive study and consideration of this field that has been given by the many scholars and the numerous departments, agencies, and officials who have participated in one way or another in the consideration of this subject. The changes proposed by S. 1336 are, in general, limited, modest, reasonable, and desirable. Except for a few relatively minor details, principally involving draftsmanship, this bill appears to be highly desirable and to represent a small but significant forward step in the development of administrative law.

These views are based not only on 2 years experience as a member of the Federal Communications Commission, but also on more than 25 years experience as a lawyer, during which time I have served as a staff member of both an administrative agency and the Department of Justice, have spent many years as a practicing lawyer dealing with Federal administrative agencies and Federal courts, and have had some experience as an appellate judge and a university lecturer in law.

The official comments of the FCC on S. 1336 make a perfunctory reference to desirable changes that might be effectuated by this bill but then proceed to oppose almost every significant amendment of present law contained in the bill. My analysis of the bill and of the FCC comments leads me to conclude that the opposition is based principally upon the ground that the bill would change some present practices and thereby cause some trouble and inconvenience. As I do not see any more substantial grounds of opposition to most provisions of the bill, and as I think the desirable features of the bill are far more important than the slight inconvenience it might cause by changing present administrative practice, it seems proper to state my separate views in support of S. 1336.

For purposes of clarity and contrast, I present my comments under the same headings as those used by the FCC.

SECTION 2—DEFINITIONS

The Administrative Procedure Act in its present form is somewhat ambiguous in defining rulemaking; and it is proposed to correct and clarify this. Rulemaking is a legislative type of agency action and normally refers to the promulgation of a general principle which operates in the future and is primarily concerned with policy considerations. See Attorney General's manual on the Administrative Procedure Act, page 14. However, the present Administrative Procedure Act defines "rule" to mean any agency statement "of general or particular applicability and future effect * * *." This is of such broad scope that it would include even licensing activity but for the fact that licensing is specifically stated to be adjudication.

The significance of the difference between rulemaking and adjudication is that adjudication requires the observance of procedural safeguards which insure that every interested party has an opportunity to present evidence and arguments and the decision must be made on the record. Rulemaking, on the other hand, generally involves a less formal procedure and permits the consideration of matters not made a part of the record on the theory that in legislating, policymakers may sometimes rely upon inarticulate or intuitive apprehensions rather than explicit evidence.

The Commission memorandum objects to the revision of the definition because this would change ratemaking from rulemaking to adjudication under the act. It is said that this is inappropriate because ratemaking is policymaking for the future. It is also said that this would be undesirable because it would result in separating the Commission from its "expert staff."

It does not seem to me that either of these arguments has much force. Rate-making is no more policymaking for the future than is licensing. It is true that ratemaking is differentiated from a proceeding involving the imposition of sanctions for past conduct. However, ratemaking is very similar to licensing, which also involves making orders with respect to future conduct. No one suggests that licensing should not be handled in an adjudicatory manner. The same considerations which require licensing to be handled in an adjudicatory manner are equally applicable to ratemaking. Ratemaking involves primarily private rights and in every significant aspect is more similar to licensing than it is to legislation.

There is little substance to the argument that it is a hardship to separate the Commission from its rate "experts" at the point of decision. The matters

involved in ratemaking are far less technical than the numerous engineering considerations involved in broadcast licensing. There is no more reason for permitting the staff members who participate in the early adversary aspects of ratemaking to advise the Commission at the point of decision than there would be to adopt a similar rule with respect to licensing.

The Commission comment argues that the practice of requiring the Chief of the Common Carrier Bureau to issue an initial decision insures that the "parties are fully apprised of the position of the staff and are given opportunity to present their views to the Commission." The irrelevance of this argument can be illustrated by the fact that it is equally applicable to the prosecuting attorney in a criminal case. The defense in a criminal case is fully apprised of the prosecutor's position by the end of the trial and has full opportunity to present its views to the tribunal. Indeed, this same thing is true of every party who participates openly in any adversary proceeding. However, it has never previously been argued that mere disclosure of one party's position to his adversary is any reason for permitting an adverse party to consult with the tribunal at the time of decision without giving all parties the same privilege.

The very facts which have required the creation of the independent regulatory agencies argue for a separation of functions within those agencies, in the manner proposed by the bill. There would be no need for regulatory agencies unless there were some differences in viewpoint and interest between the regulated utilities (or other enterprises) and the consuming public. Both the consuming public and the public utility are entitled to have able, eager, and dedicated advocacy of their respective viewpoints and interests before the regulatory agency. Both are also entitled to have impartial and disinterested consideration of their evidence and arguments by the agency which makes the decisions involving regulation. Neither is entitled to have its advocates sit as members of the deciding agency, or to advise the agency on an *ex parte* basis at the time of decision.

The Commission staff quite properly takes an attitude that is skeptical and adverse to that of the regulated utility in ratemaking proceedings. The Commission is best informed and the public interest is best protected by a play of truly adverse advocates. However, under American concepts of law we cannot have it both ways. We cannot have the staff of the Commission act as truly skeptical and adverse advocates and also as impartial and dispassionate judges. If the Commission staff is to perform its function of inquiry and advocacy adequately then it cannot sit with the Commission in the final adjudicatory process.

The Commission itself treats the Common Carrier Bureau as a separate and quasi-independent entity with its own viewpoint, by giving it the right to appear and argue before the Commission in adjudicatory matters in which it professes an interest. The Common Carrier Bureau does not appear to represent the Commission viewpoint, for in some cases a single applicant may be forced to confront one attorney representing the Common Carrier Bureau and another attorney representing the Broadcast Bureau, each of which will have his own allocation of time and present his own argument. The Common Carrier Bureau which thus appears and argues before the Commission as an interested party in various cases, and which appears as an advocate in the early stages of ratemaking cases, is the same Common Carrier Bureau which is now said to be an indispensable counsel and adviser to the Commission in determining and writing its decision in ratemaking proceedings. It seems to me that, despite the outstanding qualifications of our Common Carrier Bureau staff, which I acknowledge and proclaim, we cannot consistently expect that staff to be investigator, advocate, counsel, and assistant judge, all in the same proceeding.

The argument that there is some difficulty or expertise involved in ratemaking which somehow alters the basic concepts of due process of law is not sound, in my observation. The problems involved in ratemaking, although complex and voluminous, primarily have to do with finances and accounting. These are less difficult and less technical than many of the other problems that the Commission deals with in other fields, particularly broadcasting licensing. The Commission, as a body of individuals, is probably better qualified to deal with the problems of ratemaking without expert assistance than it is to deal with many of the other problems that come before it. The difficulties of ratemaking arise less from the technicality of the problems than from the massive volume of the evidence. But there is nothing inherent in this which requires a different mode of procedure from that applicable to other large cases. There are courts throughout the United States which have dealt with ratemaking problems with-

out a staff of technical experts. Few of these would undertake a consideration of the engineering problems that the Commission confronts daily. It seems to me that consideration of the whole scope of Commission work suggests that there is less reason for the Commission to require consultative experts in rate-making proceedings than in the decision of many other proceedings that come before it. In any event, to the extent that the Commission does require expert assistance in deciding ratemaking cases, it can make staff assignments that will provide such assistance.

Finally it should be observed that there is nothing in the requirements of the adjudicatory process that operates "to separate the Commission from its expert staff * * * ." The Commission may seek whatever information or analysis it desires from its staff in an adjudicatory proceeding. The only requirement imposed is that it do this openly and with notice to other parties so that they, too, may advise or comment on the points in issue. I cannot understand what virtue is thought to reside in the right to have ex parte and secret consultations with the staff in such matters. Indeed, it seems to me that the Commission is likely to be better advised and have a broader foundation for decision if it receives help on difficult points from all interested parties. Nothing in the proposed bill would deprive the Commission of the aid of experts on or off its staff. The bill would require advice to be given openly and with notice to other parties. This seems quite proper to me.

It is also argued that the Commission makes many rules of particular applicability in allocating frequencies to particular communities. It is suggested that this can be done more economically and with fewer delays by rulemaking than by adjudication.

If there is any evidence to indicate that rulemaking generally is more economical or expeditious than adjudication I am not aware of it and it is not hinted at in the Commission comment. I seriously doubt that this is the case. In any event, there is no reason why allocations which are not seriously challenged cannot be summarily assigned under the adjudicatory as well as under the rule-making proceedings. On the other hand, if there is a challenge to particular allocations then it does not seem justified to save time by denying interested individuals or communities the right to be heard.

The revised definition of rulemaking probably would impose upon the Commission, and other agencies, the obligation to be more careful as to the form and substance of actions taken by nominal rulemaking. However, this would appear to be altogether an improvement and no grounds for objecting to the revised definition.

SECTION 3—PUBLIC INFORMATION

Section 3 of the bill makes available for public inspection "staff manuals and instructions to staff" that affect the public. As I read section 3(b) it refers to staff manuals and general or standing instructions to the staff. (If there is any doubt as to this construction, it might be wise to revise the language in order to clarify the intent.) The Commission argues that this requirement is too broad, and that it is already done in many instances.

However, it is also notable that in many instances this is not done. It seems quite proper to require that it should be done in all cases.

The Commission now keeps minutes of its meetings in which records are made of orders, opinions, and rules that are to be made public. However, the Commission engages in a kind of double bookkeeping by maintaining also a set of "notations" as addenda to its minutes in which it records any matters that it does not desire to make public. These "notations" include standing orders and instructions to the staff with respect to such matters as the standards to be applied in judging the programing of broadcast licenses, how the staff is to exercise the authority nominally delegated by the published rules, when the staff may write letters challenging broadcast licensees on their commercial policies, and other similar matters. These subjects are of the most vital interest to those regulated by the Commission and are Commission standards and rules in every significant sense. They are clearly the kind of thing that should be made public and Congress is quite justified in making unmistakably clear that no agency has the right to establish such standards, orders, and instructions without making them public.

Similarly it seems to me that the requirement for the indexing of opinions, orders, and statements is something that is desirable and long needed. It is apparent to anyone who has had contact with administrative agencies that their

opinion, orders, and statements are badly in need of indexing. Much of this material is now virtually inaccessible for lack of indexing.

The argument that the Commission would be handicapped by its inability to cite cases as precedents if they had not been indexed "because of insufficient time" is ingenuous. It is the practice of many courts and agencies to prepare headings and index terms at the time of preparation of an opinion. This seems to be both a practical and a desirable procedure. If this is done there should be no delay whatever between the issuance of an opinion and its indexing. It is not required that the index be printed in a publication. Presumably the basic index would be maintained at agency headquarters and would consist of something like a collection of index cards. A collection of these cards would also presumably be published from time to time. However, the indexing of a case need not involve any more than the dropping into a card catalog of a few index cards. This could be done when an opinion is issued. In any event, to argue that an agency has the right to rely upon an opinion or precedent which is unavailable to the parties before it and which the agency is unwilling or unable to index is simply to say that administrative convenience ranks higher than due process of law.

The Commission comment argues against subsection 3(c) on the grounds that the enforcement procedure is too rigorous. It says that the subsection "reverses the normal presumption that a Government agency has acted properly and in accordance with law." But the argument ignores the equally normal and somewhat more important presumption that the Government's business is the public's business. Furthermore it ignores the reality that Government officials all too often prefer to close their records to the public except to the degree that Congress, the President, or the judiciary force them to disclose. It seems to me that the enforcement procedure proposed in subsection 3(c) is likely to be effective and is warranted by experience with Government agencies.

The Commission comment objects to subsection 3(e) on the grounds that the exemptions from public disclosure are not sufficiently broad. There seems to be some substance to the argument that subsection 3(e)(5) is unduly narrow. This exempts from disclosure interagency or intra-agency memorandums or letters "dealing solely with matters of law or policy." Most memorandums or letters of this character necessarily deal not only with law and policy but also with facts. However, a more important argument is that it is necessary for policymakers to have confidential assistants with whom they are free to communicate fully and privately. This is analogous to the privilege of confidentiality recognized in the attorney-client relationship. It is no less important for Commissioners to be able to consult confidential assistants, including attorneys, than it is for business executives to have that privilege. It seems to me that adequate protection is given to all parties and interests when the separation of functions is required and the publication of all general instructions and standing orders is required. Accordingly I would urge that subsection 3(e)(5) should be broadened to include: "interagency or intra-agency memorandums or letters not coming within one of the categories of agency records required to be published or disclosed by some other provision of this Act."

SECTION 4—RULEMAKING

The Commission memorandum objects to the revised requirements for rule-making, principally on the grounds that they unduly limit an agency's right to issue a rule without notice and eliminate the exemption from the notice requirements for procedural rules. However, it appears to me that the imposition of these more rigorous requirements is fully justified by practices, which many have called abuses, that have occurred in this very agency. The FCC has on a number of occasions issued rules that have had far reaching and most important consequences for substantive rights without any advance notice or opportunity by interested parties to be heard. It has done this under the guise of issuing procedural rules. This has happened in connection with the imposition of a so-called freeze on broadcasting licenses of various categories, some of which have been maintained in effect over a period of years. It seems to me that such a procedure is quite unwarranted and should be forbidden by statute. The fact that it may serve administrative convenience to proceed in this manner is hardly a reason for abrogating the substantive rights of parties subject to agency regulation.

SECTION 5—ADJUDICATION

The Commission comment makes one minor suggestion with respect to subsection 5(a)(6) which seems to me to be meritorious. In line 24 of that subsection the word "for" probably should be changed to the word "before." With this change I do not believe that there is any significant objection to this section of the bill. To the extent that Commission staff act as advocates or prosecutors before the agency they should not act as counselors in the adjudicatory functions.

SECTION 6—ANCILLARY MATTERS

The Commission comment criticizes the provisions relating to the issuance of subpoenas in adjudicatory cases. It disregards the fact that the proposed provisions bring the issuance of administrative subpoenas substantially into accord with the procedure which is followed in courts in similar matters. The proposed procedure has been tested over many years in many courts and agencies and has worked well. In my opinion, there is no ground for objection to it.

The Commission comment suggests that the Commission has under study the recommendation of the administrative conference relating to discovery procedures. The fact is that the Commission staff has completed its study of this matter and has strenuously and vehemently opposed the adoption of discovery procedures as recommended by the administrative conference. While the matter has not yet been finally disposed of by the Commission, the adverse staff reports and the opposition to such an innovation are so strong that there is no reason to believe that such a procedure will be adopted without the enactment of a statute similar to the proposed bill. In view of the recommendation of the administrative conference, of the experience with this procedure in courts, and of support of this procedure by the lawyers practicing before the Commission it is believed that this section of the bill is thoroughly warranted and is entitled to strong support.

SECTION 7—HEARINGS

The thrust of section 7 is to enlarge the authority of the hearing examiners by giving them responsibility commensurate with their functions. This seems to me to be wholly desirable, and I do not believe that any limitations are appropriate. In particular, there seems to be no reason for making the right of interlocutory appeals any broader than it is in the proposed bill. At least some of the notorious delay in Commission proceedings is due to the practice of permitting interlocutory appeals. This is not only inefficient but it tends to derogate from the authority and responsibility of the hearing officer. I believe that every consideration argues for making the hearing officer completely responsible for the proceedings before him, subject to the limitations provided by subsection 7(e) and with full protection of the right to secure correction of errors after the conclusion of the hearing. The Commission argument that interlocutory appeals should be allowed because they go to the review board and, therefore, do not bother the agency members seems to me to be quite beside the point. The reason for establishing an orderly and expeditious procedure which moves by prescribed stages from one officer to another is not based upon whether or not the agency members are personally burdened. I believe that section 7 should stand as it is written.

SECTION 8—DECISIONS

Section 8 of the proposed bill relating to decisions seems to me to recognize the reality of present-day administrative procedure. This reality is that in most cases the hearing officer sits in a position very analogous to that of a trial judge and gives a far more careful and detailed examination to the facts of the case before him than the agency members. It, therefore, seems appropriate that the procedure for appeal and review shall be specified and formal as is proposed. However, it does appear that it would be desirable to clarify subsection 8(c)(1), to insure that agency authority to review is not limited by the grounds stated in clauses (A) to (E). This might be done in any of several ways. It might be desirable to delete clauses (A) through (E) as suggested in the Commission comment. An alternative would be to add as clause (F) "that an established policy should be changed or abandoned." Another alternative might be to provide that the Commission may rule on any grounds which it desires to raise sua sponte. It does appear that this subsection might be construed to limit the scope of agency review and to preclude agency consideration of policy matters, which are the things that an agency is best qualified to deal

with. I suggest that this section be revised to enlarge the agency power and scope of review.

SECTION 10—JUDICIAL REVIEW

Under existing law, judicial review may not be had where "agency action is by law committed to agency discretion." The corresponding clause of proposed section 10 would subject agency actions involving agency discretion to judicial review unless such "review of agency discretion is precluded by law."

It appears to me that this may involve a substantial change in law which is unwarranted. As the APA now reads it provides that a reviewing court shall not interfere with the legislative discretion of an agency but may review any other action taken by an agency. The change in language might well be construed to provide that any agency action, including the exercise of agency discretion, is subject to review unless there is a specific statutory prohibition against judicial review. It does not appear that there is need or occasion for such a change. The scope of review under the present statute is becoming established and seems to be wholly adequate. I am not aware of any case which suggests that the right of judicial review is unduly limited under the present provisions of the APA. On the other hand, the new language might well project courts into an area of review of the wisdom of legislative actions, which is generally agreed is neither desirable nor appropriate under our system.

I also urge that it is inappropriate and unwise to change the review of agency actions from the courts of appeal to the district courts generally. It would be more than wise to establish a general uniform statutory review of agency action by appellate, rather than district courts. This would be in accordance with the recommendations of the Administrative Conference and is supported by several considerations. Courts of appeal sit in panels rather than as single judges, and it seems appropriate that action taken by a collegiate agency should be reviewed by a panel of judges. That this has been the general judgment of Congress is illustrated by the provisions relating to ICC review. Although actions of the ICC are nominally reviewed in district courts, it is required that the district court consist of three judges, including one appellate judge.

In the second place, the procedures of courts of appeal are better adapted to reviewing matters on a record made by a trial tribunal than are the procedures of a district court. District courts are themselves primarily trial tribunals, as are administrative agencies. Courts of appeal, on the other hand, are appellate tribunals which are accustomed and adapted to handling appellate matters.

It is significant that the procedures of administrative agencies are similar to those of trial courts. Indeed, S. 1336 proposes to make the Federal Rules of Civil Procedure applicable, at least to a degree, in agency proceedings. Thus it is clear that the administrative agencies correspond to the district courts in function and general status. Therefore, it is appropriate that appeal from the agencies should go to the courts of appeal.

Finally, it should be noted that permitting appeal from the agencies to the district court would add one more step in what is already a very complex and protracted process. This might, in some cases, involve five appeals in successive steps from a hearing examiner. In some cases an appeal might be taken from an examiner to a review board, to the agency, to a district court, to a court of appeals and finally to the U.S. Supreme Court. It is believed that this is excessive and that the district courts are not appropriate steps in this process. Accordingly, it is urged that single, simple uniform mode of appeal to the courts of appeal should be established by section 10.

CONCLUSION

While a few changes in language and one or two substantive changes in S. 1336 have been urged here it should be made clear that I believe this to be a most constructive and useful proposal, and one that will greatly improve the administration of law generally in this area. The basic thrust of S. 1336 is toward a realistic recognition of the actual manner of operation of administrative agencies today and toward a strengthening on the one hand of the position of the hearing examiners and, on the other hand, a protection of the rights of the litigants. Although it is not self-apparent, these two reforms are consistent and mutually reinforcing. To a large extent the rights of the litigants depend upon the protection afforded by the competence, fairness, and authority of the officer who conducts the initial hearing.

Reforms such as this often appear initially to be an annoyance to or restriction upon the agencies which have previously had broader and vaguer powers.

However, I am convinced that in the long run reforms such as this are not only in the interest of the litigants but also will be of real help to the agencies in establishing their own proper spheres and functions and, above all, will contribute to the public interest and will help to improve the administration of law and justice.

FEDERAL HOME LOAN BANK BOARD,
Washington, D.C., April 26, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in reply to your letter of March 24, 1965, transmitting a copy of S. 1336 requesting our study and report. It is noted that S. 1336 closely follows the revision of S. 1663 (88th Cong.) by the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, which was contained in Committee Print No. 2, dated April 20, 1964 (88th Cong., 2d sess.). This Board's views on S. 1663 were made known in the letter to you of December 6, 1963, of my predecessor, Chairman McMurray, and the Board's views on the subcommittee's revision were made known in Mr. McMurray's letter of July 20, 1964, to the Honorable Edward V. Long, chairman of the subcommittee.

The Board's major comment on the new bill is to note with favor the addition, in section 3(e)(8), of an exemption from the provisions of section 3 of matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions," and the expansion, in section 3(e)(4), of the exemption of "commercial or financial information obtained from the public and privileged or confidential" as well as trade secrets.

The Board favors the omission from section 3(c) of the provision of the earlier bill which, in a proceeding to compel production of agency records or information, gave the district court jurisdiction to assess against the agency the costs and reasonable attorney's fees of the complainant. This change should tend to discourage some unnecessary litigation. The Board also favors the relaxation or clarification, in section 3(a)(D), of the requirement of publication in the Federal Register so as to limit such requirement to interpretations "of general applicability."

The Board is not in favor of the bill's addition of a requirement of timeliness to the provision of section 3(a) which provides that a person who has not had "actual and timely notice" shall not be required to resort to, or be adversely affected by a matter required to be published in the Federal Register. The Board believes that the additional requirement will result in uncertainty in determining what constitutes "timely" notice.

For the same reason, the Board is not in favor of a similar addition in the last sentence of section 3(b) which concerns the use of agency opinions and orders against private parties.

Despite the improvements in section 3 referred to above and in the Board's letter of July 20, 1964, to Senator Long, the Board still holds the opinion that the overall, and undesirable, effect of section 3 is an attempt to eliminate the doctrine of executive privilege.

The Board favors the relaxation of the requirement of establishment of an agency appeal board where such an appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed. (Sec. 8(c)(2).) The Board does not favor the change effected by section 8(c)(4), which requires that if the agency raises any material issue of fact on review, it shall remand the case for further proceeding before the presiding officer. The subcommittee revision permitted the agency to raise and determine material questions of both fact and law (after opportunity for oral or written argument), or to remand. The result of this change will be to permit further delays in an already complex procedure.

For the reasons pointed out in Mr. McMurray's letter to Senator Long, the Board favors the revision of section 9 of the bill which eliminates the requirement of the former bill for grand jury proceedings in connection with the imposition of sanctions by an agency.

The Board notes the addition of section 9(b) which provides that "publicity * * * issued" by an agency and found by a reviewing court to discredit or disparage a person "under investigation or a party to an agency proceeding" may be grounds for setting aside agency action. In supervisory and remedial matters this Board is frequently called upon to question the soundness of management of financial institutions and to pass judgment thereon. Such matters often in-

volve the capabilities and even the integrity of management and other persons. If members or representatives of the Board were called upon to testify in a congressional hearing concerning a matter of this type pending before the Board, a reversal of the Board's decision might be required under section 9(b) as drawn. The Board is of the opinion that section 9(b) should either be omitted or revised so as to be limited to information given in the form of press releases and the like.

The Board preferred the subcommittee's revision of the opening words of section 10 of the original bill to the corresponding provision in section 10 of S. 1336. The subcommittee's revision excluded from judicial review cases where agency action is solely committed to agency discretion, while S. 1336 excludes from judicial review cases where "judicial review of agency discretion is precluded by law." The Board feels that the quoted words are probably unnecessary since the preceding clause of section 10 (p. 29, lines 20-21) excludes cases where "statutes preclude judicial review" from judicial review.

The Board believes that substantial improvements have been made in some aspects of the bill. Nonetheless, the Board opposes the adoption of S. 1336 for the reasons set forth herein as well as the basic shortcomings stated in Mr. McMurray's letters of December 6, 1963, with attachments, and July 20, 1964.

Informal advice has been received from the Bureau of the Budget that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

MICHAEL GREENEBAUM, *Acting Chairman.*

FEDERAL POWER COMMISSION,
Washington, April 23, 1965.

HON. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your request of March 24, 1965, the Commission has once again carefully reviewed the proposed amendments to the Administrative Procedure Act which are embodied in S. 1336. We note that the bill differs in a number of respects from S. 1663 as introduced in the 88th Congress as well as from the April 20, 1964, Committee Print of S. 1663 which was considered by the Subcommittee on Administrative Practice and Procedure at the hearings held in July 1964. It makes no significant changes, however, in the particular matters to which this Commission directed its attention in our comments on the earlier bill, which are included in the printed transcript of the hearings at page 64 and in my testimony which will be found beginning on page 68 of the hearing transcript.

Since the Commission's views remain unchanged on the particular matters of special concern to this agency, we request that the Commission's comments and my testimony on S. 1663 be accepted as our views on the bill currently under consideration. I enclose three copies of our comments and my statement and request that the documents be incorporated in the record of this year's hearings.

We continue to be of the opinion that it would be preferable for the subcommittee to consider individual amendments to particular sections of the act, as necessary to meet specific problems, rather than attempting a complete revision which would, with limited exceptions, be made applicable to all administrative agencies despite the dissimilarity of many of their functions. Many of the problems relating to the fair and efficient management of the administrative process can, we believe, be handled more satisfactorily through the efforts of the newly authorized Administrative Conference of the United States when it is organized. Consequently, we urge that S. 1336 not be enacted.

JOSEPH C. SWIDLER, *Chairman.*

STATEMENT OF JOSEPH C. SWIDLER, CHAIRMAN, FEDERAL POWER COMMISSION, ON
S. 1663, 88TH CONGRESS—A BILL TO AMEND THE ADMINISTRATIVE PROCEDURE
ACT

Hearings before Subcommittee on Administrative Practice and Procedure,
Senate Committee on the Judiciary, July 21, 1964

Gentlemen, I am appearing here today at the invitation of your committee to express the views of the Federal Power Commission on S. 1663, a bill to amend the Administrative Procedure Act of 1946. The Commission has transmitted to

the committee its detailed comments on those sections of the bill which it believes would most significantly affect its future operations. With your permission I should like to have them associated with my testimony at the end of this statement. Mr. Richard Solomon, our General Counsel, is here with me and will be available to answer any questions on these detailed comments.

I do not need to tell you that the proposal you have before you is an extremely complex one which would make many changes in the basic statutory standards for administrative fairness adopted by the Congress some two decades ago. I shall not attempt to discuss details of language but only the basic approach of the proposed legislation as illustrated by several of its specific provisions.

My basic difficulty with S. 1663 is that in attempting to develop a Government-wide Code of Administrative Procedure applicable to the many different types of activities undertaken by the various departments and agencies of the Federal Government, the draftsmen have set themselves an almost insuperably difficult goal. The differing types of governmental action carry with them different procedural problems and requirements. What are appropriate procedures for handling enforcement-type proceedings, such as those conducted by the Federal Trade Commission, in which procedures to insure fairness to the accused party are a primary concern, or proceedings adjudicating the disputes in the labor-management field, in which the controlling facts are often in dispute, are quite different from the procedural requirements for essentially legislative-type activities which constitute the bulk of the workload of the Federal Power Commission. In both the enforcement-type proceeding and the labor dispute the primary question is whether the law has been violated by a party to the case. In the FPC ratemaking proceedings the issue is usually a policy question in which the decision provides a rule of broad application.

These vital distinctions were recognized by the Congress in 1946 when, in section 2(c) of the Administrative Procedure Act, it specifically made agency ratemaking subject to the less restrictive provisions of section 4 governing rulemaking, and in section 5(c) provided that both ratemaking and initial licensing were not to be subject to that section's prescriptions with respect to agency separation of functions. The reasons for the distinction between the strictly adjudicative and the rulemaking types of proceedings have been well stated in the manual on the act issued by the then Attorney General, Tom C. Clark, shortly after its passage. As Mr. Justice Clark points out therein (p. 14) :

"* * * Rulemaking 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 rulemaking 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 the witnesses would often be important, but rather to the policymaking conclusions to be drawn from the facts * * *. 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." [Emphasis added.]

I am convinced that Congress acted wisely in 1946 and that, if we now attempt to fit both the essentially legislative and the essentially judicial functions of administrative agencies into the same procedural mold, we shall only impair the progress of administrative reform.

The activities of the Federal Power Commission, both in the ratemaking areas and in its licensing and certificate work as well, are essentially legislative, with the problems being the application to the complex but normally undisputed facts of record of the policy judgments of the Commissioners appointed by the President to make these collective judgments. I urge, therefore, that the present provisions of section 2(c) which define rulemaking as including ratemaking be retained.

I do not mean to suggest that administrative procedure for ratemaking or initial licensing should not conform to standards that will insure fair treatment to the various parties whose interests may be vitally affected by agency determinations. On the contrary, procedural due process is the foundation of any administrative proceeding and the procedures now in effect for the ratemaking, licensing, and certificate functions of the Federal Power Commission, while not presently subject to the provisions of the Administrative Procedure Act governing formal adjudications, conform in substance with such provisions.

Let me explain more specifically the manner in which S. 1663 could impair the ability of the Federal Power Commission to carry out its regulatory responsibilities. The proposed amendments to section 8 of the act, if I correctly understand them, would have the result of subordinating the role of the Commission members in formulating and effectuating regulatory policy. I hope this is not the intended objective of these amendments. In any event, the proposed elimination of the present provision of section 8(a) of the act, which makes clear that the agency, in reviewing an initial decision of an examiner, has "all the powers which it would have in making the initial decision," is most unfortunate. Another troublesome problem is presented by the proposed amendments to section 8(a) which would eliminate any authority on the part of the Commission to dispense with an examiner's decision in the interests of expedition. Also, the language of the proposed new section 8(c) which would limit the nature of the exceptions which may be filed from an initial decision (sec. 8(c)(1)), and which would introduce an intermediate appellate procedure between the hearing examiner and the Commission (sec. 8(c)(2)) gives us great concern.

I recognize that some of these limitations on direct Commission action could be avoided by a special order of the Commission if it is in a position to know at a preliminary stage of the proceeding exactly what problems lurked in a complex record, and also that once the Commission took a case for review it could, subject to complying with various additional procedures, decide almost any issue which came to its attention. However, to stake out the issues at the outset is a practical impossibility. The issues in a rate or certificate case cannot be developed in a vacuum. The purpose of a hearing is to develop a record on which policy decisions can be made on the basis of the facts.

Moreover, for the Commission to be compelled to review each case in detail at an intermediate stage, in order to decide whether the case should be taken up for direct Commission decision, and upon what issues, would further add to the burdens of the Federal Power Commission and the risk of regulatory lag.

Time is of the essence in all FPC proceedings, and especially in certificate and license cases where construction to meet the Nation's growing demand for natural gas and hydroelectric power must await a final decision by the Commission. A requirement in one of our certificate cases that the Commission could raise an issue only by remanding the case for further briefing or hearing would often mean that the issue could not be raised at all, because the urgency of the case at that stage would preclude a resubmittal of the case to an examiner. Viewed realistically these provisions would therefore greatly circumscribe the Commission's decisionmaking power.

The problem, however, is not only one of avoiding unnecessary roadblocks to administrative efficiency, important as this is. As I have indicated, the regulatory process in the work of the FPC is basically that of policy determination rather than factfinding. Under these circumstances, neither the regulatory process nor the industries subject to Commission regulation would be benefited by procedures calculated to exalt the separate determinations of our 18 hearing examiners, and to restrict the Commission itself to a largely supervisory role. I say this with great deference to the Commission's able and dedicated corps of hearing examiners. It is not of them, but of the inherent problem of consistent policy definition in an agency which speaks with 19 voices, that I raise question.

I know that a general criticism of the regulatory commissions has been that they spend too much time in adjudicating unimportant private disputes and too little in formulating overall agency policy. I agree that wherever possible the agency should attempt to enunciate governing policy by rules or statements of policy of general applicability. We have made a great deal of progress toward this objective at the Federal Power Commission. With the aid of such rule-making actions as the prescription of guideline prices for producer sales and the outlawing of certain types of price escalation clauses, we have been able to process the great majority of our certificate applications on an accelerated, non-contested basis. There are other types of decisions less amenable to rule-making treatment.

Such matters as the proper rate of return to be given a particular pipeline or public utility, or which of several competing pipelines can best provide additional new service to a particular market, or matters of pipeline or electric utility rate design—the type of issue which predominates in our contested cases—do not lend themselves to any advance formulation which can be automatically applied to a given state of facts by an examiner. Statutory provisions which

limit the scope of the Commissioner's responsibilities in deciding such issues, or which create procedural hurdles to our accomplishing this task are, in my judgment, not in the public interest.

Similarly, the provisions of section 5(c) of the present act which limits the extent to which the commissioners of an agency may consult with staff were made inapplicable to rulemaking and initial licensing because, as the Attorney General's manual made clear (pp. 50-52), Congress recognized that in such cases the commissioners would require greater access to staff expertise than where they were sitting as judges to determine whether an act had been violated. Thus, section 5(c) of the act now precludes the agency, in cases not involving rate-making or initial licensing, from consulting with staff personnel who had appeared as a prosecutor or investigator in any "factually related case." To apply this to ratemaking would mean that if a top staff official had ever served as Commission counsel in a case involving a particular pipeline or utility the Commission could not make use of his knowledge of the company in a proceeding commencing many years later.

The proposed amendments to section 5(c) (now 5(a)(6)) would only enhance the difficulty. They add to the category of excluded staff personnel those appearing in "advocating" roles, which apparently precludes persons who had defended the Commission in court appeals from advising them as to the significance of an adverse decision. Moreover, a new provision has been added in the new 5(a)(6)(B) which prohibits an agency member in drafting an opinion from having the aid of any staff employee who "participated in the preparation * * * of a factually related proceeding." Thus any member of the staff who had once participated in the preparation of a pipeline rate case, perhaps including even the Commissioner's assistant who aided in the preparation of an opinion, could not again be used to aid in deciding similar pipeline rate cases. Similarly, a staff member who had worked on a case involving a given pipeline would probably be barred from participating in the decisional process in any proceeding involving the same pipeline.

The draftsmen responsible for the proposed revision of the Administrative Procedure Act evidently had in mind a type of agency which dealt with a host of different problems and a great variety of litigants. They surely could not have had in mind an agency like the Federal Power Commission in which a very large part of the work relates to a fairly small number of companies which are under continuing regulation and where the same issues must be resolved year after year in terms of a comparison of past and present performance. In the context of FPC work, knowledge of the history and background of the giant natural gas and utility corporations which we regulate is almost essential to knowledgeable participation in the decisional process.

In closing I should like to pay tribute to the skill and imagination of the draftsmen of S. 1663 in its present form. It is a work which commands the respectful attention of everyone who is interested in administrative reform, and it reflects careful consideration of the criticisms of earlier versions of this bill. My difficulties go to the whole conception of a detailed uniform code for all agencies irrespective of their differences in authority, constituency, and the inherent nature of their proceedings.

My belief is that insofar as the Federal Power Commission is concerned the Administrative Procedure Act, as it presently stands, goes as far as is desirable in attempting to establish a uniform Code of Federal Administrative Procedure. To the extent that it is not adequate, the solution lies in the adoption of the proposal pending before this Congress for the establishment of a permanent administrative conference which can study and make recommendations with respect to the administrative problems of particular agencies or groups of agencies, supplemented, to the extent necessary, by specific legislation directed at the evils disclosed by the studies.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Washington, May 12, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter received by the Board on March 25, 1965, requesting a report on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

It is the Board's opinion that S. 1336, viewed in its entirety, contains guidelines for administrative agency procedures reasonably calculated to further the public interest or policy underlying the many and varied laws administered by agencies of the Government, while according the individuals dealing with these agencies maximum recognition of the rights secured to them under law. At the same time, the Board finds several of the specific provisions of S. 1336 objectionable, either as they affect the Board in particular or in their probable effect on all agencies generally.

The substance of certain of the comments that follow has been transmitted previously to the Committee on the Judiciary or to that committee's Subcommittee on Administrative Practice and Procedure in response to requests for views on proposed legislation relating to agency practices and procedures. By letter to you of July 11, 1963, the Board reported on S. 1666, a bill that would have amended the public information provisions of the Administrative Procedure Act. On November 6, 1963, the Board responded to your request for views on S. 1663, the provisions of which in several respects paralleled those of S. 1336. The Board's detailed comments on S. 1663 were set forth on analysis forms provided by the committee and were forwarded as enclosures to the Board's November 9 letter of comment. Subsequently, by letter of July 1, 1964, the Board submitted to Senator Edward V. Long, chairman of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, views and comments on a new comparative print of S. 1663. In many respects the revised form of S. 1663 more closely paralleled the language of certain of the provisions of S. 1336 than did the original version of S. 1663. Accordingly, some of the Board's comments regarding S. 1663, as revised, are herein restated.

In view of the similarity that certain of the provisions of S. 1336 bear to some of the provisions of one or more of the three earlier bills mentioned, the Board believes that the committee may find helpful, in respect to its deliberations on S. 1336, the views and comments contained in the Board's letters of July, 1963, November 1, 1963, and July 1, 1964. At the same time, it is the Board's belief that the enclosed comments on S. 1336 represent a self-contained analysis of the bill's provisions, in respect to their effect on the Board's functions and related procedures, and on certain aspects of Government agency procedures in general.

Sincerely yours,

WM. McC. MARTIN, Jr.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

REPORT ON S. 1336

Section 2—Definitions

The most significant change made by section 2 of S. 1336 is the removal from the definition of "rule," as that term is defined in the Administrative Procedure Act (hereinafter "the APA"), of "the approval or prescription for the future of rates, * * *." Despite the deletion of the language relating to ratemaking actions, the definition of "rule" as "the whole or any part of any agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy * * *" can still be read reasonably as including agency ratemaking actions. The reasonableness of this conclusion is further strengthened by the fact that the deleted language is not carried over to section 2(d) where "order" and "adjudication" are defined.

However, remarks of Senator Dirksen, a cosponsor of S. 1336, made at the time the bill was introduced, indicate congressional intent that under S. 1336 agency rate actions "would be decided under the adjudicative procedures (sec. 5) of the agency," (Congressional Record, Mar. 4, 1965, p. 3982.) If agency rate actions are to be considered "adjudications" under S. 1336, this should be made clear by transfer to section 2(d) of the specific language relating to that function.

As applied generally to all agencies, the proposal to place ratemaking functions under the agencies' adjudication procedures appears to have merit. In most agencies there exists a pressing need to assure agency members of maximum time to consider and act upon matters of policy. Logically, this can be done best by relieving agency members of as many decisional functions as possible. As applied to the Board's ratemaking actions, however, it would be undesirable to have responsibility for the initial decision elsewhere than in the agency itself. The Board's actions in the field of ratemaking are intrinsically policymaking functions. They involve *the establishment of discount rates* (the

rates to be charged on loans and discounts by the Federal Reserve banks to member banks of the Federal Reserve System), *the setting of stock margin requirements* (the amount of credit which may be extended to a customer by brokers, dealers, or members of a national securities exchange, or by banks for the purchase and carrying of registered securities), and *the establishment of maximum rates of interest payable on time and savings deposits by member banks.*

The decisional processes underlying the Board's actions in establishing discount rates, rates of interest on time and savings deposits, and margin requirements preclude the treatment of these functions as mere factfinding actions to be subjected to the same procedural and decisional processes as are applicable to the fixing of freight, passenger, or utility rates. In this respect, the Board notes that only those cases of adjudication which are "required by the Constitution or by statute to be determined on the record after opportunity for an agency hearing" are subject to the notice, pleadings, prehearing conferences, hearing procedures, separation of functions, and emergency action provisions of section 5(a). As the Board interprets section 5, all other cases of adjudication, including the Board's ratemaking actions, are permitted by section 5(b) to be conducted by the agency itself pursuant to procedures provided for by agency rule. Thus, the Board's ratemaking functions could be conducted under such procedures as are determined by the Board to best meet its statutory responsibilities and to serve the public interest.

If, contrary to the Board's expressed interpretation of section 5, particularly of subsection (b) thereof, the Board's rate actions would be subjected either to the procedural requirements of section 5(a) or to a hearing officer, evidential type procedure under section 5(b), the Board would strongly urge either:

(a) retention of the APA's classification of agency rate actions as rule-making functions and, as now provided, an exception for such actions from the notice and public procedure requirements "in any situation in which the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"; or

(b) that the Board's actions in respect to the establishment of (1) rates of interest on discounts and advances by Federal Reserve Banks; (2) rates of interest to be paid by member banks of the Federal Reserve System on time and savings deposits; and

(3) margin requirements be exempted from the requirements of section 5. Either alternative would permit the Board to apply its expert knowledge and experience in these highly complicated areas of national economic policy, unimpeded by procedural requirements which, if applied, could imperil the Board's ability to formulate and implement policy in credit and monetary matters and impede its ability to respond promptly and with the required flexibility to the day-to-day dictates of national economic policy.

Section 3—Public information

Section 3 of S. 1336 would make substantial and far-reaching changes in the "public information" provisions of section 3 of the APA. In introducing the bill, Senator Dirksen stated that section 3 of S. 1336 "changes the availability of Government information from a question of agency discretion to a requirement that the information be made available unless it fall within certain exempted categories." (Congressional Record, Mar. 4, 1965, p. 3983.)

The Board views favorably the purpose underlying the provisions of section 3 of S. 1336. When access to information to which the public is entitled is foreclosed by agency action based upon existing provisions of law, remedial legislation appears warranted. Despite this general accord with the purpose of section 3, the Board finds several of its provisions to be unduly severe in the requirements imposed on the agencies, and to require disclosure of agency records to an extent and in a manner inconsistent with the public interest.

Section 3(e) of the bill contains eight specific exemptions from the provisions of section 3. These would take the place of (1) the two general exceptions to the APA's public information requirements relating to "any functions of the United States requiring secrecy in the public interest" and "any matter relating solely to the internal management of an agency"; and (2) the specific exception to the "opinions and orders" and "public records" requirements of matters held confidential for good cause found. Viewed in the light of the Board's continuing functions in the areas of credit and monetary policy, and bank supervision and regulation, the eight exemptions from the require-

ments of section 3 are considered by the Board to offer reasonable assurance against unwarranted disclosures. However, a literal construction of these exemptions leads to the belief that there would remain exposed to indiscriminate public demand certain critical records of the Board, disclosure of which could impair the Board's effectiveness both as an instrument of national economic policy and as a regulatory body. Accordingly, while being favorably disposed to the form and content of the eight exemptions in section 3(e) of the bill, the Board urges retention of the exceptions from publication now found in the preamble and in subsections (b) and (e) of section 3 of the APA.

Section 3(b) of the bill, dealing with the requirements for availability for public inspection and copying of agency final opinions, orders in the adjudication of cases, statements of policy and interpretations adopted by the agency, etc., deletes an existing provision of the APA whereby an agency may withhold from public access all final opinions or orders in the adjudication of cases *for good cause found*, when not cited as precedents. S. 1336 does provide that an agency may delete identifying details to the extent required to prevent a clearly unwarranted invasion of personal privacy.

The Board is opposed to the removal from the law of the provision authorizing an agency to withhold from public availability opinions, orders, or statements of policy "required for good cause to be held confidential and not cited as precedents." Further, the exception provided in S. 1336 regarding deletion of identifying details is not, in the Board's opinion, an adequate alternative to the present nondisclosure authority. Inasmuch as the bill recognizes that there can be cases in which there would occur a "clearly unwarranted invasion of personal privacy," the Board believes that a far more workable and equitable basis for nondisclosure is that provided in the present section 3(b) of the APA.

Section 3(b) of the bill would also require that every agency maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated and which is required by subsection (b) to be made available or published. The Board urges that the requirement for a current index be made subject to the same exception as has been urged in respect to the publication of opinions and orders—namely, that there be excluded from the current index requirements "identifying information" that the agency for good cause shall hold confidential and not cited as precedents.

The Board is opposed to the provisions in section 3(c) of the bill that would require every agency to "make all its records promptly available to *any person*." [Italic supplied.] Presently, the APA requires that matters of official record shall be made available "to persons properly and directly concerned." This provision, if combined with the judicial enforcement provision in section 3(c) of the bill, would, in the Board's judgment, assure an equitable balancing of the need of Federal agencies to determine themselves what records and information a particular person should or need have, with the public's right to such records and information. The words "any person" become the more objectionable because of their presence in the subsequent provisions of the bill permitting court action to obtain a court order requiring production of agency records.

The foregoing comments combining references to the phrase "any person" and the provisions affording court assistance when an agency has wrongfully withheld records and information should not be construed as Board opposition to the court enforcement provisions per se. On the contrary, the Board is in sympathy with the need for a form of judicial enforcement, and is generally in accord with the means to this end proposed in section 3(c) of the bill. However, the Board does oppose giving "*any person*," whether or not properly and directly concerned, access to all agency records not specifically exempted and, upon mere allegation of improper withholding, permitting "*any person*" to bring suit to obtain an order requiring production. Admittedly, the bill would require that issuance of such court order be premised upon a finding that the record demanded but not produced was improperly withheld. The requirement of such finding is viewed as a relatively minimal deterrent both as to unwarranted demands for disclosure and as to the number of baseless complaints that could be filed seeking judicial relief.

In respect to such complaints, the bill places upon the agency the burden of sustaining its action in withholding records or information from "any person."

As a result, in any case where the records sought do not fall within one of the eight exemptions contained in section 3(e), in attempting to have sustained its administrative action, the agency would be denied the opportunity of showing that the person demanding production of the records is not properly and directly concerned with the matter reflected in such records. Such opportunity is available presently under the APA.

In sum, the Board finds equitable and reasonable the placement upon the agency of the burden of sustaining its action in withholding matters of record. That burden becomes unreasonable, however, by inclusion in section 3(c) of the provision requiring that every agency make its records available to "any person." The Board submits that the congressional intent inherent in the proposed language of section 3(c) would be equally realized by language that would combine the provisions of section 3 of the APA with the court enforcement provisions of the bill, the latter appropriately adjusted to the language of section 3 of the APA.

Section 4—Rulemaking

In respect to the changes that section 4 of S. 1336 would make in existing law relating to rulemaking procedures, the Board is opposed to these changes in the following two respects.

Section 4(a) of the APA excludes from the "notice of proposed rulemaking" requirements "persons * * * named and either personally served or [who] otherwise have actual notice thereof in accordance with law." S. 1336 would make the notice requirements applicable even as to persons personally served or who have actual notice of proposed rulemaking. The Board opposes the deletion of the exclusion now applicable to persons served or who have actual notice, and believes that elimination of this exception would place upon the agencies an unnecessary and burdensome procedure.

Section 4(c)(2) of S. 1336 would make applicable the requirements of section 7 ("Hearings") where rules are required "by the Constitution or by statute to be made on the record after opportunity for an agency hearing." Section 4(b) of the APA makes applicable the provisions of section 7 ("Hearings") and section 8 ("Decisions") only to rules required by *statute* to be made on the record after hearing.

The Board opposes the coverage within section 7 requirements of rules required *by the Constitution* to be made on the records, etc. By this change, in addition to following express statutory requirements for hearings that presumably are premised upon constitutional guarantees, agencies would be obliged to reckon with innumerable aspects of due process of law in determining whether the requirements of section 7 must be followed. Administrative agencies would be faced with the perplexing dilemma of determining whether a rulemaking hearing is "required" or not. In general, agencies of the Government function within the framework of congressionally delegated authority. In delegating authority, it is assumed that the Congress will determine the circumstances under and the extent to which the public interest require adherence to the standards of section 7 in the decisionmaking process. This is particularly true in respect to agency rulemaking, essentially a quasi-legislative function. The Board urges deletion of the reference to constitutionally required rulemaking hearings.

Section 5—Adjudication

The Board incorporates by reference its earlier comments relating to the proposed classification of agency rate actions as section 5 "adjudications."

Section 5(a) provides that all of its provisions shall be applicable in those cases of adjudication which are *required by the Constitution or by statute* to be determined on the record after an opportunity for agency hearing. For the reasons earlier stated in respect to the Board's opposition to similar language of applicability in respect to rulemaking functions, the Board opposes making all the provisions of section 5 applicable to cases of adjudication which are *required by the Constitution* to be determined on the record after hearing. As indicated, the Board believes that the requirements of due process of law in respect either to functions involving rulemaking or adjudication can be assured by appropriate congressional action at the time agencies' statutes are enacted. To place upon administrative agencies the burden of case-by-case determination as to whether a particular adjudication is required by the Constitution to be determined on the record after opportunity for an agency hearing could give rise to administrative delays and judicial appeal proceedings that would be clearly

contrary to the principles of expeditious administrative resolution at which S. 1336 is apparently aimed.

The Board favors the changes in existing hearing procedures that would be effected by enactment of section 5(a) (3) and (5). Provisions for prehearing conference that could be utilized in the discretion of the agency or the presiding officer should significantly expedite administrative proceedings, enable greater simplification of complex issues, and better advise both the agencies and other participating parties regarding the probable course of the adjudicative proceedings. Similarly, the provision for modified hearing procedures that fall without the requirements of the section 7 appears likely to serve the interests of both the agencies utilizing such abridged procedures and the parties as to whom they are made applicable. The Board believes, however, that the beneficial results intended by utilization of abridged hearing procedures could be substantially thwarted by the fact that such procedures would be utilized only by consent of the parties. Preferable, it is believed, would be use of such abridged hearing procedures as the agency in its discretion may designate by rule or order.

Finally, the Board notes with approval the inclusion in section 5(a) (7) of a provision not presently contained in the APA whereby emergency action, found by an agency to be necessary for the preservation of the public health or safety, or as otherwise provided by law, may be taken without the notice or other procedures required by section 5(a).

Section 6—Ancillary matters

Section 6 of S. 1336 would expand the provisions of the APA regarding ancillary matters so as (1) to make more specific the provisions regarding appearance of attorneys and other representatives of parties before agencies; (2) to provide for the issuance of subpoenas upon request to any party to an adjudication *unless otherwise provided by statute*, and for the issuance of subpoenas to any party to a *rulemaking* proceeding upon request, upon a showing of general relevance and reasonable scope of the evidence sought, and as *authorized by law*; (3) to make available deposition and discovery procedures to the same extent and in the same manner as in civil proceedings in the district courts of the United States except to the extent an agency deems such conformity impracticable and otherwise provides for depositions and discovery by published rule; (4) to permit an agency to consolidate related proceedings or to order joint hearings on common or related issues in different proceedings; and (5) to issue declaratory orders and to dispose of motions for summary decisions, motions to dismiss or motions for decisions on the pleadings.

While the Board favors many of the additions that S. 1336 would make in the ancillary matters provisions of the APA, the Board is opposed to certain of the provisions contained in S. 1336. These are the provisions, or portions thereof, dealing with the issuance of subpoenas (sec. 6(e)), depositions and discovery (sec. 6(h)), and declaratory orders (sec. 6(k)).

The Board opposes the language of section 6(e) that would require every agency to provide by rule for the issuance of subpoenas upon request to any party to an adjudication *unless otherwise provided by statute*. Proceedings conducted by the Board or a duly designated representative thereof usually relate to the Board's function as a regulatory and supervisory agency. In the course of such proceedings, the Board is required to have access to and make use of facts and financial data of an extremely sensitive and confidential nature in order properly to discharge its statutory function. The Board does not believe that parties to such proceedings should be permitted to demand access to such information and data through subpoenas *unless expressly authorized by law to do so*. To permit such access could have seriously adverse economic and personal consequences on the banking organizations involved, their representatives, and their customers. For example, disclosure of a bank's resources and amounts of income, its loss experience on consumer loans, the amount of and changes in valuation reserve accounts, its investment and loan portfolio structure, and related financial information could do irreparable damage to the disclosing bank's financial position. Similarly, compulsory disclosure through subpoena of bank officers' salaries, the names of borrowers, the amounts and terms of their loans, and the deposit balances of customers could prove highly prejudicial and irreparably damaging to the individuals or institutions involved. The Board does not believe that provision in section 6 for the quashing or modification of any subpoena for lack of general relevance or reasonable scope is sufficient guarantee against indis-

criminate or unwarranted disclosure to make acceptable the proposed subpoena provisions relating to adjudications.

For the foregoing reasons, the Board strongly urges that the provisions for issuance of subpoenas relating to adjudications be made identical with the provisions for the issuance of subpoenas in rulemaking proceedings—namely, that agency subpoenas *authorized by law* shall be issued to any party to an adjudication upon request upon a showing of general relevance and reasonable scope of the evidence sought.

Section 6(h) would add a provision to existing law making available depositions and discovery to the same extent and in the same manner as the same are available in civil proceedings in district courts of the United States except to the extent an agency deems such conformity impracticable and otherwise provides for depositions and discovery by published rule. In essence, the Board opposes this change for the same reasons expressed in its opposition to the proposed provision in section 6(e) regarding subpoenas in cases of adjudication. It is not believed that parties to proceedings before the Board should be permitted to probe through deposition and discovery procedures the highly confidential details of another's business transactions, particularly in view of the unique public interest considerations involved in the field of banking.

Nor are the Board's objections to the depositions and discovery procedures overcome by the presence in section 6(h) of a provision that an agency might depart from such procedures where the same are found to be impracticable and the agency otherwise provides for depositions and discovery by published rule. To permit deviation from the prescribed procedures only if adherence thereto can be shown to be impracticable, that is, burdensome or difficult in implementation, misses completely the substantive objections that the Board has to the proposed provisions relating to depositions and discovery procedures.

Accordingly, it is recommended that if the depositions and discovery provisions are to remain in S. 1336, following the last word in section 6(h) as now proposed there be inserted the following language "or where the use of such process by a party would, in the judgment of the agency, be contrary to the public interest, in which case the agency shall by published rule set forth the particular circumstances under which resort to such process shall be allowed."

Finally, in respect to the provisions of section 6(k) directing that an agency shall act upon requests for declaratory orders, the Board believes desirable the insertion of specific language clarifying what appears to be the intent of Congress to make the issuance of a declaratory order a discretionary act upon the part of an agency. This could be effected by insertion at line 6 of the present provision, immediately following the word "authorized", the phrase "in its sole discretion."

Section 7—Hearings

Viewed in the context of the changes urged herein in respect to certain of the proposed provisions in sections 2, 4, 5, and 6 of S. 1336, the Board does not oppose the proposed provisions of section 7.

Section 8—Decisions

The Board views as generally unobjectionable most of the changes in existing law relating to the decision functions of administrative agencies that would be made by section 8 of S. 1336. The Board does oppose certain of the provisions of section 8 of S. 1336, its major objections being as follows:

Section 8 of the Administrative Procedure Act provides that in cases in which an agency itself has not presided at the reception of evidence at a hearing, the presiding officer shall initially decide the case or, in the alternative, the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Section 8(a) of S. 1336 would do away with the initial decision procedure by providing that in all adjudications subject to section 5(a) the presiding officer shall make the decision and, in the absence of either an appeal to the agency or review by the agency within time provided by statute or by rule, the presiding officer's decision shall become the decision of the agency.

At the present time the Board follows the practice in an adjudicatory proceeding of requiring the record of such proceeding to be certified to it for initial decision, following issuance by the presiding officer at the hearing of his recommended decision. Such a procedure, provided for by section 8(a) of the Administrative Procedure Act, allows the Board to review the facts *de novo*, to appraise the presiding officer's evaluation of those facts, and either to affirm the

presiding officer's recommended decision or alter or reverse the same in the light of the applicable statutory standards.

The Board strongly desires the preservation of its present decisionmaking procedures whereby an initial decision issued by a presiding officer is reviewed by the Board prior to its becoming a final Board decision. Although there are few occasions upon which the Board conducts adjudications requiring application of the provisions of section 7, when such occasions do arise the nature and the subject of such proceedings are sufficiently technical and sensitive as to require, in the Board's judgment, a final decision to be made in the first instance by the Board itself. Adjudicatory proceedings that would be conducted by the Board might involve termination of a bank's membership in the Federal Reserve System, removal of officers or directors of a bank for unsafe or unsound banking practices or violations of law, suspension of a bank's access to the credit facilities of the Federal Reserve System, termination of a bank's authority to extend credit to finance securities transactions, revocation of a holding company affiliate's voting permit, or issuance of a cease and desist order under the Clayton Act. As to many of the aforementioned types of adjudicative proceedings, there are minimal statutory guidelines or criteria pursuant to which a final decision is to be reached. Because of the infrequency of such proceedings there has not been established, with respect to most of these matters, any large body of decisional precedent upon which a subordinate officer could rely for guidance. The applicable statutes grant the Board broad discretion, and the issues involved go substantially beyond the mere application of facts to statutory criteria. In such circumstances, the Board believes that to place in a subordinate officer the final decision in cases of adjudication, with very limited opportunity for agency review under section 8(c) (4), could be prejudicial both to the respondents in such cases and to the Board's effectiveness as a statutorily constituted regulatory and supervisory body.

Accordingly, the Board favors retention of the provisions of section 8(a) of the Administrative Procedure Act pursuant to which a presiding officer makes a recommended decision, upon review of which the agency issues the initial decision.

In respect to the provisions of section 8(c) of S. 1336 calling for the establishment by each agency of one or more appeal boards, the Board favors the functional purposes to be served by such establishments. However, the following comments are offered for consideration in respect to certain of the provisions relating to the establishment of these appeal boards.

The Board recommends that ultimate authority to grant oral argument during the proceedings before an appeal board be placed in the discretion of the agency. Section 8(c) (2) would grant oral argument in any case upon request of a party. Provision is made in section 8(b) for the opportunity, in the discretion of the presiding officer, for oral argument in support of proposed findings and conclusions. Presumably, the instances would be infrequent where oral argument thus requested would be denied. To accord parties an absolute right of oral argument before an appeal board would, in the Board's judgment, introduce an element of delay in the total administrative process that would not be compensated for by any significant benefit to the party or to the agency involved. The rights of parties appearing before an agency appeal board would not appear to be prejudiced in any manner by giving to that appeal board a discretionary judgment in respect to granting oral argument.

The provision in section 8(c) (2) whereby a private party could avoid consideration and determination by the appeal board of exceptions to a presiding officer's decision or rulings appears to render nearly useless the functions intended to be performed by the appeal board. Under the proposed provision a private party may avoid consideration by the appeal board merely by filing an application for a determination of exceptions by an agency—a procedure identical to that where an agency has not established an appeal board. It is believed that agency determination of exceptions raised by a party should be limited to those cases where the agency has not established an appeal board.

Regarding the grounds upon which an agency may order a particular case brought before it for review, section 8(c) (4) limits such grounds to (1) decisions or actions that may be contrary to law or agency policy; (2) to cases as to which the agency wishes to reconsider its policy; or (3) to cases as to which a novel question of policy has been presented. The Board would be unopposed to these provisions *only* if its recommendations relating to retention of the Administrative Procedure Act's recommended decision procedures are adopted. If S. 1336

were to provide that an agency may by rule designate a case in which the agency itself may make the initial decision following a *recommended* decision by a presiding officer, the appeal and review procedures proposed in S. 1336 would not be objectionable since the agency would have control over the class of cases as to which it would delegate initial decision authority to the presiding officer. Absent retention of the recommended decision feature of the Administrative Procedure Act, the Board strongly recommends that S. 1336 contain a provision giving an agency the authority to consider de novo any issue involved in a case appealed to or reviewed by the agency after entry of the decision of the presiding officer or after the action of an appeal board.

Section 9—Sanctions and powers

The Board favors the provision of section 9 that would impose on every agency, in respect to any proceeding required to be conducted pursuant to S. 1336 or otherwise required by law, a duty to set and complete such proceedings "with reasonable dispatch." Such requirement is at present specifically applicable only to licensing proceedings conducted pursuant to sections 7 and 8 of the Administrative Procedure Act.

Section 9(b) provides that any publicity issued by an agency or officer, employee, or member thereof, that is found by a court to have been issued to discredit or disparage a person under investigation or a party to an agency proceeding, may be held to be a prejudicial prejudgment of the issues in controversy and to constitute a basis for court action in setting aside any agency action against such person or party.

In the Board's judgment, the inclusion in S. 1336 of the proposed language relating to agency publicity offers a greater potential for misunderstanding and confusion than for any remedial benefit that might be derived therefrom.

Should it be deemed necessary to provide specifically for the right of a reviewing court to set aside adverse agency action which is shown to have been preceded by a prejudicial prejudgment of the issues in controversy, such a provision could be added as a seventh category of agency actions which, as required by section 9(e) (B), a reviewing court shall "hold unlawful and set aside."

Section 10—Judicial review

The judicial review provisions of the APA are expressly inapplicable insofar as (1) *statutes preclude judicial review* or (2) *agency action is by law committed to agency discretion*. Thus, two distinct criteria are now provided by which a determination can be made as to whether a particular agency action is subject to judicial review. If a statute precludes or can be interpreted as intended to preclude judicial review of particular agency action, such action is excepted from the judicial review provisions of the APA. Similarly, where the statutory provisions under which an agency purports to act either expressly or by implication commit a particular action to agency discretion, such action is not subject to judicial review.

Section 10 of S. 1336 would exclude from judicial review, as does the APA, agency actions as to which "statutes preclude judicial review." However, S. 1336 would narrow the existing APA provision regarding agency discretion by making the exception with respect thereto applicable only where "judicial review of agency discretion is precluded by law." In the Board's view, there is neither need nor justification for the change proposed in respect to acts committed to agency discretion. The Board believes the existing provisions of law to be unambiguous and to meet fully the apparent congressional intent in formulating the judicial review provisions of the APA. On the other hand, the proposed language in S. 1336 relating to judicial review of discretionary agency actions can be said to be redundant in that the circumstances covered by the exception appear to be included in and covered by the first exception of section 10 relating to situations where "statutes preclude judicial review." It appears to the Board that agency discretion that is "precluded by law from judicial review" must, even under a very narrow construction, be construed as action precluded from judicial review by statute, either specifically or by reasoned deduction from the statutory context. Thus, rather than the two separate and distinct circumstances under present law that give rise to exception from judicial review, S. 1336 would provide but a single circumstance under which agency action would be excepted from judicial review; namely, where judicial review is precluded by statute.

Even assuming, arguendo, that the Board's interpretation of the preamble to section 10 of S. 1336 is unduly restrictive, the Board would oppose the proposed language more broadly interpreted. Under existing law, a single determination is required under each of the two exceptions from judicial review of agency action. Judicial review is precluded (1) if so provided by statute, or (2) if agency action is by law committed to agency discretion. Pursuant to the provisions of S. 1336, a determination of whether a discretionary agency action is judicially reviewable would, in turn, require two distinct determinations. First, is the agency action in question expressly or by implication committed to agency discretion? Second, if so committed, is judicial review of such discretionary action expressly or by implication precluded by law? The Board is unable to ascertain either a need or justification for the change proposed in the existing provisions of law. Even assuming the need for a change in the APA's provisions, the Board views section 10(2) of S. 1336 as lacking in a clear, functional guide for determining agency actions that are to be excepted from the bill's judicial review provisions.

The Board finds a far more objectionable feature of the judicial review provisions of section 10(2) to be that actions of the Board in the areas of credit regulation and monetary policy, including those earlier discussed relating to ratemaking, would be made subject to these judicial review provisions. Such Board actions, committed by law to the Board's discretion, are now excluded from judicial review pursuant to provisions of the APA.

The change proposed would subject the Board's judgment and action in money market and credit requirement matters to affirmation, modification, or rejection by a court allegation by any person that he is adversely affected by such action, notwithstanding its uniform applicability to the public at large. It is the Board's belief that irreparable and substantial harm to the economy of the Nation could result were the Board deprived of final authority to take those actions in the areas of credit regulation and monetary policy that are considered necessary in the public interest. Inasmuch as enactment into law of proposed section 10(2) of S. 1336 could bring about the harm described, the Board strongly urges rejection of the proposed provision and retention of the exemptions from judicial review now provided by the preamble to section 10 of the APA.

The Board is opposed to the change proposed by section 10(a) of the bill in regard to persons entitled to judicial review of agency action. At present, the APA gives a right of review to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute." Under S. 1336, the test would be merely whether a person is adversely affected by agency action. The finite concept of *legal wrong* and *statutory* definition of "adversely affected or aggrieved" would be discarded in favor of an abstract test having no perceivable limits. Thus, should the Board deny an application by a member bank for permission to establish a branch facility, under the proposed provision providing for judicial review, any resident of the town in which the proposed branch would have been located could assert that he was "adversely affected in fact" by the Board's denial action, and thus entitled to judicial review of that action.

Regarding the potential for innumerable, unwarranted petitions for judicial review, section 9 of the Bank Holding Company Act of 1956 expressly provides that "any party aggrieved by an order of the Board * * * may obtain review of such order in * * * [a] United States Court of Appeals * * *." Under section 10(a) of the APA, the only "aggrieved" person in such cases would be a *party* to the proceeding, since this is the only person who can be "aggrieved * * * within the meaning of * * * [the] relevant statute." Pursuant to the proposed amendment under discussion, apparently not only a *party* to a proceeding under the Bank Holding Company Act could seek review of the Board's action, but any other person, such as a customer of a bank involved or of a competitor, another bank holding company competing in the same area, or any one of a host of other persons who might assert themselves to be "adversely affected in fact," directly or indirectly, substantially or remotely, by the Board's action. The Board views the proposed change in the review provisions of the APA as potentially productive of circumstances that could harmfully impede the orderly and expeditious disposition of administrative matters. Accordingly, the Board strongly recommends that the standards now contained in section 10(a) of the APA regarding standing to seek judicial review be retained.

The Board also urges retention of the language in section 10(b) providing that that form of proceeding for judicial review "shall be any special statutory review proceeding * * * in any court specified by statute."

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., June 17, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Further reference is made to your letter of March 24, 1965, requesting a report of this agency on S. 1336, "To amend the Administrative Procedure Act, and for other purposes."

During the 88th Congress this agency twice extensively reported its views on bills to revise the Administrative Procedure Act. On December 6, 1963, this agency reported to the chairman of the Senate Judiciary Committee on S. 1663 and on July 8, 1964, this agency reported to the chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on a proposed staff revision of S. 1663.

Attached hereto are the views of this agency principally on sections 3, 4, and 5 of S. 1336, which concern public information, rulemaking, and adjudication. For the reasons stated therein this agency would object to enactment of those portions of these sections of the bill which would have an adverse impact on this agency.

It is not feasible at this time to determine the precise financial effect of the bill on the operations of GSA although it is probable that sections 3, 4, and 5, if enacted, would substantially increase the cost of agency administration.

The Bureau of the Budget has advised that, from the standpoint of the administration's program, there is no objection to the submission of this report to your committee.

Sincerely yours,

LAWSON B. KNOTT, Jr., *Administrator.*

S. 1336—COMMENTS

Section 3 of the Administrative Procedure Act now excludes from its public information requirements "any matter relating solely to the internal management of any agency," final opinions or orders "required for good cause to be held confidential," matters of official record sought by persons not "properly and directly concerned," and record "information held confidential for good cause found." For these exclusions section 3 of the bill proposes to substitute primarily the eight exemptions stated in its subsection (e). In a report of April 5, 1965, to the chairman of the Subcommittee on Foreign Operations and Government Information, House Committee on Government Operations, on H.R. 5012, a bill to amend Revised Statutes section 161 in a manner compatible with section 3 (c) and (e) of S. 1336, this agency explained at some length the inadequacies of the proposal. Our objections are equally applicable to section 3(c) of S. 1336 and to affected provisions of section 3 (a) and (b). A copy of the report of April 5, 1965, is attached.

In addition, we would like to comment on some unduly burdensome and risky provisions of section 3(b). Under its first sentence, an agency must make available for public inspection and copying, with certain limited exemptions, all final opinions and orders made in adjudication of cases. If this means in GSA, in effect, that we would have to make publicly available determinations made, with any supporting opinion, whenever a person protests, questions, requests, or seeks a particular agency action in its area of statutory and administrative responsibility, then we have serious reservations as to its feasibility and reasonableness. This area involves a tremendous range of functions, including procurement of real and personal property, utilization, and disposal of property, construction, leasing, and maintenance of public buildings and space, transportation, public utilities, telecommunications, supply, and records management for the executive branch of the Government. The issues and questions which arise are similarly vast and range widely in complexity and importance. To make all this material available on request, except as provided in subsection (e), appears to be burdensome and expensive and, in many instances, without offsetting benefit.

Like objections apply to the requirements in section 3(b) for making publicly available unpublished statements of policy and interpretation, staff manuals and staff instructions, and a current index of agency material required to be published or made available. While provision is included for deletion of private identification details, the deletions must be fully explained in writing—a quite burdensome arrangement.

The last sentence of section 3(b) puts teeth in the foregoing index requirement by prohibiting reliance upon or use of material not indexed, absent actual notice of the material. Preparing and maintaining an index has value. But where manpower, budget, and other imperative circumstances prevent current maintenance of an index, the agency's administrative processes and management should not be so dangerously halted and hamstrung.

Section 4 of the Administrative Procedure Act now excludes from its requirement for public notice and participation in agency rulemaking, among other things, "any matter relating to agency management * * * or to public property, loans, grants, benefits, or contracts," and "any situation in which the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Subsection (h) of the bill proposes to substitute for these exemptions primarily an exemption for "minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights" (although the subsection would retain to a certain extent other exemptions now in the act). A memorandum prepared by the staff of the Senate Subcommittee on Administrative Practice and Procedure about April 1964 "thought it meritorious and necessary that all rules be subject to the notice and public participation requirements of section 4."

In explanation of the subject exemptions from the present act the Senate Judiciary Committee stated: "* * * The exemption of proprietary matters is included because the principal considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rulemaking procedures they will adopt in a given situation within their terms * * *" (S. Rept. No. 752, 79th Cong., Nov. 1945. Also printed in Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., p. 199.)

The same point of view was expressed by the House Judiciary Committee in its report on the bill which became the act. (H. Rept. No. 1980, 79th Cong., May 1946. Also printed in Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., p. 257.) Congressman Walter of Pennsylvania, a major sponsor of the act, explained on the floor of the House: "* * * The exemption of proprietary matters is included because in those cases the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts." (92 Congressional Record 5650, May 1946. Also printed in Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., p. 358.)

These insights of the original framers of the act would be lost under the proposed revision of section 4. The public rulemaking procedure would be applied to the formulation and amendment of, as well as exceptions from, agency policies, procedures, mechanics, methods, and general interpretations. As stated in connection with section 3 of the bill, in GSA these policies and procedures are applied to a wide range of functions—such as procurement, disposal, utilization, leasing, and supply—and the policies and procedures vary greatly in complexity and in their significance to the public. Apart from minor amendments, revisions, and refinements, all these policies and procedures would require public notice and participation. Administrative authority would be lost to determine that the policy or procedure was not sufficiently important to the public to warrant dispensing with public rulemaking as "impracticable, unnecessary, or contrary to the public interest," even where agency management and proprietary activities, such as contracting, are involved.

It seems to us that the public rulemaking procedures of the bill should be confined to protect "regulated industries," such as the railroads, public utilities, and natural gas pipeline companies, where fairness and due process support their participation in the Federal ratemaking process and formulation of related policies. Public policy has led to compulsory regulation of these industries. On the other hand, dealers, suppliers, contractors, and beneficiaries with respect to public property, grants, and contracts do business with the Government on a voluntary basis and to the extent that their own self-interest motivates them. They may negotiate many terms of the transactions or withdraw altogether, hence do not need special statutory standing to participate in the development of the administrative agency's policies and mechanics.

Nevertheless, better regulations and operations frequently result in these areas where the views of such dealers and contractors are solicited, their experience brought to bear, and their education furthered. GSA (and other agencies) continuously solicit their views where the issues are of sufficient importance, either through notice in the Federal Register or by direct communication. We plan to continue to do this. We object only to the proposed requirements to do so in all cases, across-the-board, regardless of the need and public interest.

While the emergency rules provisions of section 4(d) would provide some relief, they do not reach the basic difficulty nor counterbalance the disadvantages.

Section 4(c) (2) of the bill, as to rulemaking, and section 5(a) of the bill, as to adjudication, would require special hearing procedures where the Constitution or statute requires action based on the record after opportunity for an agency hearing. Since the Constitution does not specify any instances when an opportunity for an agency hearing arises, an indefinite standard is prescribed, one that necessarily shifts with judicial interpretation over the years under changing circumstances. Complicated and somewhat illusory guidance is thus afforded for the large number of agencies and their personnel who must comply. Statutory enumeration would appear to be preferable.

Section 5(b) would require agency procedures for prompt apprising of the parties of the facts and issues involved in "all other cases of adjudication" (except those involving inspections and tests and making decisions at the conclusion of the proceeding, subject to appeal as may be provided. While the thrust of these requirements is unobjectionably toward speed and fairness in adjudications, the full meaning of the subsection is not clear. An expansive interpretation could impose unduly formalized procedures for many kinds of adjudicative matters processed by this agency, with only delay and expense resulting.

Section 10 of the Administrative Procedure Act now excludes from judicial review, among other things, "agency action * * * by law committed to agency discretion." Section 10 of the bill would change this to read, where "judicial review of agency discretion is precluded by law."

We construe the changed language as not altering present reviewability under the act of GSA actions and as preserving, in accordance with the original intention of the act, administrative freedom from much judicial review of agency actions in the areas of public property and contract management. The principles denying standing to sue the Government to citizens and prospective contractors in these areas would remain unabridged. (*Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); Attorney General's Manual on the Administrative Procedure Act, p. 96 (1947).)

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., April 5, 1965.

Hon. JOHN E. MOSS,
*Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Government Operations, House of Representatives, Wash-
ington, D.C.*

DEAR MR. MOSS: Your letter of March 25, 1965, requested the views of the General Services Administration on H.R. 5012, a bill to amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

The bill would, in effect, substitute for section 3(c) of the Administrative Procedure Act (5 U.S.C. 1002(c)), new provisions, to be included in 5 U.S.C. 22, to govern the availability to the public of Government agency records, providing jurisdiction in district courts of the United States to enjoin agency withholding of certain agency records and information, and providing for certain related aspects of judicial procedure, including punishment for contempt of responsible officers.

The bill, which provides for eight categories of exception from a general information disclosure and records availability requirement, is similar to that portion of the proposal in S. 1336 and S. 1160 which would amend section 3(c) of the Administrative Procedure Act, and is a refinement of similar provisions in S. 1666 and S. 1663 of the 88th Congress.

The proposed bill is intended to delineate more clearly information and records access rights and to impose restrictions on the right of Government agencies to

limit access to Government records and information. It would, in effect, circumscribe the present broad agency authority in section 3 of the Administrative Procedure Act to withhold information relating solely to agency internal management, or information requiring nondisclosure in the public interest or held confidential for good cause found, and would also, apparently, impose limitations on executive branch implied powers over records and information disclosure.

We are naturally in agreement with the general objectives of proper public access to Government records and information as a necessary characteristic of our free society. However, we think the bill would result, in some areas, in undesirable and perhaps unintended results adversely affecting both agency functions and reasonable rights of privacy of affected individuals.

Past legislative efforts to deal with this problem appear to have been unsuccessful, primarily, we believe, because the remedy proposed was too sweeping to permit maintaining the delicate balance between the needs of effective Government and those of public information.

Recognizing the extent of discretion over information disclosure and records access under present law, and to be constructive, we think it necessary to provide concrete suggestions as to types of Government information requiring special treatment as regards our agency functions. Specifically, we suggest that the following activities or matters should not be open to general public inspection.

1. Property appraisals made by the Government for use in acquisition or disposal of property, especially prior to consummation of the acquisition or disposal. (Disclosure would prejudice the Government's legitimate economic bargaining interests.)

2. Records related to evaluation of bidder responsibility, including financial and credit information, especially prior to award. (Disclosure would make virtually impossible the orderly and fair conduct of contract award procedures; also, information on credit, integrity, etc., should be entitled to privacy in the interest of the affected individuals.)

3. Government (interagency) consolidated, as well as intraagency, debarred and suspended bidders lists; also, ex parte documents which reflect adversely on individuals. (These lists are maintained as a mechanism for the conduct of a governmental proprietary function and general dissemination outside Government would serve no useful purpose and would be unfair and harmful to affected concerns because of the defamatory and "penal" implications which would inevitably be drawn by many persons as a result of publicizing such lists. The individuals actually on the list are so advised and given opportunity to contest the debarment.)

4. Contract records in general, especially prior to award, but including after award, especially where the individuals seeking the information are not properly or directly concerned. (Indiscriminate access would be generally disruptive of the contracting process and promote unfair competitive actions among concerns doing business with the Government or otherwise.)

5. Internal guidelines for Government use in dealing with contractors, such as architect-engineer fee curves. (Disclosure would prejudice the Government's legitimate efforts to negotiate effectively. The Government does not have equal access to contractor's private profit objectives in contract negotiation.)

6. Results of tests of contractor products by persons other than the manufacturer or vendor. (Access to detailed test results by competitors would be unfair and potentially harmful to the producers or vendors of products which may be excellent products though not meeting particular Government specification requirements.)

7. Information which the Government is contractually bound to withhold from dissemination. (Primarily technical data, manufacturing or process type information but not necessarily covered by category (4) of the bill.)

8. Budget, fiscal, and Government project information. (Proposed agency budget, until released by the President; proposed public buildings projects prior to submission to Congress, etc.)

9. Agency planning and other internal agency management documents, especially those which may give competitive advantage or would otherwise be prejudicial to the interests of persons similarly situated but who are without such information or which would adversely affect morale or effectiveness. (The proposed implied repeal of the present exception for any matter relating to "the internal management of an agency," would have particular Government disruption potential.)

10. Information which would prejudice the Government's bargaining position in business transactions, such as expected prices on stockpile sales, expected realization estimates on Government mortgage foreclosures, expected ultimate purchase or sale prices, etc.

11. Records and information representing preliminary and developmental processes in arriving at final decisions, including such matters as evaluations by subordinates looking toward recommendations for agency action (whether or not it falls within category (5) of the bill), including factual data which is not "law or policy."

12. Business, company, or other information furnished the Government in confidence, whether or not it falls technically within category (4) of the bill. (This principle is ingrained in both common law and statutory law, including prior acts of Congress such as 18 U.S.C. 1905; 18 U.S.C. 605; 15 U.S.C. 190; 13 U.S.C. 9; 5 U.S.C. 139b., etc.)

13. All categories of customary privileged matters within the common law context (doctor-patient, attorney-client, clergy-parishioner, etc.), whether or not it comes within categories (4) or (6) of the bill, and including internal or private matters of private parties not otherwise a matter of public information.

14. Records and information involved in current or pending claims and litigation and investigative records not related to "law enforcement." (This is a needed addition to "law enforcement" under category (7) of the bill.)

15. Records and information, the nondisclosure of which is directed by the President in the national interest. (Needed to preserve constitutional authority of the executive branch, as more fully discussed below.)

16. Records and information where the scope or nature of the request is of such character as does not reasonably permit compliance by the agency because of the unavailability of manpower, or the particular skills needed to segregate or compile the information. (This has nothing to do with "withholding" the information, but simply the capability, administratively, to cope with the request to obtain a massive amount of information or specialized information requiring unavailable skills.)

Except as the context of each item enumerated otherwise suggests, as for example privileged or proprietary information, or information withheld at the direction of the President, there would normally be no objection to furnishing information in the above categories to Congress, the Comptroller General, or any other authorized governmental source which would reasonably be expected to avoid indiscriminate publication or access.

Unlike the Administrative Procedure Act which calls for the disclosure of information to "persons directly and properly concerned," the proposed bill makes no distinction as to the status of persons seeking the information. The public interest in seeking a broad policy of liberal Government information disclosure should, it is believed, be balanced by an equal solicitude for avoiding the release of information in such way or in such circumstances as would promote the mischievous purposes of intermeddlers, idle curiosity seekers, smut peddlers, persons with irrelevant prejudicial motives, and others having no reasonably legitimate interest in the information. An illustration of this principle is contained in the above item suggesting the need to furnish information on the results of product tests to the product owner, but not to his competitors.

The bill, imposing, as it does, significant disclosure requirements on the executive branch, naturally raises questions involving application of the basic principle of the equal and coordinate status of the three branches of the Federal Government under which no one branch may encroach upon the constitutional prerogatives of the others. In this respect, category (1) of the bill, for example, appears to contravene this principle by imposing limitations on the executive branch, excepting only matters "to be kept secret in the interest of the national defense or foreign policy." (See, in this regard, Department of Justice comment on the April 20, 1964 subcommittee revision of S. 1662, 88th Cong., 2d sess., Administrative Procedure Act hearings before the Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, 88th Cong., 2d sess., on S. 1663, July 21, 22, 23, 1964, at p. 208, with particular reference to sec. 3 of that bill; also, the Department of Justice statement of Mar. 6, 1958, before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, on "Inquiry by the Legislative Branch Concerning the Decision Making Process and Documents of the Executive Branch.")

In this connection, the provisions of the bill providing jurisdiction for obtaining injunctions to require disclosure and authorizing the district court "to punish

the responsible officials" for contempt, raises serious problems of fundamental conflicts between the executive and judicial branches of Government. It is not unlikely that such a provision would result in Government employees finding themselves on the horns of a dilemma: Noncompliance with a court order, and a prison sentence for contempt, on the one hand—or, on the other hand, compliance with the court orders and made the subject of disciplinary proceedings or other prejudicial consequences for failure to carry out an order issued by an authorized official of the executive branch. Also, to be noted here, is the inconsistency in terminology in proposed section (b) as regards the requirement simply to "make all its records available promptly" but providing a judicial remedy addressed more broadly to "records and information."

Although the proposed section (c) of the bill deals with "information" and "records," category (5) of the bill speaks only of inter-agency or intra-agency "memorandums or letters." It would appear appropriate to add the words "or other matters," in order to make this category coextensive with the section subject matter.

In category (2) of the bill the reference to internal personnel "rules and practices" would appear to be narrower than the subject matter of the section which, as above indicated, deals with "information" and "records." Thus, it would appear desirable to add the word "matters," a term employed in a similar context in the introductory portion of section 3 of the Administrative Procedure Act.

Subsection (b) of the proposed 5 U.S.C. 22 provides for agency publication of rules stating the "time," place, and procedure to be followed in making its records available. If, as we would definitely recommend, it is the purpose of the reference to "time" to permit agencies to distinguish between availability of records before and after an event, then we recommend this be clarified. For example, if it is intended to permit an agency to withhold bid or negotiation information at least until after award, this is not entirely clear although we would be inclined so to construe it since such construction would contribute to the workability of the criteria.

It is worth noting that the subject matter of the bill is one which has heretofore been an integral part of the general structure of the Administrative Procedure Act, dealing with the broad subject of administrative procedure, authority, and limitations. It would appear desirable that the subject matter of this bill remain under section 3 of the Administrative Procedure Act since that section deals with the entire subject of "public information," and there is recognized interdependence and overlapping between subsection 3(c), proposed to be transferred to 5 U.S.C. 22, and subsections 3 (a) and (b), which would remain in the Administrative Procedure Act.

Based upon the foregoing considerations, the General Services Administration is opposed to enactment of H.R. 5012 in its present form. We recognize that perhaps some clarifying improvements in section 3 of the Administrative Procedure Act may be desirable although we believe it has been generally reasonably construed. If legislation similar to the proposed bill is to be enacted, we recommend consideration of the adoption of amendments which will adequately reflect the suggestions above outlined.

The financial effect of the enactment of this measure cannot be estimated by GSA. However, substantial cost attributable to administration of such a measure is inevitable.

The Bureau of the Budget has advised that, from the standpoint of the administration's program, there is no objection to the submission of this report to your committee.

Sincerely yours,

LAWSON B. KNOTT, Jr.,
Acting Administrator.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Washington, D.C., May 21, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This replies further to your request for a study and report by the National Aeronautics and Space Administration on S. 1336, a bill to amend the Administrative Procedure Act, and for other purposes.

The bill, if enacted into law, would represent more than an amendment to the Administrative Procedure Act (hereinafter abbreviated APA); it would amount to a complete reenactment of that statute. Certain sections of the proposed reenactment were found to be objectionable. The comments and criticisms of the National Aeronautics and Space Administration with respect to these sections are set forth as follows:

SECTION 2—DEFINITIONS

The distinction between "rulemaking" and "adjudication" now extant in the APA is preserved in form only under the proposed reenactment. There are major divergencies with respect to substantive applications of these terms. Thus, if an "agency statement" is of "general application" the statement qualifies as a "rule," but if it is only of "particular application" it does not. In contrast to "rulemaking," "adjudication" comprehends agency process for the formulation, amendment, or repeal of an *order*, and "order" in turn is defined in the reenactment as "the whole or any part of the final disposition * * * by *any agency in any proceeding* * * * to determine rights, obligations, and privileges of *named parties*." [Emphasis added.] Conceivably the concept of "adjudication" in the proposed legislation covers, or may be interpreted as covering, matters such as the award and negotiation of Government contracts, change orders to Government contracts, terminations of the same, invitations to bid, and an array of other agency executive functions which have traditionally been excluded from the notion of "adjudication."

Apart from engendering a wholesale disruption of administrative and court precedent, the substantive changes in these definitions from those in the Administrative Procedures Act would place intolerable burdens upon NASA if the proposed legislation were enacted into law. In the area of contract administration alone, a vast increase in paperwork would result and significant additions of personnel would have to be anticipated if this, and kindred agency executive functions, are now to fall within the purview of "adjudication." As an added criticism, it is conceptionally unsound to ignore, as the proposed legislation does, the basic differences between quasi-legislative and quasi-judicial functions by determining the application of procedural requirements according to whether the parties are named.

SECTION 3—PUBLIC INFORMATION

In contrast to the existing scope of subsection 3(b) of the Administrative Procedures Act, the companion provisions of the proposed reenactment place within the purview of public inspection and copying "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." The inclusion of "policy statements" in this statutory provision may result in certain problems. From the plain import of the provision it appears that all "statements of policy" not published in the Federal Register must be made available for public inspection and copying. There are no criteria in the proposed legislation, however, as to what constitutes an agency "statement of policy" and the term itself may be applied differently by, and among, the various agencies of government.

Unlike the existing provisions of the Administrative Procedures Act, this subsection also requires an agency to make available for public inspection and copying "staff manuals and instructions to staff that *affect any member of the public*, unless such materials are *promptly* published and copies offered for sale." [Emphasis added.] The standards for determining when a manual or instruction "affects" a member of the public are not contained in the proposed legislation, and it would appear rather difficult to determine in categorical instances when any member of the public is affected by provisions of staff manuals and agency instruction. For example, the officers and employees of the agency involved are also "members of the public" and certainly agency instructions and staff manuals will "affect" them in a broad range of circumstances. To the extent also that these materials must "promptly" be published and copies offered for sale other questions emerge which are not resolved by the provisions of this subsection. In that the sale of public documents requires ordinarily that they be published by the Government Printing Office, is the burden of "promptness" in publication to be shared by the Government Printing Office with the agency requesting publication?

The subsection provides additionally that identifying details of opinions, statements of policy, interpretations, staff manuals, or instructions may be deleted by the agency to prevent a clearly unwarranted invasion of personal privacy. However, in every case of deletion, a justification for the deletion must be fully explained in writing. The persons or entities to whom this justification must be explained are not identified in the proposed legislation. Is it the recipient of the published matter, or the Congress, or others, or may the justification appear as a frontispiece to the matter which is published or made available?

In addition to the administrative burdens described above, remaining provisions of subsection 3(b) would, if enacted into law, require every agency to "maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of [the proposed act] and which is required by this subsection to be made available or published." Moreover, no final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be "relied upon, used, or cited as precedent by any agency *against* any private party unless it has been indexed and either made available or published * * *." [Emphasis added.] The language may be interpreted as suggesting that such matter, though not indexed or conforming to other requirements, may be used *in favor of* a private party. Thus, conceivably in the case of "third party practice" before administrative boards or other adjudicatory bodies a ruling in favor of one party based upon an unindexed precedent may have no force or validity as against an intervenor or impleador. If this is the case, then it would appear that a requirement of form could dominate the question of administrative due process.

As in the case of changes to subsection 3(b) of the APA, the changes disclosed by the proposed legislation to subsection 3(c) of the APA emerge also as unsound departures from existing practice. Cast as a simple and clearly understood statement, subsection 3(c) of the APA provides that, apart from statutory prohibitions against disclosure, matters of official record "shall be made available to persons *properly and directly concerned* except information held confidential *for good cause found*." [Emphasis added.] Not only is this simple, and clearly understood, standard for withholding eliminated in the companion provisions of the reenactment, but it appears from a reading of the companion provisions that "any person" may have access to agency records irrespective of whether that person is properly and directly concerned with the contents of those records. Save for limited categorical exceptions to the right of access as enumerated in subsection 3(e) of the reenactment, it appears that this proposed legislation would exact a requirement for an agency to make its records promptly available to the public at large. The refusal to make such records available to "anyone" may, under the proposed reenactment, be reached by court injunction with contempt proceedings anticipated for principals of the agency who persist in refusing. In all events the burden is placed upon the agency to sustain, in a *de novo* proceeding before the court, its action with respect to the withholding of agency records.

The vice of subsection 3(c) of the proposed legislation is that it would impose undue burdens on the Government and its officials in carrying out the business of Government itself. The courts have long recognized the necessity for officials of the Government to exercise their duties unembarrassed by vexatious lawsuits in respect to actions done in the performance of their job—suits which would consume time and energies which would otherwise be devoted to Government service and the threat of which might prohibit the effective administration of Government. *Barr v. Matteo*, 360 U.S. 564, 571 (1959); *Gregoire v. Biddle*, 177 F. 2d 579, 581. Specially, the objections to this subsection are as follows:

1. There is no precise meaning ascribed to the term "records" as it appears in the subsection. It could mean any document or item containing information in the possession of the agency including such diverse objects as contracts, invoices, transcription belts, and tape recordings. Moreover, there later appears in the subsection the phrase "records and information." It is not clear whether the term "records," when it first appears, is intended to encompass "information" as well. And what does information mean opposed to "records"? If it means something different from records, then it would not be available under agency procedures which only encompass means of acquiring "records," leaving "information" to be acquired through court process.

2. There is no requirement levied in the subsection to compel the one requesting "records" to identify the desired item nor to make a showing that he has a legitimate need for them. Hypothetically, anyone, merely out of idle curiosity, could compel the agency to produce all of its "records" except for those classes of items withheld pursuant to subsection (e) of the proposed legislation. The expense and administrative burden stemming from this type of request or even one of lesser magnitude would seriously impair the operations of any agency, including NASA.

3. Shifting the burden to the agency of sustaining its withholding decision before a court creates even more problems. There are evidentiary questions, such as how much of a showing must the agency make before sustaining its actions? As a corollary question, will the court be permitted to go behind an administrative determination that records should be withheld because they deal with "exempt" categories of information, such as law and policy or investigative reports?

With respect to the recording requirements for voting set forth in subsection 3(d) of the reenactment, it would appear that these requirements have few, if any, discernible advantages. In point of fact, these requirements could conceivably encourage "voting for the record" rather than voting in accord with one's convictions.

As to subsection (e) of the reenactment there are serious doubts concerning its legality. By enumerating eight categorical classes of privileged information the subsection suggests nullification of the doctrine of "executive privilege." If this is the import of the subsection then its constitutionality is immediately drawn into issue since violence is done to the separation of powers enunciated in the Constitution. But even apart from encroaching upon "Executive privilege" the exemptions set forth in the subsection are defective for other substantive reasons. Excepted from the reach of the subsection, for example, is any matter "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." This would force Presidential attention to essentially petty problems of document classification. Unless the President were indeed to issue innumerable Executive orders, he would probably be required to formulate an extremely broad definition of what should be kept secret. Thus, the very purpose of this subsection would remain unfulfilled.

SECTIONS 4 AND 5—RULEMAKING AND ADJUDICATION

The expanded coverage of "Rulemaking" and "Adjudication" in sections 4 and 5, respectively, should be read together with the changes in definitions for these terms as set forth in section 2 of the reenactment. Five categorical exemptions from section 4 (Rulemaking) are contained in subsection 4(h) of the proposed legislation. Among other exemptions the provisions of section 4 would not apply to "rulemaking required by an Executive order to be kept secret in the interest of the national defense or foreign policy." As in the case of section 3 of the proposed legislation, the burdens placed upon the President become readily apparent, since he would be obliged to anticipate every difficulty which might arise. More importantly, the Executive order that would be needed if section 4 procedures were to be omitted might in itself destroy the very secrecy it was intended to protect. Consider, for example, the making of rules in "the interest of national defense" which govern and regulate access to exclusion areas at certain facilities of the National Aeronautics and Space Administration. Unless the President were to issue an Executive order which, of course, would be immediately available for publication, section 4 procedures would have to be followed.

Respecting "Adjudication" the proposed legislation would establish "pre-hearing conferences," "regular hearing procedures," and "modified hearing procedures" for various classes of adjudication, and would provide other procedural requirements to apply "in all other cases of adjudication." Presumably, "adjudication" as redefined would embrace all matters which are not rulemaking. With respect to the definition for, and coverage of, "adjudication" as set forth in sections 2 and 5, respectively, there appear to be no palpable limits to matters which would fall within the scope of the term. In its existing form, proposed section 5 is so broad in its sweep that a useful analysis is not possible.

SECTION 6—ANCILLARY MATTERS

Under existing provisions of the Administrative Procedure Act only persons compelled to appear before an agency or representative thereof are accorded the right to counsel. This section provides that any person appearing voluntarily or involuntarily before any agency or representative thereof in the course of an investigation or in any agency proceeding shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. The National Aeronautics and Space Administration endorses the aim of this section with respect to broadening the statutory right to counsel.

II

The passage of the proposed legislation would dislodge a long tradition of workable precedent throughout the Federal establishment relative to existing conceptualizations of "rulemaking" and "adjudication," and result in the expenditure of years for realineing new concepts of these terms to conform to changes and definitions of "rulemaking" and "adjudication" in these legislative proposals. This wholesale disruption of practice and precedent is itself unsound and represents an erroneous approach to administrative reform. Apart from these problems, the proposed legislation draws into issue constitutional questions relative to the separation of powers between the executive and legislative precincts of Government. Moreover, a number of provisions in the legislation really defy analysis. For the reasons indicated, the National Aeronautics and Space Administration strongly opposes the enactment of S. 1336.

The Bureau of the Budget has advised that, from the standpoint of the program of the President, there is no objection to the submission of this report to Congress.

Sincerely yours,

RICHARD L. CALLAGHAN,
Assistant Administrator for Legislative Affairs.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Washington, D.C., June 21, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your letter of April 1, 1965, in which you requested a report from the National Aeronautics and Space Administration on the bill S. 1522, to remove arbitrary limitations upon attorneys' fees for services rendered in proceedings before administrative agencies of the United States, and for other purposes.

The bill would repeal existing provisions of law and regulations which impose dollar or percentage limitations on attorneys' fees charged for representation before administrative agencies and any penalties connected with such limitations. Pursuant to rules and regulations prescribed for that purpose by the agency concerned, the bill would authorize such agencies to pay, or allow, attorneys' fees in the amount of the reasonable value of services rendered.

From time to time the Congress has, by statute, regulated and limited the amount of attorneys' fees payable for services rendered for the assertion of claims against the Government in court or before administrative bodies. Additionally, some agencies have issued regulations limiting attorneys' fees or imposing other conditions with respect to them. Statutory and regulatory provisions of this nature are more commonly imposed by regulatory, as distinguished from executive type, agencies.

The National Aeronautics and Space Administration has not adopted general regulations limiting attorneys' fees in matters before the agency; it has, however, by regulation (NASA Management Instruction 3-8-1A), adopted the 10-percent limitation on attorneys' fees set forth in the Federal Tort Claims Act (28 U.S.C. 2678) for claims settled under that act and for claims settled under section 203(b)(13) of the National Aeronautics and Space Act of 1958 (72 Stat. 426, 431; 42 U.S.C. 2473(b)(13)).

From the foregoing it appears that, if enacted into a law, the legislation would not substantially affect the National Aeronautics and Space Administration or its activities. Accordingly, this agency has no objection to its enactment.

This report has been submitted to the Bureau of the Budget which has advised that, from the viewpoint of the program of the President, there is no objection to the submission of this report to the Congress.

Sincerely yours,

RICHARD L. CALLAGHAN,
Assistant Administrator for Legislative Affairs.

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., May 11, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In reply to your request we wish to take this opportunity to express the views of the National Labor Relations Board on some of the proposed amendments to the Administrative Procedure Act, embodied in S. 1336 of the 89th Congress. As section 3 of S. 1336 is virtually identical with S. 1160 of this Congress, the comments herein directed specifically to section 3 of S. 1336 are also to be considered as applicable to S. 1160 and no separate report on S. 1160 will be submitted.

Since its enactment in 1946, the APA has worked well at the National Labor Relations Board, and our practices and procedures thereunder during the nearly 20 years of its existence have become well established in consonance with the interpretations of the Attorney General and the Federal courts. Any major revisions of the APA necessarily would have an immediate drastic impact on the capacity of the Board to fulfill its obligations under the National Labor Relations Act and on the understanding by labor and management of the precise procedural requirements for the protection of their rights. Despite many compensating benefits that may be derived from material revisions of the APA, substantial uncertainties in many well-established administrative areas would result, and extended court litigation would be required to clarify the atmosphere and to reestablish certainty.

Time is of the essence in labor-management controversies, and the elimination of industrial strife is a major objective of our organic statute. Perhaps of greatest concern to us, therefore, is the proposal to remove the present exemption of proceedings for "the certification of employee representatives" contained in section 5 of the APA; and in consequence to apply to such proceedings the full panoply of the manifold procedures contained in sections 5, 7, and 8 of S. 1336. So to judicialize these nonadversary election cases and to add unneeded steps to their processing would result in delay injurious to labor relations peace, not to mention the additional costs inherent in the new, formal procedures. Such action, moreover, would undo the historic policy of the Congress since 1935 to retain the essence of their informality and investigatory quality and to encourage their expeditious resolution by speedy balloting.

It is estimated that during fiscal year 1966, 2,415 hearings in representation cases will be conducted and 2,077 decisions issued. In view of the basic investigatory nature of these proceedings, it has been our practice to use employees of our field offices as hearing officers to develop a factual record but without authority to recommend. This practice is pursuant to congressional authorization in section 9(c) (1) of the National Labor Relations Act, which provides that "such hearing[s] may be conducted by an officer or employee of the regional office, who shall not make any recommendation with respect thereto." The elimination of the representation case exemption would now appear to require this agency to utilize only hearing examiners qualified under section 11 of the APA for these informal investigatory proceedings. This would create an additional financial burden of approximately \$2,375,000 and require the hiring of 86 more APA hearing examiners, or about double the present complement of Board hearing examiners, who are in grade GS-16, assuming that this number of qualified examiners would be available. If we are unable to hire additional qualified examiners, we would be forced to use our present staff of APA hearing examiners, required by law for unfair labor practice case hearings, thereby

imposing further delay upon the processing of unfair labor practice cases, as well as representation cases.

As we now show, elimination of the exemption would formalize, encumber, and slow down proceedings which are fundamentally investigatory in character and have been deliberately streamlined to enable the Board to determine with dispatch, by means of an election, questions concerning the representation of employees, and in that manner to avert or dispel labor unrest. At the very least, election case handling would be newly freighted and greatly retarded by:

1. Formal pleadings (sec. 5(a)(2)) and the necessity to deal with technical motions addressed to the pleadings;
2. Rather strict rules of evidence unsuitable to nonadversary representation proceedings (sec. 7(c));
3. Submission to the hearing examiner of proposed findings of fact and conclusions of law (sec. 8(b));
4. A formal opinion and decision of the hearing examiner prior to the holding of any election (sec. 8(b));
5. A further time-consuming procedure for the filing of exceptions to the hearing examiner's decision prior to the holding of any election (sec. 8(c)(1));
6. And, finally, an appeal to an appellate body, other than the agency itself, which would in simple cases result in de novo review upon the filing of artful exceptions and in difficult cases interpose de novo review as an intermediate step before the agency itself would review and dispose of the issues (sec. 8(c)(2) and (4); see also our comments on sec. 8(c)(2), *infra.*)

All of the foregoing would occur before directing an election. After an election has been held, objections may be filed to conduct which occurred prior to or during the election and which affected the election. Once again, in the objection phase, all of the procedures listed above would have to be followed, and still further delay would be involved.

Prior to the delegation of authority to regional directors authorized by Congress in 1959 under section 3(b) of the National Labor Relations Act (see *infra*), the median time for disposition of a representation petition from filing to direction of election was 113 days. During the first 6-month period of fiscal 1965, our regional directors under the delegation directed elections in representation cases in the drastically reduced median time of 44 days. During the same period, in unfair labor practice cases, the median time from the filing of a complaint to the issuance of a hearing examiner's decision was 136 days; and where exceptions were taken to the decision, there was an additional median time of 251 days before the Board made its determination. It is thus apparent that, applying unfair labor practice procedures to representation cases, as this bill proposes, would, even if allowances were made for the greater complexity of unfair labor practice cases, substantially lengthen the time necessary to process a representation case to the point of a direction of election. Obviously, this does not include the additional time that would be required to determine objections to the election under the provisions of this bill.

Such burdensome procedures and delays in election cases would undercut the purposes of the National Labor Relations Act and negate longstanding congressional policy. So far as we know, no valid reasons have been put forth to justify these radical changes, which would inordinately delay the processing of election cases.

The legislative histories of both the National Labor Relations Act and the Administrative Procedure Act are clear with respect to the need for expediting election cases. In its report on the bill which later went to conference and ultimately became the National Labor Relations Act of 1935, the House Committee on Labor had this to say about representation elections (H. Rept. No. 1147, pp. 22-23, 74th Cong., 1st sess.):

"Elections.—Section 9(c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged * * *.

"The committee adheres, with the present National Labor Relations Board, to the common belief that the device of an election in a democratic society has, among other virtues, that of allaying strife, not provoking it. Obviously the Board should not be required to wait until there is a strike or immediate threat of strike. Where there are contending factions of doubtful or unknown strength,

or the representation claims of the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections.

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) [sec. 10 deals with unfair labor practice proceedings] is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c)." [Insert ours.]

The specific exemption of election proceedings from section 5, and therefore from sections 7 and 8, of the APA, was granted in 1946 only after careful consideration by the Congress. It was inserted in section 5 because the Board's "determinations rest so largely upon an election or the availability of an election." (S. Rept. No. 7052, p. 6, 79 Cong., 1st sess.; H. Rept. No. 1980, p. 26, 79th Cong., 2d sess.; remarks of Congressman Walter, Congressional Record, vol. 92, No. 98, p. 5756.) Congress also paid heed to the arguments that "intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition" (see p. 7, Senate committee comparative print on revision of S. 7 June 1945 (79 Cong., 1st sess.)).

When the National Labor Relations Act was amended in 1947, provision was made in section 9(c) that preelection representation case hearings "may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto." Our continuing practice has been to have regional office personnel conduct preelection hearings and make no recommendations.

Recognizing the need for even greater expedition in the handling of these cases, the Congress in 1959 amended section 3(b) of our act, prescribing as follows:

"The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) of (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board and by interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director."

Pursuant to this enabling provision the Board by its rules has delegated to its regional directors its own powers with respect to election cases and has established standards which must be met for review of their decisions. In the normal preelection situation, therefore, a qualified employee of the regional office hears the representation case, making no recommendations after completing the record upon which the regional director bases his decision. That decision will be reviewed by the Board in Washington only if the appellant makes the showing demanded by the agency's rules. In the overwhelming majority of cases the regional director's decision becomes final and can be effectuated with little loss of time.

The delegation has worked exceedingly well. It has permitted the acceleration of election case handling and resulted in a reduction of the Board's backlog. Rapidity and not cumbersome delay is even more acutely needed today in the fiscal year 1946, during which the Administrative Procedure Act was passed and representation election cases received their exemption, 8,445 representation cases were filed with the Board; by the fiscal year 1964, the number of such filings had increased to 11,685; and, for the fiscal year 1965, these filings are running at a rate of 3.3 percent higher than in fiscal 1964.

Speaking in 1945 of the election proceeding, including the hearing, envisaged in section 9(c) of the National Labor Relations Act, the Supreme Court, in language that is equally apt today, remarked:

"Obviously great latitude concerning procedural details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be 'due,' the hearing 'appropriate.' These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an 'investigation,' essentially informal, not adversary. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706 (1945)."

The reason, the imperative, for informality and flexibility was explained by the Court as follows (325 U.S. at 708):

"* * * under Public Resolution 44, which preceded section 9(c), the right of judicial hearing was provided. The legislative reports cited above showed that this resulted in preventing a single certification after nearly a year of the resolution's operation and that on purpose of adopting the different provisions of the Wagner Act was to avoid these consequences. [Footnote omitted.] In doing so Congress accomplished its purpose not only by denying the right of judicial review at that stage but also by conferring broad discretion upon the Board as to the hearing which section 9(c) required before certification."

In fact, the need for expediting election cases reflected in the legislative history of the Wagner and Taft-Hartley Acts has recently been reemphasized by the Supreme Court in *Boire v. Greyhound*, 376 U.S. 473.

After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause the very bottleneck Congress and the Board have for years been attempting to prevent. Need we add that if the Board is bogged down in the handling of representation cases, unfair labor practice proceedings are also sure to suffer. Since the delegation of authority to regional directors, our backlog of both kinds of proceedings has decreased. To superimpose upon or substitute for the delegation the additional procedures required by the bill would reverse this trend and have serious consequences for labor, management, and the public. For all these reasons we earnestly request that the specific election case exemption be retained.

We turn now to an examination of the individual sections of the bill and offer the following comments on some ambiguous and, we believe, ill-advised sections.

Section 3—Public information

We do not challenge the general purposes of section 3 to assure access by the public, to the fullest extent practicable, to information concerning the operations of administrative and other governmental agencies. In our view, however, the proposal contains a number of serious deficiencies which, if enacted into law, would hamper this agency in carrying out its functions effectively and in the best interests of the public.

Subsection (b)—Agency opinions and orders

The proposed subsection (b) (C) adds a requirement not contained in previous bills that "staff manuals and instructions to staff that affect any member of the public" shall be available for public inspection and copying. Such a provision would require an agency to publish instructions to its staff dealing with matters of internal management—matters which may "affect" the public but only indirectly and remotely in that they do not involve substance and policy underlying rulemaking or adjudication where the public interest requires publication. Most modern businesses have similar internal manuals and instructions for their personnel, and no one would seriously suggest that they should be published. We recommend that this provision be deleted.

Subsection (c)—Agency records

The proposed subsection (c) would require agencies to make their records "available to any person." The phrase "any person" is unduly embracing and could lead to a disruption of the Government's business by opening the door to unjustified requests for information by curiosity seekers and irresponsible persons. (See testimony of Prof. Kenneth C. Davis, hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 88th Cong., 2d sess. on S. 1663, July 23, 1964, pp. 247-248.) Consideration should be given to some words of limitation, such as "persons properly and directly concerned" (as presently contained in sec. 3 of the Administrative Procedure Act, 5 U.S.C. 1002), or "persons with a legitimate interest."

The district court procedure set out in subsection (c) to restrain the withholding of agency records provides for a de novo determination by the court. However, where the alleged withholding has taken place in an administrative proceeding it would appear that the normal procedure for judicial review of final agency orders should be followed and would provide an adequate remedy. In the case of this agency, section 10(f) of the National Labor Relations Act provides that any party aggrieved by a final order of the Board may obtain review of such order in an appropriate U.S. Court of Appeals.

Subsection (c) also provides that in suits to compel disclosure of records "the burden shall be upon the agency to sustain its action." This is contrary to the ordinary civil discovery procedure: rule 34 of the Federal Rules of Civil Procedure provides that a court may order production of books and papers upon motion of "any party showing good cause therefor." There would appear to be no good reason to reverse the procedure when an agency of the Government is the holder of the records sought by a litigant.

Subsection (d)—Agency proceedings

Subsection (d) requires a record of the "final votes of each member in every agency proceeding." If "final votes" is interpreted to mean votes on final decisions and not on interlocutory matters and the like we would have no objection. However, it would be preferable if the words "not interlocutory in nature" were added after "every agency proceeding."

Subsection (e)—Exemptions

Subsection (e) (2) excepts from the provisions of subsection (c) matters that are "related solely to the internal personnel rules and practices of an agency." The language of this exception appears to be unduly restrictive. We see no good reason for departing from the exception now provided in section 3 of the Administrative Procedure Act—i.e., "any matter relating solely to the internal management of an agency," and this language should be substituted.

Subsection (e) (3) excepts matters that are "specifically exempted from disclosure by statute." The use of the narrow term "statute" fails to take into account the law in this area created by sound judicial decisions. The substitution of "law" for "statute" would preserve the carefully considered principles established in such landmark cases as *U.S. v. Morgan*, 313 U.S. 409, 422; *Hickman v. Taylor*, 329 U.S. 657; *Kaiser Aluminum Co. v. U.S.*, 157 F. Supp. 939 (Ct. Cl.); and *Roviaro v. U.S.*, 353 U.S. 53, 59-62.

Subsection (e) (4) excepts matters that are "trade secrets and commercial or financial information obtained from the public and privileged or confidential." The phrase "commercial or financial" unnecessarily limits this exception. The equivalent exception in S. 1666, 88th Cong., 2d sess., as passed by the Senate (110 Cong. Record 17080), contained preferable language, i.e., "trade secrets and other information obtained from the public and customarily privileged or confidential."

Subsection (e) (5) excepts "interagency or intra-agency memorandums or letters dealing *solely* with matters of law or policy." [Emphasis added.] Since there is infrequent occasion to deal with abstract legal or policy questions, most agency internal communications relate to legal or policy issues based upon a specific set of facts or to mixed questions of law, policy, and fact. In view of the limited nature of the exception provided by (5), an agency would thus be required to make available virtually all of its internal documents, since most of them would deal to some extent with facts. This would include internal staff memorandums containing advice and recommendations relative to pending cases, working papers, tentative draft decisions, etc. All of these documents tend to reveal the mental processes of decision makers and their staffs in arriving at determinations in specific cases and are entitled to be privileged against disclosure. See *Morgan v. U.S.*, *supra*, and *Kaiser Aluminum Co. v. U.S.*, *supra*. In sum, if internal reports are to be worth anything, they must be based on facts rather than abstractions, and they must be free expressions of those who prepare them and not something "cleared for publication." As the Supreme Court said in *Hickman v. Taylor*, *supra*, "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." This is to say nothing of the mental processes of the decision-makers themselves. It is suggested, therefore, that this exception be broadened to read as follows: "interagency or intra-agency memorandums, letters, or other papers."

Subsection (e) (6) excepts "personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While there is some ambiguity here, we construe this as providing an unqualified exception for personnel and medical files, the limiting phrase "the disclosure of which, etc.," modifying only "similar matters." There is no reason why only personnel and medical files should be generally excepted. In any event, the requirement of a "*clearly unwarranted* invasion of personal privacy" would appear to be unduly restrictive and to offer insufficient protection to a right highly valued in our democratic society. Consideration should be given to the deletion of the underlined phrase.

Subsection (e) (7) excepts from availability "investigatory files compiled for law enforcement purposes except to the extent they are available by law to a private party." This provision would appear to permit a Board respondent to obtain the affidavits taken from employees and other persons in the course of the preliminary investigation of an unfair labor practice case, even though those persons may never be called as witnesses in the proceeding. For, "to the extent * * * available by law to a private party," could well encompass the discovery procedures of the Federal Rules of Civil Procedure, and such affidavits would be obtainable under those procedures, which are incorporated in section 6(h) of the bill (depositions and discovery). To permit the disclosure of pre-trial statements of persons who may never be called as witnesses would unduly interfere with the administration of the National Labor Relations Act, for these persons, who are generally employees, would be reluctant to give statements if they knew that their statements could be revealed to a hostile employer or union in a position to take retaliatory action affecting their economic welfare, even though they may not be called to testify. Over the years about 90 percent of unfair labor practice cases filed with the Board are settled, withdrawn, or administratively dismissed and never go to hearing. In recognition of the intimidatory effect on employees, the courts have held that it is an interference with employee rights under the act for an employer to ask employees for copies of statements which they have given to Board agents, and about the matters contained in those statements. *Texas Industries v. N.L.R.B.*, 336 F. 2d 128 (C.A. 6); *Suprenant Mfg. Co. v. N.L.R.B.*, 341 F. 2d 756 (C.A. 6); *N.L.R.B. v. Winn Dixie*, 341 F. 2d 750 (C.A. 6). Under the more limited *Jencks* rule, which is applicable to Board proceedings, pre-trial statements are made available, but only in the cases of those persons who have been called as witnesses in the board proceeding. Accordingly, it is suggested that the exclusion in (7) be amended as follows: "(7) investigatory files, including statements of agency witnesses until such witnesses have been called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination."

Section 4—Rulemaking

Subsection (b)—Notice

Under this subsection the Administrative Procedure Act would be amended to delete the exemption from notice requirements of proposed changes in Board procedures and practices, so that a notice of rulemaking change in those areas would now have to be published in the Federal Register. The Board customarily has not given notice in the Federal Register of proposed changes in its procedures and practices, although interested persons have generally been given the opportunity to express their views or to submit their comments before extensive or important amendments are promulgated. It seems unnecessary to require a formal rulemaking procedure when only such changes in procedure are contemplated, especially since rules of agency organization continue to be exempt from the advance notice requirements.

Section 5—Adjudication

This section wipes out the exemption of representation election cases and consequently subjects them to the operative provisions of sections 5, 7, and 8. As we have hereinabove indicated, elimination of the exemption would formalize, encumber and slow down proceedings which are fundamentally investigatory in character and have been deliberately streamlined to enable the Board to determine with dispatch, by means of an election, questions concerning the representation of employees, and in that manner to avert or dispel labor unrest.

*Section 6—Ancillary matters**Subsection (a)—Appearance*

This subsection grants everyone appearing before an agency the right to counsel. Additionally, every party is given the right to appear by or with counsel at any agency proceeding or investigation. Although no one can quarrel with the basic purposes of this subsection, by the inclusion of the word "investigation" the Board would be unable to investigate the merits of a charge prior to the issuance of a complaint without giving each potential respondent the right to participate at all stages of the investigation. For example, a respondent employer or union would be able to insist upon being present when a potentially adverse witness—an employee or union member—is being interviewed to determine preliminarily whether any formal proceedings should be instituted. Such a provision would severely hamper the NLRB in the performance of its investigatory duties imposed by Congress. We accordingly recommend that the word "investigation" be eliminated.

Subsection (d)—Investigations

This subsection requires the Board to give a copy of the data or evidence submitted by a person if he asks for it and eliminates the present exception for nonpublic investigatory proceedings. Although we normally give potential witnesses copies of their statements if they desire them, our experience has shown that there are situations when an individual gives a statement to a Board agent which he does not wish his employer or his union to have. The elimination of the present exemption would subject an individual, at a time when it is not even clear that he will be called as a witness, to unwarranted employer or union pressure to secure a copy of his statement. (See discussion of the problem of disclosure of pretrial statements under sec. 3(e)(7), supra.) Accordingly, it is suggested that the final clause of section 6(b) of the present Administrative Procedure Act excepting nonpublic investigatory proceedings, be retained.

Subsection (g)—Computation of time

This subsection sets forth the standards for the computation of time. Section 102.114 of the Board's rules and regulations contains the following statement: "When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation." Since the Board only allows 5 days for a party to file objections to the conduct of the election or conduct affecting an election, if Saturdays [holidays if the Board office is closed] and Sundays are not excluded, the proposed subsection might be construed, under certain circumstances, to allow the parties only 3 working days within which to file objections. We would therefore suggest that a provision like that contained in our rules and regulations be expressly included in this subsection to obviate this possible interpretation.

Subsection (h)—Depositions and discovery

This provision makes depositions and discovery available to the same extent that it would be in a U.S. district court, unless an agency promulgates a rule finding such conformity to be impracticable. To the extent that discovery would be mandatory rather than discretionary with the Board, we find this provision objectionable. While admittedly, the conformity proviso makes this section more palatable, it would appear to be desirable to let each agency promulgate its own deposition and discovery rules to meet its own particular problems. This is especially true in most Board proceedings, where discovery is not necessary and would only delay the administrative process. (See discussion under sec. 3(e)(7), supra.) It is noted that the last Administrative Conference's recommendation No. 30 conforms to our views.

*Section 8—Decisions**Subsection (c)—Appeal and review*

"Except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress," subsection (c)(2) requires the establishment of appeal boards. Since the number of unfair labor practice proceedings in which exceptions are filed is substantial and Congress has not provided for agency appellate procedures in unfair labor practice proceedings (see sec. 10(c) of the National Labor Relations Act), this would require the establishment of appeal boards for unfair labor practice

cases. (See further discussion, *infra*.) Insofar as representation proceedings are concerned, section 3(b) of the National Labor Relations Act authorizes the Board to delegate to the regional directors its powers with respect to representation proceedings subject to discretionary review by the Board upon request for review by any interested party. If this be construed as an agency appellate procedure "otherwise provided by Congress," the regional director in reviewing the opinion and decision of the hearing examiner required under section 8(b) (see *supra*), would be considered to be an appellate body, otherwise the Board would be required to establish an agency appeal board between the hearing examiner or the regional director and itself in representation proceedings. As indicated above, proceeding under any of these interpretations would unduly burden and delay the handling of election cases and nullify the congressional intention to expedite the processing of such cases reflected in the 1959 Amendments to the National Labor Relations Act permitting the Board to delegate its authority in representation cases to its regional directors.

Nor do we believe that the appeal procedures proposed would be an advantage to parties appearing before the Board in unfair labor practice cases. On the contrary, they would interpose another decisional level, thereby causing additional delay in the resolution of labor disputes, at least, in difficult cases.

We also note that the General Counsel of the Board is a litigant before the Board in unfair labor practice cases. Yet the proposed subsection (c) (2) would limit direct appeal to the agency to a "private party" and would not, therefore, allow the General Counsel to seek direct agency review. The General Counsel functions in the public interest. He should have the same right of appeal granted to any other party.

The last Administrative Conference of the United States considered in depth the entire question of delegation of decisionmaking authority and recommended in its recommendation No. 9 that (a) agencies be authorized to accord administrative finality to hearing examiners' initial decisions without agency review, unless the party seeking review makes a certain specified showing, and (b) agency decisions to accord or not to accord administrative finality to the hearing examiners' initial decisions should not be subject to judicial review. Recommendation No. 9 accords more nearly with the Board's views than the current proposal establishing an intermediate step of appellate boards in the processing of unfair labor practice cases.

Section 9—Sanctions and powers

In subsection (a), the last sentence states "no sanction shall be imposed, *investigation commenced*, or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." [Emphasis added.] The National Labor Relations Act applies only to employers "engaged in commerce." The Board's processes are not self-activating but can only be invoked by the filing of a petition or a charge; a preliminary step in every investigation is the informal development of facts to establish to the Board's satisfaction that an employer's activities sufficiently affect commerce to warrant the assertion of jurisdiction by the Board. The quoted sentence implies that statutory jurisdiction must be formally established prior to the commencement of an investigation and therefore the very investigation concerning "commerce facts" might be subject to prior judicial challenge. This would be contrary to the settled principle that the agency has broad power to investigate matters within the general orbit of its authority and that specific challenges to its jurisdiction can only be raised when, and if, the investigation has culminated in a final order which is reviewable in the courts under the statutory procedure. See *Myers v. Bethlehem*, 303 U.S. 41; *Oklahoma Press Publishing Co., v. Walling*, 327 U.S. 186. (See also discussion under sec. 10, *infra*.) Accordingly, we recommend that the words "*investigation commenced*" be deleted.

Subsection (b)—Publicity

This subsection is objectionable because the word "publicity" is overly broad and might be interpreted to include merely the release of information concerning the filing of charges, the issuance of complaints or decisions, or any other agency action relating to an investigation or agency proceeding. Since there are no standards set forth as to what is meant by "to discredit or disparage," any release might be found to violate this subsection. If so, the subsection appears to be in direct conflict with the purposes of section 3 and would mean that an agency could never safely disseminate information to which the public may be entitled.

Section 10—Judicial review

The opening clause of section 10 of the Administrative Procedure Act excepts therefrom "agency action [which] is, by law, committed to agency discretion." Under S. 1336 this clause has been stricken and would be replaced by "judicial review of agency discretion is precluded by law." Under section 3(d) of the National Labor Relations Act, the General Counsel has been given "final authority, on behalf of the Board," to investigate and prosecute unfair labor practice cases. This language vests the General Counsel with discretionary authority to refuse to prosecute, and the exercise of this discretion has been held to be nonreviewable. To change the language may unnecessarily cause confusion where none now exists. Accordingly, we prefer that the present language of the Administrative Procedure Act be retained.

Subsection (a)—Right of review

This subsection states "any person adversely affected in fact by any reviewable agency action * * *" may obtain judicial review. The words "in fact" replace "or aggrieved" presently contained in the Administrative Procedure Act." Since the concept of a "person aggrieved" has a well-defined meaning in administrative law and under the National Labor Relations Act, the substitution of a new concept would lead to confusion and to unwarranted litigation. We recommend, therefore, that the wording of the present Administrative Procedure Act be retained.

Subsection (b)—Jurisdiction, venue, and form of action

Subsection (b) (2) would confer upon U.S. district courts jurisdiction to protect "the substantial rights of any person in any agency proceeding." This language could be construed to permit wide inroads to be made upon the doctrine of *Myers v. Bethlehem, supra*, which requires the exhaustion of administrative remedies. And it could also be interpreted to allow unwarranted interference with and direct review of election case proceedings in situations unlike *Leedom v. Kync*, 358 U.S. 184, where agency action was considered on its face clearly to contravene an unambiguous statutory mandate and where no adequate means other than judicial action existed for redressing that wrong. In *Boire v. The Greyhound Corporation, supra*, the Supreme Court, in ruling that a U.S. district court had no jurisdiction to enjoin the Board action in an election case, indicated that *Leedom v. Kync*, should be confined very closely to its facts and should be considered a very narrow exception. As the language in question is much too broad, it should be deleted.

In summary, we believe that, since its enactment in 1946, the Administrative Procedure Act has worked well in tandem with the National Labor Relations Act, enabling the Board to carry out substantive labor policies formulated by the Congress. We could not and do not have any reason to protest procedural changes which would assist in the effectuation of those policies. But we do object to changes, such as the proposals we have criticized, which would or could have demonstrably harmful effects. Furthermore, we think changes in a statute should not be made solely because it has been on the books for 19 years. Time alone does not raise a presumption that there is need for something new. And change for the sake of change, especially when uncertainty, confusion, and litigation may be engendered, is plainly unwarranted. We are certain you and your committee will agree with these general observations. There is, we submit, a heavy burden which rests on those who ask the Congress for large-scale overhauling of the Administrative Procedure Act, a burden which requires them to justify their positions, fully and in each and every respect.

Finally, we note that a permanent Administrative Conference of the United States was established by legislative enactment last year and soon will be activated for the purpose of studying the entire administrative process and making recommendations for its improvement. It would be much more desirable to utilize the conference machinery to recommend changes, where the need for change has been demonstrated, rather than proceeding at this time to attempt to make such sweeping, radical, and comprehensive revisions in the administrative process as are proposed in S. 1336.

We would appreciate having this report included in the record of the hearings on this bill. Further, our comments on section 3 should be considered as a report on S. 1160 and included in the record of any hearings on that bill.

The Bureau of the Budget has no objection to the submission of this report to your committee.

Sincerely yours,

WILLIAM FELDESMAN, *Solicitor.*

NATIONAL MEDIATION BOARD,
Washington, D.C., April 9, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: You have requested the views of the National Mediation Board on S. 1336, 89th Congress, which is a bill to amend the Administrative Procedure Act.

Section 3(c) of the proposed bill provides that every agency shall * * * make all its records promptly available to any person.

The administration of the Railway Labor Act by this Board requires the mediation of labor disputes between labor organizations and representatives of management in the railroad and airline industries. In order to accomplish the purposes of the Railway Labor Act the members, officers, and employees of the Board must maintain a reputation of impartiality and integrity. Needless disclosure of information, given in confidence to members, officers, and employees during mediation proceedings, would inhibit a full and frank exchange of ideas which could be utilized in the resolution of labor disputes.

An additional responsibility of the Board is to investigate representation disputes and certify the duly authorized representative of the employees. As evidence of a dispute to justify a union's claim to represent employees and therefore entitled to set the Board's machinery in motion leading up to certifications, individual employee statement of authorization to represent workers involved in the dispute are required to be filed with the Board. These authorizations become a vital part of the evidence, and of course, an integral part of the file.

Employee authorizations are considered confidential solely for the protection of the employees. To open such a record to public inspection could subject the employees to reprisals from their employers or competing unions. Further, employees, knowing their union authorizations would no longer be confidential, may be afraid to exercise their right to organize and bargain collectively through the peaceful means provided by law, and look to other less tranquil ways of settling such affairs.

Unrestricted access to all records pertaining to the above-mentioned activities of this Board could have an adverse effect upon the administration of the Railway Labor Act.

Records pertaining to other administrative activities of the Board are available for public inspection in that they do not pose a problem such as indicated above.

We have been advised by the Bureau of the Budget that, from the standpoint of the administration's program, there is no objection to the submission of this report to the committee.

Very truly yours,

HOWARD G. GAMSER, *Chairman.*

U.S. OF AMERICA
RAILROAD RETIREMENT BOARD,
Chicago, Ill., April 26, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: The Bureau of the Budget has informed the Railroad Retirement Board that it has no objection to the presentation of the Board's report on S. 1336, dated April 9, 1965, from the standpoint of the administration's program.

Sincerely yours,

HOWARD W. HABERMEYER, *Chairman.*

UNITED STATES OF AMERICA RAILROAD RETIREMENT BOARD,
Chicago, Ill., April 9, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: This is in reply to your letter of March 24, 1965, requesting a report on S. 1336.

The Railroad Retirement Board is now excluded from the operation of the Administrative Procedure Act except as to section 3 thereof. This section

relates, of course, to public information. Section 2(a) of S. 1336 would extend this exception to cause the Board to be subject to section 4, which relates to rulemaking. We express no objection to the proposal to subject the Board to this section.

The bill would include "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," in the exceptions from the requirement of section 3(c) of the act that records of agencies be made available to the public. Our comment with respect to this provision is to express, for the record, our understanding that the term "medical files" covers all records of the Board relating to the physical or mental condition of applicants or prospective applicants for benefits under both the Railroad Retirement and Railroad Unemployment Insuring Acts.

The Board has had no experience with the application of the Administrative Procedure Act except with section 3 of the act, to which alone it has been subject. In view of this fact and the fact that the Board would, under the bill, be subject only to sections 3 and 4, we have no other comments to make.

As you requested that the report be submitted within 20 days from March 24, 1965, we have not had time to obtain clearance from the Bureau of the Budget, and consequently no determination has been made as to the relationship of this report to the program of the President. The Bureau of the Budget is being furnished copies of the report and you will be informed of the views of that Bureau as soon as they are received.

Sincerely yours,

HOWARD W. HABERMAYER, *Chairman.*

COMMITTEE ON LABOR AND PUBLIC WELFARE,
Washington, D.C., May 1, 1965.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: On April 12, Mr. Aubrey Wagner, Chairman of the Board of Directors of the Tennessee Valley Authority, wrote you expressing the views of TVA regarding S. 1336, a bill to amend the Administrative Procedure Act.

The Tennessee Valley Authority has had discussions with me regarding S. 1336 and its views expressed in the letter of April 12. Supplementary thereto, I am enclosing a memorandum summarizing TVA's position regarding S. 1160. Apparently, the provisions of S. 1160 are incorporated in section 3 of S. 1336. The memorandum recommends certain changes regarding the legislation and I would appreciate your bringing it to the committee's attention at such time as the legislation is being considered.

Thanking you and with kindest regards, I am,

Very sincerely,

LISTER HILL.

COMMITTEE ON THE JUDICIARY

S. 1160 (89 Cong.) (Long, Missouri)

To amend section 3 of the Administrative Procedure Act, chapter 324 of the act of June 11, 1946 (60 Stat. 239), to clarify and protect the right of the public to information, and for other purposes

Section 3(c) of S. 1160 requires, with certain enumerated exceptions in section (e) that every agency make its records available to any person requesting them. TVA does not believe that this strikes a proper balance between the interest of the public in obtaining information and the interest of the Federal Government in the efficient operation of its various agencies. It is true that section 3(e) of the bill contains a broad list of exemptions, although some of these exemptions appear to be unreal. For example, exemption number (5) on page 5 exempts interagency or intraagency memorandums or letters dealing solely with matters of law or policy. Most legal or policy memorandums must of necessity deal to some extent with facts. Thus inclusion of "solely" largely nullifies any practical effect of the exemption. "Solely" as it appears in line 12 on page 5 should be deleted.

None of the present exemptions covers reports of investigation of accidents or other materials pertinent to litigation which if disclosed might adversely

and unfairly affect the Government's position in lawsuits. Where litigation is concerned there appears to be no sound reason for treating a Government agency differently from a private party in making pertinent information available. The availability of such materials is already covered and should continue to be covered by the rules of discovery. TVA suggests, therefore, that the number "(8)" in line 17 on page 5 be changed to "(9)" and a new exception be inserted numbered (8) and reading as follows: "materials pertinent to litigation except to the extent they would be available under established rules of discovery in the Federal courts."

Subsection (c) is entitled "Agency Records" and the requirement is that agencies make their records available to the public except as otherwise exempted. However, the remedy provided in the subsection for persons to whom disclosures have not made refers in lines 12 and 13 on page 4 to "records or information improperly withheld." Inclusion of the words "or information" in line 13 on page 4 is inconsistent with the rest of the subsection and creates ambiguity. TVA believes those words should be deleted in the interest of clarity.

To summarize: The following three changes in S. 1160 as introduced are suggested:

- (1) Strike the word "solely" in line 12 on page 5.
- (2) Change "(8)" to "(9)" in line 17 on page 5 and insert a new exception numbered "(8)" to read as follows: "materials pertinent to litigation except to the extent they would be available under established rules of discovery in the Federal courts."
- (3) Strike "or information" in line 13 on page 4.

TENNESSEE VALLEY AUTHORITY,
Knoxville, Tenn., April 12, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR EASTLAND: This is in response to your letter of March 24, 1965, requesting a report on S. 1336, a bill "to amend the Administrative Procedure Act."

Because of the similarity of this bill to S. 1663 in the 88th Congress, our present comments are similar in many respects to those made in our letter of June 18, 1964, to the Administrative Practice and Procedure Subcommittee in reference to the earlier bill. While we think the current bill is in some respects an improvement over the previous one, we still believe enactment of S. 1336 in its present form would seriously impair the efficiency of this agency.

The Administrative Procedure Act is concerned basically with the quasi-judicial and quasi-legislative functions of Government agencies, whereas TVA is an operating agency concerned primarily with the development of natural resources and the sale of certain types of Government property. It exercises only very limited quasi-judicial or quasi-legislative functions. As to these, the Administrative Procedure Act has imposed no serious problem, and we do not believe the changes in the act proposed in S. 1336 would change the situation materially. We are concerned, however, that provisions in the bill would, if broadly construed, impose a straitjacket on our program operations.

Our first concern is with the question of rulemaking. One of the major functions of TVA is the disposition of electric energy. TVA sells power at wholesale to 156 municipal and cooperative distributors, as well as to certain Federal agencies and large private power users. The impropriety of subjecting this type of program to rigid rulemaking requirements is presently recognized in the Administrative Procedure Act. Section 4 expressly excepts from the rulemaking requirements any matter involving "public property, loans, grants, benefits, or contracts." Since the electric power which TVA sells is public property, this provision exempts such sales from the rulemaking process. S. 1336 would eliminate this exception.

One of the objectives of the TVA Act was to create a corporation "possessed of the flexibility and initiative of a private enterprise" (message of the President to Congress, Apr. 10, 1933), and a large measure of TVA's success during the past 32 years have been due to its ability to maintain flexibility in its operations. Application of the rulemaking requirements to programs such as the TVA power program would take away this flexibility. The program is carried out through

contracts negotiated with individual distributors, and on major questions of policy, with representatives of all distributors. The contracts reflect the basic policies of the TVA Act as implemented by the Board, but these policies are not rigid and inflexible. The TVA Act entrusts a wide discretion to the TVA Board, and policies are refined from time to time as necessary to meet specific problems which arise. Contracts and revisions of contracts are negotiated as the occasion requires. It has been TVA's experience that it is not possible to foresee every eventuality that may occur or to draw statements of policy that cover all the exceptions and ramifications that will be encountered in the future. Formal statements of policy worked out in formal procedures may be appropriate for a regulatory agency in order to furnish guideposts to the individual who is regulated, but for a program agency such as TVA they simply produce a rigidity which makes it difficult or impossible to handle specific problems as they arise. Moreover, procedures for the formulation of policies under the rulemaking requirements of S. 1336 would place TVA and its distributors in an adversary position where the tendency would be for each distributor or group of distributors to try to gain an advantage in the formulation of the policy rather than working with TVA and other distributors in a mutual effort to find the best possible solution to each problem as it arises.

It may be suggested that the proposed revision of the Procedure Act would not require TVA to issue rules to govern its operations. If this is the intent of the bill, it should say so specifically. Section 4(g), as amended by S. 1336, would permit any interested person to petition for the issuance of a rule, and it is by no means clear that denial of such a petition would not be subject to review in the courts. Section 2(g) would define agency action as including "sanction, relief, or the equivalent or denial thereof, or failure to act." Section 2(f) would define sanction as including withholding of relief, and relief as including the "taking of any other action upon the application or petition of, and beneficial to, any person." Section 10(a) would confer the right of review upon any person "adversely affected in fact by any reviewable agency action"; and agency action is made reviewable except so far as statutes preclude judicial review or judicial review of agency discretion is precluded by law. Whether a court would hold that the denial of a petition for the issuance of a rule is agency discretion precluded by law from judicial review, we are unable to predict. Consequently, unless the exemption of public property from the rulemaking requirements of section 4 is restored, we believe S. 1336 should be revised to provide specifically that the determination of an agency as to the granting of a petition for the issuance, amendment, or repeal of a rule is agency discretion precluded from review.

We also think section 3 of S. 1336 goes too far. It does not, we feel, strike a proper balance between the interest of the public in obtaining information and the interest of the Federal Government in the efficient operation of its various agencies. While section 3(e), as amended by the bill, contains a fairly broad list of exemptions, some of these exemptions seem unreal or inadequate. Item (5), for example, relates to intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy. Since legal or policy memorandums almost invariably deal to some extent with the facts, this provision would provide no real protection and could lead to serious disruption and harassment. Also, while item (7) would exempt investigatory files compiled for law-enforcement purposes, investigatory reports and other materials relating to pending or potential civil litigation would have no protection. We see no reason why Government agencies should be placed at a disadvantage in such litigation by being required to furnish files of a kind which, under the ordinary rules of discovery, private parties are not required to furnish. Finally, the references to "information" in section 3(c), page 7, lines 11-13, where the text otherwise deals with the availability of "agency records" results in ambiguity.

We also feel that the basic judicial review provisions of the Administrative Procedure Act should be left unchanged. The proposed language would provide for judicial review of all agency actions except so far as (1) precluded by statute, or (2) judicial review of agency discretion is precluded by law. We do not know what the legal effect of clause (2) would be, and it would almost certainly take years of litigation to find out. While the present language does not solve all questions of reviewability, litigants have the benefit of 20 years' experience and numerous court decisions interpreting it. In any event, if clause (2) is intended to assure the right of review where there has been an abuse of agency discretion, as proponents of the legislation have stated, it would seem

preferable to state the provision in those specific terms rather than in language that is wide open to varying interpretations.

It is also proposed that section 10(a) dealing with standing to sue be revised but, again, no one would know until after extensive litigation what the effect of the revision would be. Here, too, we have a situation in which the existing provision does not supply all the answers but interpretative decisions have tended to clarify the law. Proponents of the change have stated that the purpose is to provide a new test for standing to sue which is clearer and which avoids some of the confusion caused by the existing APA language. In our judgment the proposed language is no clearer and would serve only to invite a new round of standing to sue questions and decisions.

In summary, it seems to us that the proposed changes in the scope of judicial review in section 10 are unnecessary and can only lead to greater uncertainty and extensive litigation, and that the proposed changes in sections 3 and 4 which we have discussed above are not only unnecessary but, in total, could destroy the ability of an agency such as TVA to function effectively. Whatever revisions may be necessary in the Administrative Procedure Act to make it more effective as applied to quasi-legislative and quasi-judicial functions, we believe it is essential to governmental efficiency that the bill be revised so as not to put program operations in an administrative straitjacket.

Because of the limitation on the time for submittal of our report, we are transmitting this letter to you without having first obtained the Bureau of the Budget's advice as to the relationship of the views we have expressed to the President's program.

Sincerely yours,

AUBREY J. WAGNER, *Chairman.*

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS' AFFAIRS,
Washington, D.C., July 1, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 24, 1965, requesting a report on S. 1336, 89th Congress, a bill to amend the Administrative Procedure Act, and for other purposes.

S. 1336 would be a complete restatement of the Administrative Procedure Act and would make numerous changes in existing law. Since this bill has Government-wide application, we assume that most Government agencies will be commenting to your committee on various aspects thereof. We will, therefore, limit our comments to those sections of the bill which would have a significant impact on Veterans' Administration activities, specifically sections 3, 4, 5, and 6 of the bill. A somewhat detailed analysis of these selected sections is enclosed with comments as to their effect upon our activities.

Subsection (c) of section 3 of the bill, public records, is a matter of particular interest. While the exemptions contained in section 3(e) of the bill remove many areas of our major concern, nevertheless, we believe that, if enacted into law in its present form, these provisions would have a resultant adverse impact on this agency. Purely as a matter of good business management and efficiency, it would be undesirable to create a situation under which agency officials would be reluctant to reduce anything to writing unless it was so innocuous that it could be made available to any person, including the press, private counsel, speculators, Government contractors, or even the idly curious, at any time, present or future. It would seriously impede the effectiveness of administrative investigations, the successful conduct of which is no less dependent on their confidential nature, than an investigation conducted for law enforcement purposes. It is difficult to conceive a successful procurement program where contractors have access to agency records, such as estimates of costs prior to bidding.

Administratively, it is believed that, if enacted into law, the bill would give rise to many complex and costly problems. It is so broad in scope that it could, and probably would, create excessive demands on an agency for information, requiring costly duplication and transfer of records in order to make them available. Further, the easy access to the courts provided in the bill could give rise to extensive litigation, which in many instances, would be unwarranted by

the circumstances. The impact of this problem is greatly magnified by the failure of the bill to limit in any way the persons to whom the records must be made available, subjecting the agency to requests which could be frivolous, without purpose, and in some cases, made for the purpose of harassment only.

The Veterans' Administration is not opposed to the principle of furnishing to the public as complete information concerning our operations as is feasible. To the contrary, we take great pains to see that information of interest to the public is made available. The policy of the Veterans' Administration is set out in Veterans' Administration Manual MP-1, chapter 4, section 405.01, providing:

"Both the veterans and the public are entitled to full information about VA. The Administrator's policy is that VA will release all available information about its activities, freely and frankly, to all information media. This policy must be carried out."

It is our view that any public information requirement must preserve to the agency's discretion the right to determine the extent to which it is feasible or in the public interest to make its records available for random public inspection. If a bill, such as the one under consideration, is to be enacted into law, it is urged that consideration be given to the following changes:

The phrase "any person" appearing in line 7, page 7, of the proposed subsection (c) of section 3 be defined to include only those having a demonstrated legitimate interest in the records requested and the phrase "and the burden shall be upon the agency to sustain its action." appearing in line 15, page 7 thereof, be deleted.

The exemption appearing in proposed subsection e(2), lines 6 and 7, page 8, be amended to read, "related solely to the internal personnel rules and management practices of any agency;" and proposed subsection e(7), lines 14, 15 and 16, page 8, be amended to read, "investigatory files compiled for law enforcement or administrative purposes except to the extent available by law to a private party;"

Section 4 is likewise a matter of concern. The present text of the bill represents a major departure from the present Administrative Procedure Act, which exempts from the rulemaking procedures "matters relating to agency management or personnel of an agency, or public property, loans, grants, benefits, or contracts—" which had the effect of exempting service agencies, such as the Veterans' Administration, from compliance therewith. The existing exceptions are reasonable and recognize that there is a sharp distinction between the activities of a service agency, such as the Veterans' Administration, and the activities of the regulatory and enforcement agencies to which the provisions of section 4 are primarily directed.

We are aware of no demand from the public or from the veterans' organizations for subjecting our procedures for the issuance of regulations to the complications and delays encompassed in section 4 of the Administrative Procedure Act. We appreciate the fact that section 4 procedures could be set aside in any case where we determine that "notice and public participation would be unwarranted and contrary to the public interest." Nevertheless, if the Congress eliminated the existing complete exemption as to rulemaking dealing with the aforesaid subjects, it would be strong evidence of an intent that section 4 procedures should be routinely followed in cases dealing with such subjects, notwithstanding the absence of any positive advantage to compensate for the numerous problems which would be engendered.

We should point out that our current practice with respect to issuing or amending regulations does involve certain limited public participation, but only at agency option. Comment on proposed regulations is frequently invited from service organizations, banking and loan institutions and associations, education and medical groups, and others who are interested. It is also our policy to consider carefully suggestions by any sources for changes in regulations.

Under these circumstances, we recommend continuing the exemptions for the section 4 procedures contained in the present act. If, for reasons which do not occur to us, the new language would serve a useful purpose as to the programs of some other agency, we would recommend that veterans' benefit matters be specifically excluded.

While subsection 5(a) of the bill has no application to Veterans' Administration procedures, subsection 5(b) appears, at first examination, to apply to all adjudications excluded from subsection 5(a). While we are not convinced that

the subsection would be so construed, such a construction would have an adverse impact on the initial adjudication of approximately 2 million claims for veterans' benefits annually. Accordingly, modification or clarification of this subsection is recommended to eliminate the possibility of its application to the original adjudication of claims for veterans' benefits. At the appeal level in the adjudication of such claims the procedure required by section 4005 of title 38, United States Code, is in substantial accord with the proposed subsection, as are the procedures of our Board of Contract Appeals, which are prescribed by published regulations.

Subsections (b) and (c) of section 6 of the bill, providing for practice by attorneys and service of notice to attorneys, are similar to S. 1758, 89th Congress, on which we will furnish a separate report to your committee.

Section 6(e), dealing with subpoenas, and section 6(h), dealing with depositions and discovery, are, we believe, directed to adversary proceedings in adjudications under section 5 of the bill. We would suggest that the language be clarified to clearly confine the subsection to such adversary proceedings.

In view of the foregoing, I cannot recommend favorable consideration of S. 1336, 89th Congress, by your committee, in its present form.

We are advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the presentation of this report to your committee.

Sincerely,

W. J. DRIVER, *Administrator.*

ANALYSIS OF SELECTED SECTIONS OF S. 1336, 89TH CONGRESS, A BILL TO AMEND THE ADMINISTRATIVE PROCEDURE ACT AND FOR OTHER PURPOSES, AS IT APPLIES TO THE FUNCTIONS OF THE VETERANS' ADMINISTRATION

SECTION 3. PUBLIC INFORMATION

Section 3(a). Publication in the Federal Register

This subsection provides for publication in the Federal Register, for the guidance of the public, each agency's description of its central and field organization and the established places at which, the officers from whom, and the methods by which, the public may secure information or obtain decisions; a statement of the general course and method by which its functions are channeled, including the nature of all formal and informal procedures; the rules of procedure, including descriptions of forms and places where forms may be obtained; substantive rules adopted as authorized by law, and statements of general policy or interpretations of general applicability; and every amendment, revision or repeal of the foregoing. It further provides that no person shall be required to report to, or be adversely affected by, any matter not properly published in the Federal Register.

This subsection does not materially depart from the present provisions of the Administrative Procedure Act and the Veterans' Administration is in substantial compliance therewith.

Section 3(b). Agency opinions and orders

This subsection provides that every agency shall, in accordance with published rules, make available for public inspection and copying all final opinions and all orders made in the adjudication cases; statements of policies and interpretations which are not published in the Federal Register; and staff manuals and instructions to staff that affect any member of the public unless such materials are promptly published and offered for sale. Each agency is required to make available for public inspection a current index providing identifying information as to any matter which is issued, adopted or promulgated and which is required by this subsection to be made available or published. No final order, opinion, policy, interpretation, manual, or instruction that affects any member of the public may be used as a precedent by an agency against any private party unless it has been so indexed and made available or published or unless the private party shall have had actual and timely notice of the terms thereof.

The Veterans' Administration makes approximately 2 million decisions each year in individual veterans' claims cases. A literal interpretation of this subsection might be construed to require publication of the opinion or order in each of these cases. However, in view of the exceptions to this subsection contained in subsection (e), and the prohibition against disclosure in veterans' claims matters contained in section 3301 of title 38, United States Code, it is believed

that a proper interpretation would not require any publication beyond that already being accomplished by the Veterans' Administration as a matter of policy. This view is fortified by the fact that the only sanction imposed for failure to publish as required by this section is that the matter may not be relied upon or cited as a precedent. The Veterans' Administration does not utilize as precedent any decisions other than decisions of the Administrator and opinions of the General Counsel, which are approved as precedents by the Administrator. Administrator decisions are printed, collected, and, from time to time, published in bound volumes which are available for purchase by the public at the Government Printing Office. Printed Administrator decisions not yet published in bound volumes, as well as precedent opinions of the General Counsel of a general nature, are printed and available for inspection in the Office of the General Counsel and the chief attorneys' offices in field stations. Decisions of the Veterans' Administration Contract Appeals Board are indexed and made available for public inspection and copying. The only material effect of this section on present procedures in the Veterans' Administration is that it would require public availability of indexes of Administrator decisions and precedent opinions of the General Counsel and that copies of manuals and instructions to staff, insofar as they affect any member of the public, would have to be made available to the public or offered for sale. The detailed requirements of internal procedure and administration published in manuals and instructions to staff, insofar as they affect the public, are made available to service and welfare organizations representing veteran claimants and to others who regularly do business with the agency. This practice, we feel, fulfills any practical need for public dissemination of this information.

Section 3(c). Agency records

This subsection requires that every agency shall, in accordance with published rules, make all its records promptly available to any person. It further provides that upon failure to do so, the agency may be enjoined from withholding its records upon the filing of a complaint in the district court of the United States in which the complainant resides, or has his principal place of business, or in which the agency records are situated, the court to determine the matter de novo, the burden of proof being on the agency.

Section 3(d). Agency proceedings

This subsection provides that agencies having more than one member shall record the vote of each member in every proceeding and make such record available for public inspection.

The exemptions to section 3 of the bill are contained in subsection (e) and include matters that are (1) required by Executive order to be kept secret in the interest of national defense or foreign policy; (2) related solely to the internal personnel rules and practices of the agency; (3) exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intraagency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes, except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

Under these provisions veterans' claims matters would continue to be exempt from disclosure because of section 3301 of title 38, United States Code, which provides in part:

"All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans' Administration shall be confidential and privileged, and no disclosure thereof shall be made except as follows:":

Following the quoted language, certain specific exemptions are made under which material otherwise confidential may be released. In general, these pertain to disclosure to the claimant or his duly authorized agent or representative as to matters concerning himself alone; or when information is required by process of a U.S. court or by any department or other agency of the U.S. Government. One exemption is the requirement that the amount of pension, compensation or dependency and indemnity compensation of any beneficiary should be made

known to any person who applies for such information. Likewise, this bill would exempt from disclosures internal rules and practices dealing with personnel and internal communications dealing solely with matters of law and policy.

The exemptions provided in the bill remove many areas of major concern. They would adversely affect present Veterans' Administration policy in two major matters; i.e., the release of interagency or intraagency memorandums which are not related to internal personnel rules or confined to matters of law or policy, and matters developed in investigations which are made for administrative purposes, as distinguished from law enforcement purposes.

Further, we question the provision contained in subsection (c) placing the burden on the agency to sustain its action in withholding records in court actions, being of the view that the burden should be on the moving party to show that the agency's action is improper.

SECTION 4. RULEMAKING

Section 4(a). Informal consultation prior to notice

This subsection allows an agency the opportunity to consult with interested persons for suggestions in rulemaking prior to the notice required by subsection 4(b).

Section 4(b). Notice

This subsection requires that when notice of rulemaking is to be undertaken by any agency, including service agencies, such as the Veterans' Administration, it should be published in the Federal Register, give all interested persons a reasonable time in which to prepare and submit matter for consideration and state the time, place, and manner in which any interested person may submit matter for consideration, the authority under which the rule is proposed, and the terms and substance of the proposed rule.

Section 4(c). Procedures

This subsection, which also applies to service agencies, such as the Veterans' Administration, provides that after notice required by subsection (b), the agency shall afford interested persons an opportunity to participate in rulemaking through the submission of written data, the opportunity to present the same orally, except when the agency determines that oral argument is inappropriate, and that the agency shall consider all relevant matter before making a decision. Section 4(c)(2) refers only to those rules required to be made on the record and has no application to Veterans' Administration functions or procedures.

Section 4(d). Emergency rules

This subsection provides that where an agency finds that rulemaking without the notice and procedures provided by subsections (b) and (c) is necessary in the public interest, the agency may issue an emergency rule to be effective for not more than 6 months and may extend such emergency rule for a period not to exceed 1 year by commencement of a rulemaking proceeding dealing with the same subject matter after giving notice required by subsection (b).

Section 4(e), (f), and (g)

These subsections require that each agency maintain a docket showing the current status of all published rules for rulemaking; that the publication of any rule shall be made not less than 30 days prior to the effective date, except as otherwise provided by the agency upon good cause found and published with the rule; and that any interested person may petition the agency for the issuance, amendment, exception from or repeal of a rule.

Section 4(h). Exemptions

This subsection exempts from the provisions of the section (1) rulemaking required by Executive order to be kept secret in the interest of national defense or foreign policy, (2) rulemaking that relates solely to internal personnel rules and practices, (3) advisory interpretations of rulings of particular applicability, (4) minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights, and (5) rules of agency organization.

The present Administrative Procedure Act exempts from the rulemaking provisions any matter relating to public property, loans, grants, benefits, or

contracts. The effect of this exemption was to remove Veterans' Administration rulemaking from the provisions of the act. Under this bill it appears that Veterans' Administration rulemaking must conform with section 4. During the calendar year 1964 the Veterans' Administration promulgated approximately 498 new regulatory rules and canceled 36 previously published rules. Of these it is estimated that between 250 and 300 constituted minor exceptions from, revisions of, or refinements of, rules which did not affect protected substantive rights, thus coming within the exemption of the proposed bill. Based on the foregoing experience, it is estimated that in approximately 200 to 250 instances, the promulgation of Veterans' Administration regulations would require the notice and procedures set out in section 4 of the bill. Many of these, however, would reflect new statutory requirements or state legal rules which would not be subject to discretion, hence compliance with the proposed procedure would result in delay without an attendant gain.

SECTION 5. ADJUDICATION

Section 5 (a)

This subsection has application only to those cases of adjudication required by the Constitution or by statute to be determined on the record after opportunity for agency hearing, and would not apply to Veterans' Administration procedures.

Section 5 (b)

This subsection provides that in all other cases of adjudication, excepting those involving inspections and tests, the agency shall provide procedures to promptly, adequately, and fairly inform the parties of the issues, facts, and arguments involved and that the officer who conducts the proceeding shall make his decision which will constitute final agency action, subject only to such appeal and review as is provided by agency rule. This subsection, literally read, could be construed to have such broad application as to encompass the initial adjudication of claims for gratuitous benefits, such as veterans' benefits. We are of the view that such application is not the intent of the proposed subsection, nor are we convinced that it would be so construed. However, such a construction would result in an undesirable formalization of some 2 million initial adjudications annually in the Veterans' Administration. At the appeal level in adjudication of veterans' benefits the procedure required by section 4005 of title 38, United States Code, which provides that the claimant be furnished a statement of the case, generally meets the requirements of this proposed subsection.

SECTION 6. ANCILLARY MATTERS

Section 6 of S. 1336 contains procedure for—

- (1) Appearance before the agency,
- (2) Practice by attorneys,
- (3) Service of notice,
- (4) Investigations,
- (5) Subpenas,
- (6) Notice of denials,
- (7) Computation of time,
- (8) Depositions and discovery,
- (9) Consolidation of proceedings,
- (10) National defense and foreign policy matters,
- (11) Declaratory orders, and
- (12) Summary decisions.

Much of the procedure prescribed in this section is either similar or comparable to present agency practices.

Section 6 (a). Appearance

This subsection provides for the right of a person to appear before the agency, and his right to be represented by counsel. Present Veterans' Administration procedures are consistent with this procedure.

Section 6 (b). Practice by attorneys

This subsection provides for the practice of attorneys before the agency without the necessity for any special admission requirements provided he is a member in good standing of the bar of the highest court of a State, possession, territory, Commonwealth, or District of Columbia, and subsection (c) provides for the service of notice to such attorney, or other representatives. These provisions

are similar to those contained in S. 1466, 88th Congress, passed by the Senate, as well as S. 1758, 89th Congress.

Although the Veterans' Administration has, for some time, required the formal recognition of attorneys, for the purpose of presenting claims for veterans' benefits, we are in the process of eliminating such requirements and are developing procedures to permit any member in good standing of the bar of a State, possession of the United States, or the District of Columbia, to practice before the Veterans' Administration upon submission of a power of attorney from the claimant.

Section 6(d). Investigations

This subsection provides that all investigations and matters relating thereto must be authorized by law, and persons submitting evidence shall be entitled to a copy thereof. Present Veterans' Administration practices are in accord with those prescribed in this subsection.

Section 6(e). Subpenas

This subsection provides that every agency by rule provide for the issuance of subpenas upon request to any party to an adjudication and by rule designate officers who are authorized to sign subpenas. The authority of the Administrator of Veterans' Affairs to issue subpenas is now contained in 38 U.S.C. 3311-3313. We believe that the intention of this subsection is to limit its application to proceedings in adjudications under section 5 of the bill and that it does not apply to nonadversary proceedings such as are involved in Veterans' Administration claim matters.

Section 6(f) and (g)

These subsections provide for prompt notice of denial of any application, petition, etc., to persons interested therein accompanied by a statement of reasons therefor; and procedure for the computation of time in matters when a period of time is prescribed or allowed.

Section 6(h). Depositions and discovery

This subsection provides that depositions and discovery shall be available to the same extent and in the same manner as in civil proceedings and the district court, except to the extent that the agency deems such impractical and makes other provision by published rule. As in section 6(e), dealing with subpenas, it is believed that this subsection has application only to adversary proceedings in adjudications under section 5 of the bill and does not have application to nonadversary proceedings, such as are considered by the Veterans' Administration in veterans' claims matters. Public Law 87-666 has established procedures designed to fit the nonadversary-type proceedings which are before the Veterans' Administration which require that a claimant, upon filing a notice of disagreement, be furnished a "statement of the case" summarizing the pertinent evidence and law, as well as the decision and reasons therefor. Additionally, service and welfare organizations, as well as attorneys and agents presenting claims for benefits on behalf of veterans and designated to do so by power of attorney, are permitted access to information contained in the veterans' files.

Section 6(i), (j), (k), and (l)

These subsections do not appear applicable to Veterans' Administration functions.

APPENDIX II: MISCELLANEOUS COMMENTS ON S. 1160, S. 1336, S. 1758,
AND S. 1879

AMERICAN GAS ASSOCIATION, INC.,
New York, N.Y., May 10, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure of the
Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: We transmit herewith a statement regarding S. 1336, 89th Congress, 1st session, a bill to amend the Administrative Procedure Act. We understand that hearings are scheduled to begin May 12. This statement was prepared for AGA by our special committee of executives on regulatory affairs, Robert A. Hornby, chairman.

Last August, this association submitted a statement regarding S. 1663 of the 88th Congress. Your staff was kind enough to consider our statement at that

time in redrafting the Administrative Procedure Act into its present form. We appreciate this courtesy. During recent years, regulatory delay has posed major problems to the gas industry. Our special committee of executives on regulatory affairs has addressed itself assiduously to this problem during these years. A special report on the problem of regulatory delay was made available to the Federal Power Commission, and Chairman Swidler was kind enough to say that eight of the nine recommendations not requiring legislative action had been adopted in whole or in part.

Our comments address themselves to what we understand to be two broad objectives of the bill. First, it is important that fairplay be assured all parties before an administrative agency. Second, we believe it equally important to assure that every effort is made to expedite agency action and to eliminate regulatory delay.

In 1964 legislation was passed which authorized the formation of an Administrative Conference of the United States (Public Law 88-499, 88th Cong., S. 1664, Aug. 30, 1964). Of course, the membership of the Administrative Conference has not yet been appointed. The American Gas Association believes that, when organized, the Administrative Conference should have an opportunity to review any redraft of the Administrative Procedure Act that may be arrived at during the course of your hearings.

Please let us know if we can be of further help to you. Our Special Committee of Executives on Regulatory Affairs is a continuing one. It is charged with the responsibility of working for concepts and procedures of regulation that will be truly modern and thus responsive to the public interest. We stand ready to assist your subcommittee and its staff in the drafting process.

Respectfully,

GUY W. WADSWORTH, Jr.

STATEMENT ON BEHALF OF THE AMERICAN GAS ASSOCIATION WITH RESPECT
TO S. 1336

The American Gas Association (A.G.A.) represents approximately 365 natural gas transmission and distribution companies and as such is concerned primarily with the proposed bill, S. 1336, as it would affect procedures before the Federal Power Commission under the Natural Gas Act (hereinafter referred to as the FPC and NGA, respectively).

We agree that, after nearly 20 years, it is appropriate to evaluate and, if possible, improve the Administrative Procedure Act of 1946 (APA). Certainly, the proposed bill makes some such improvements and the subcommittee and its staff are to be complimented on their efforts. However, in that S. 1336 seeks to tailor a procedural statute to the requirements of literally dozens of different agencies with their widely differing procedural requirements, care must be exercised lest more problems be created than are solved. With the extensive experience of the members of this association in proceedings before the FPC as a background, we should like to make what we hope will be constructive suggestions.

First, we support what we understand to be the bill's two broad objectives:

(a) That all parties before an administrative agency be assured of fairplay, as to both substantive and procedural due process.

(b) That, since "justice delayed is justice denied," every effort be made to expedite agency action and to eliminate regulatory delay.

Secondly, our comments are confined to what we believe to be the bill's basic problem areas plus some limited and specific procedural suggestions.

Thirdly, in connection with the bill's objective of expediting agency action and eliminating regulatory delay, it is not amiss to emphasize that a most critical problem confronting business subject to regulation by Federal agencies has been the delay before final decision was reached. In our dynamic society, it is not practical for important business decisions to be in suspension for years. For example, rate proceedings before the Federal Power Commission involve the issue of the cost of raw material, which, in the case of natural gas, constitutes approximately 50 percent of the total cost of doing business. Yet, in many cases, customers do not know this cost for a long time. Commonsense and sound business practice require a reduction in regulatory delay.

As pointed out in greater detail below, one of A.G.A.'s chief concerns with S. 1336 is that certain procedural provisions would, in its opinion, aggravate and not mitigate the delays presently inherent in the regulation of the gas industry.

The public interest—as represented by the consumer, as represented by industry which needs gas for many new and advanced processes, and as represented by the millions of investors in these large enterprises—requires this committee, as it debates this legislation, to keep uppermost in its mind the question: Will this hinder or will it expedite agency decisions?

I. DEFINITIONS—SECTION 2(d)

Section 2(d) of the APA defines “order” as follows:

“(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 rulemaking but including licensing. ‘Adjudication’ means agency process for the formulation of an order.”

Section 2(d) of S. 1336 deletes “other than rulemaking” for the apparent purpose of including rulemaking proceedings and rulemaking orders under the definition of orders and adjudication. We support this because ratemaking procedures and orders have been held to be “rulemaking” and were therefore excluded from the provisions of the APA relating to adjudication. Since such proceedings are often highly controversial and affect substantive rights, parties to such proceedings should have the same protection under the APA as is afforded parties to other administrative proceedings. There is a possible ambiguity, however, which should be corrected by adding after the word “licensing” on line 9, of page 3,¹ the words “and ratemaking.” Since licensing is expressly included, and since it is the obvious intent of the draftsmen of the bill to include ratemaking, we submit that future litigation will be avoided by inserting such specific reference to ratemaking.

II. VENUE—SECTION 3(C) AND SECTION 10(b)

A. Section 3(c) requires every agency to make all its records promptly available to any person and provides that upon complaint to the district court of the United States “in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records * * *.” We submit that in cases where an agency has offices in the District of Columbia and in various other places the complainant may not know where the agency records in question are kept and considerable confusion as to proper venue might result. This can be avoided by giving jurisdiction to the District Court of the United States for the District of Columbia. It is recommended that the words “for the District of Columbia or for” be inserted after “United States” on page 7, line 8, and that the word “in” be deleted.

B. Section 10(b) provides that a proceeding for judicial review shall be commenced by filing a complaint in the district court in the judicial district in which the complainant resides or has his principal place of business “or in which the acts giving rise to the agency action took place * * *” (p. 30, lines 20–21). The quoted language is ambiguous. It is usually impossible to pinpoint a particular act occurring in a particular judicial district as being the one which gave rise to the agency action. For example, a pipeline may cover many judicial districts, and a rate action cannot be limited to any one district. Consequently, it is recommended that the quoted language should be deleted and the following substituted therefor: “or in which the agency is located or in the District of Columbia.”

III. PROPOSED SECTION 4(C) PARAGRAPH (4)—JUDICIAL REVIEW OF RULEMAKING ORDERS WHERE SUBSTANTIVE RIGHTS ARE INVOLVED

There is no expressed provision in the bill authorizing judicial review of rulemaking orders which may affect substantive rights.

The necessity of judicial review of certain rulemaking orders is emphasized by the recent decision of the U.S. Supreme Court in *FPC v. Texaco, Inc.*, 377 U.S. 33, 13 L. Ed. 2d, 112, 84 S. Ct. 1105 (1964). This case arose out of the following fact situation.

The FPC adopted a rule providing that it would reject, without a hearing, any application pursuant to section 7 of the Natural Gas Act for a certificate of public convenience and necessity where the application disclosed that it was sup-

¹ Unless otherwise noted, all page and line references are to S. 1336, print of Mar. 4, 1965.

ported by a gas sales contract containing certain types of indefinite price-escalation provisions.²

There was no provision by which persons who opposed such rule could seek judicial review of it.

Thereafter, a natural gas producer filed an application for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act, which section expressly provides that the FPC shall set such application for hearing. The application was rejected without hearing on the ground that it was supported by contracts containing the type of escalation clause proscribed by the FPC's rule. The natural gas producer contended that he was entitled to an evidentiary hearing to show that the contract provisions in question were in the public interest since he had not been given an opportunity for such a hearing or judicial review with respect to the rule itself.

The court of appeals reversed the FPC, but the U.S. Supreme Court upheld the FPC's action, holding that, in filing the application under section 7(c), the company must comply with the FPC's rules. It further stated that, to require the FPC to proceed only on a case-by-case basis, would force it to repeat in hearing after hearing its conclusions that condemn the particular pricing provisions.

In consequence it is obvious that, unless proper safeguards are provided, a party may be effectively deprived through rulemaking of a hearing and judicial review on matters affecting his substantive rights. S. 1336 should, therefore, be amended to avoid such a deprivation of rights, as hereinafter suggested. Conceding that the Commission must not be required to adopt a case-by-case approach where a rulemaking proceeding would be more appropriate, it is submitted that when the Commission formulates a rate or certificate policy in a general rulemaking proceeding, it should comply with the statutory hearing requirements contemplated for rate and certificate cases. Agencies should not be allowed to adopt lesser procedural standards in rulemaking proceedings where rates or certificate policies for the whole industry are involved than where only one company is involved.

We urge the committee to consider adding a paragraph (4) to section 4, subsection (c), substantially as follows:

"No agency shall make any rule the effect of which may be to impair or deny directly or indirectly the right of any person to an adjudication of a matter or issue where a hearing or adjudication of such matter or issue is provided by statute, unless a hearing on such proposed rule shall be had on the record in accordance with the provisions of subsection (c) (2) of this section. The agency's final action shall be subject to judicial review as provided in section 10 of this Act."

It is further recommended that at the end of section 4(g) (p. 11, line 25) the following language be added: "Denial of any such petition shall constitute final agency action within the meaning of section 10 hereof."

IV. SECTION 4(D)—EMERGENCY RULES

For the purpose of clarification, it is recommended that on page 11, line 7. before the word "period" the word "total" be inserted to make it clear that it is the intent of the bill that emergency rules should be in effect for a *total* period of not more than 1 year rather than 1 year in addition to the basic 6 months' period. In the absence of this provision, the bill might be construed to authorize emergency rules to be placed into effect for a total period of 18 months. This would permit an unwarranted use of the emergency power.

V. SECTION 4(H)—EXEMPTIONS

Section 4(h) provides that section 4 shall not apply in certain situations including "(4) minor exceptions from, revisions of or refinements of rules which do not affect protected substantive rights; * * *" (p. 12, lines 7-8). By providing certain substantive rights are "protected," there is an implication that certain substantive rights are not protected. We submit that the provisions of section 4 should be adhered to wherever any substantive rights are involved. Consequently, it is recommended that the word "protected" be deleted on page 12, line 8, of the bill.

² We want to emphasize that we would not regard it as appropriate that we comment upon the merit of the particular rule involved; we emphasize only the lack of procedural safeguards.

VI. SECTION 5(a)(2)—RULES OF CIVIL PROCEDURE OR RULES OF CRIMINAL PROCEDURE

Section 5(a)(2) requires that every agency shall provide adequate rules governing its pleadings, including responsive pleadings, and other papers. It requires that, "To the extent practicable, such rules shall conform to the Rules of Civil Procedure or the Rules of Criminal Procedure for the United States district courts." (P. 13, lines 1-4.) The Rules of Civil Procedure and the Rules of Criminal Procedure for the U.S. district courts are substantially different, because each is designed to cope with particular problems in a manner dictated by experience. Still different procedural rules have evolved in the various agencies to cope with the entirely distinct problems of administrative law. Decades of experience and intelligent effort on the part of administrative agencies and their staffs may be lost or impaired if Congress now sees fit to require that the rules of such agencies conform to either the Rules of Civil Procedure or the Rules of Criminal Procedure to the extent practicable. It is recommended that the following be deleted, "To the extent practicable, such rules shall conform to the Rules of Civil Procedure or the Rules of Criminal Procedure for the United States District Courts."

VII. SECTION 5(a)(6)—SEPARATION OF FUNCTIONS

We are in accord with the bill's fundamental objective of strengthening the present provisions so as to separate the functions of investigating, prosecution, and advocacy, from the function of decisionmaking. While we recognize that there may be opposition to such strengthening, on balance we believe it is warranted.

It is a fundamental principle of the Anglo-American system of law that an advocate of a particular position cannot also be a judge in the same case without serious risk of depriving the parties of a fair hearing. Clearly, the drafters of the bill recognize this principle. The question posed is whether the separation of functions prescribed in the bill is appropriate. In this connection, the committee's attention is directed to two specific problems:

A. In many situations, filings are processed by the agency staff and there is no contested hearing. In these cases we see no reason why the staff investigating the filing should be precluded from advising the agency in disposing of these matters. Therefore, we suggest the last sentence of section 5(a)(6)(A) of the bill be amended to provide:

"No officer, employee, or agent other than a member of an agency engaged in the performance of investigating, prosecuting, or advocating functions for any agency in any *contested* case shall participate or advise in the decision, or in agency appeal or review thereof pursuant to section 8, except as witness or counsel in public proceedings."³

This modification makes the separation of functions apply specifically to contested proceedings where agency personnel may very well take an adversary position.

We recommend striking the words "or a factually related" from subparagraph (A) of section 5(a)(6) as drafted since this would be too restrictive upon the agency in the use of its available personnel.

B. In FPC contested proceedings, staff witnesses will frequently testify in support of a new approach or a new policy which has either been formulated or cleared by the chief of the bureau concerned. We believe *ex parte* type advocacy to the Commission during decisionmaking by a bureau chief, who has assisted in the formulation or directed the formulation of the staff position, is unfair. Some means should be provided by statute to prevent it. In rewriting the draft bill (both subpars. (A) and (B) of sec. 5(a)(6)), it is urged that consideration be given to this problem, taking into account both the recognized need of the FPC to have the advice of informed staff personnel and at the same time the need to preserve fair play.

VIII. SECTION 6(1)—SUMMARY DECISIONS

Section 6(1) (p. 21, lines 11-13) authorizes an agency to dispose of motions for summary decisions, motions to dismiss, or motions for decision on the pleadings. The bill is devoid of any indication of the type of case to which

³ Pp. 14-15, line 22 of p. 14 to line 2 of p. 15.

it would apply. Moreover, such summary action does not seem appropriate to proceedings under the NGA, which specifically provides that parties are entitled to a hearing on the substantive issues involved in sections 4 (rate) and 7 (certificate) proceedings thereunder. We believe that this section should either be deleted or the areas to which it is to be applied should be set forth in detail so that it does not become a device for depriving parties of substantive due process. This comment also applies to section 7(b)(8), which empowers presiding officers to dispose of motions for summary decisions, motions for decision on the pleadings, or motions to dismiss.

If section 6(1) is not deleted, it is recommended that it be amended to provide as follows:

"(1) *Summary decisions.*—An agency is authorized to dispose of motions for summary decisions, motions to dismiss, or motions for decision on the pleadings, provided that this provision shall not be applicable where a party has a statutory right to a hearing and provided further that orders issued hereunder shall constitute final agency action within the meaning of section 10."

IX. SECTION 7(c)—BURDEN OF PROOF

Section 7(c) of the bill states that, except as otherwise provided by statute, the proponent of a rule or order shall have the burden of proof. It is recommended that the words "and of going forward initially with the proof" be added at the end of the first sentence of this section. The FPC has taken the position in rate investigations under section 5 of the NGA that, even though it has the burden of proof with respect to the unreasonableness of the rates in question, it can nevertheless force the respondent company to assume the burden of going forward—in effect, proving its defense. We believe this interpretation should be corrected.

X. SECTION 7(c)—WRITTEN EVIDENCE

The last sentence of section 7(c) provides that any presiding officer may, where the interest of any party will not be prejudiced thereby, require the submission of all or part of the evidence in written form. We support this provision as far as it goes. However, the agency should have the same authority. Consequently, we recommend insertion of the words, "The agency or" before the word "any" on page 23, line 19.

XI. SECTION 8(c)—APPEAL AND REVIEW

We strongly urge that section 8(c) be deleted in its entirety (pp. 25-28). This section, which is lengthy, complicated, and abstruse, would, if enacted, create confusion and delay. It would not accomplish any useful purpose for the following reasons:

A. It provides that in appealing from an examiner's decision:

"Any portion of the record relied upon shall be identified by detailed page references. Except for good cause shown, no exceptions by any party shall rely on any question of fact or law upon which the presiding officer had not been afforded an opportunity to pass" (p. 26, lines 8-13).

The first quoted sentence deals with the kind of minutia which should be left to professional practice or commission rules. A statute should not require something which under particular circumstances might not be necessary or practical. Most lawyers annotate their briefs and exceptions very carefully but in many cases general references are quite adequate. The agencies certainly can protect themselves in this area by rule. The second quoted sentence is objectionable because:

(i) If the agency's expertise is greater than the examiner's a party would not be permitted to call upon the agency to take official notice of matter of which the examiner did not take official notice. Assume, for example, that the examiner finds that something is black when everyone associated with the case except the examiner knew all the time that it was white. The Commission knew it was white, everyone assumed the examiner knew it was white and submitted no evidence on the subject. This language could be construed so as to preclude the Commission from taking official notice of this fact and reversing the examiner's finding. It might be argued that the language on page 26, line 10, "except for good cause shown" takes care of this. We are inclined to believe, however, that this sentence is a trap or pitfall which could only be avoided by devising some type of "boiler plate" to be

included in each exception requesting in substance that if the Commission determines that the exceptions violate this provision, that it find that good cause has been shown for passing upon this point without the examiner having ruled upon it. If this provision becomes law, a great deal of litigation may evolve around the question of whether the presiding officer had been afforded an opportunity to pass on particular issues. This is an unnecessary encumbrance of the administrative process.

(ii) The examiner might reach a conclusion contrary to law without knowing or considering the legal point. It might never have been raised because his action was not anticipated. The parties should be permitted to raise the point on appeal. The fallacy of this provision apparently stems from an assumption that the decision will be for A or against B. The administrative process is by its nature pragmatic and hearing examiners and agencies often reach necessary solutions which were never advocated by any party. Such solutions may raise new issues not considered by the examiner. There is no way to ask an examiner to reconsider. It is necessary to appeal to the agency to get consideration of these issues.

B. Subsection 2 provides that except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress, each agency shall establish an appeal board.

There may be other criteria besides the number of proceedings in which exceptions are filed which should determine the desirability of an appeal board. The nature of the proceedings should be taken into accounts as well as the importance of having agency policy established on the basis of facts presented to the Commission on the record.

In addition to this unwarranted limitation of criteria, there are other objections to this provision. It requires that all petitions for review of an examiner's decision would be determined by the appeal board except where a party requested the Commission to review the examiner's decision. In the latter situation, the Commission would not have any discretion to refer the matter to the appeal board. It would either review the matter itself, or affirm the examiner's decision in total. While there may be certain agencies as to which this general approach may be sound, we would regard it as cumbersome, time consuming, and unduly restrictive if applied to the FPC.⁴

As suggested at the outset, delay and resulting uncertainty is the current hallmark of administrative proceedings in too many instances. This procedure will compound this problem.

We submit that the proper means of handling this question would be by amendment to each agency's basic statute.⁵ In this way conflicts between the APA and the several organic regulatory statutes could be avoided.

In support of our position, we point out certain problems which arise when the appeal board procedure provided for in section 8 is compared with the statutory procedure provided for in judicial review under the NGA, which makes it necessary that an application for rehearing of the FPC's final order be filed before seeking judicial review. As we understand the provisions of the pending bill, the various steps in a proceeding before the FPC would be as follows: First, there would be a hearing and an examiner's decision. Next, there would be a review by an appeal board unless a private party requested review by the Commission itself. Following these several considerations of the case, it would be necessary to file an application for rehearing before seeking judicial review, unless the NGA and/or the pending bill are modified to provide that an application to the FPC for review of a decision of the appeal board is equivalent to an application for rehearing under section 19 of the NGA.⁶

The proposed proceeding is made even more cumbersome by subsection 8(c) (4) which provides that after the case has finally reached the top echelon within the

⁴ We also seriously question the provision which would enable examiners to sit in review of their fellow examiners with whom, as a practical matter, they are closely associated.

⁵ The A.G.A. has previously recommended that the FPC be increased to 7 members and be authorized to sit in panels of 3 Commissioners. The orders of such panels would be orders of the FPC and only subject to application for rehearing, which application is a prerequisite under sec. 19 of the NGA to an appeal to a court.

⁶ We are advised that in some situations where appeal boards have been so tailored to the particular requirements of an agency and where the basic agency statute has been amended to accomplish the desired objectives, such as at the Federal Communications Commission, appeal boards have worked successfully and have actually cut down the time previously required to obtain review of an examiner's decision.

agency, if material questions of fact are raised, the agency shall remand the case to the presiding officer with instructions for further proceedings. Under existing law, cases are frequently pending before the FPC for more than 5 years. Under this bill delays would be even greater.

In addition to the foregoing comments, subsection 8(c) (5) uses the terms "review" and "appeal" in an ambiguous manner which implies that they are meant to have different meanings. Such terms are not defined in the bill to have other than their normal meaning. Consequently, this subsection is abstruse and difficult to understand.

XII. SECTION 10(a)—JUDICIAL REVIEW

Under section 10(a) of the APA, any person suffering "legal wrong, or adversely affected or aggrieved" by agency action is entitled to judicial review. Under section 10(a) of the bill, only persons "adversely affected in fact" shall have standing and be entitled to judicial review (p. 29, lines 23-25). For reasons which we do not understand, the bill obviously restricts the right to judicial review. Is it intended that persons suffering "legal wrong" shall not necessarily be entitled to judicial review? The bill apparently reflects the thesis that certain persons who are "aggrieved" may not be "adversely affected in fact." We submit the proposed amendment to section 10(a) might substantially impair the right of judicial review and, in any event, it would result in subsequent and substantial litigation to determine the meaning of the new language. Accordingly, we urge that in the absence of some compelling reasons not presently disclosed, the present provisions of section 10(a) be kept.

Respectfully submitted.

AMERICAN GAS ASSOCIATION, INC.,
GUY W. WADSWORTH, Jr., *President*.
ROBERT A. HORNBY,

Chairman, Special Committee of Executives on Regulatory Affairs.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
New York, N.Y., May 11, 1965.

HON. EDWARD V. LONG,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: The enclosed ANPA statement is submitted for the record of hearings on freedom of information legislation by your Subcommittee on Administrative Practice and Procedure May 12, 13, and 14. Our statement was prepared by John H. Colburn, editor and publisher of the Wichita (Kans.) Eagle and Beacon and member of the ANPA Federal Laws Committee.

Our association wishes also to express its deep appreciation of the work you and your fellow committee members have carried on to promote not only the legal access to public information but the public's understanding of the importance of this subject in our free society. In this respect your committee and the ANPA have been working on parallel lines. This is a source of deep satisfaction to us.

With high esteem.

Sincerely yours,

STANFORD SMITH,
General Manager.

STATEMENT OF JOHN H. COLBURN, EDITOR AND PUBLISHER OF THE WICHITA (KANS.) EAGLE AND BEACON AND MEMBER OF THE FEDERAL LAWS COMMITTEE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF BILL S. 1160

The American Newspaper Publishers Association (ANPA), an organization of more than 930 daily newspaper members with 90 percent of the total daily newspaper circulation in the United States, advocates favorable action on Senate bill S. 1160 and section 3 of bill S. 1336. This proposal to require Government agencies to make "records promptly available to any person" is of vital public interest.

Most of my 35 years as a reporter, foreign correspondent and editor have been dedicated to keeping the public informed as to how Government affairs

are conducted. Since World War II, especially, I have been more and more concerned by efforts of Government agencies to deprive the people of legitimate information, which they need to properly exercise their role as responsible citizens.

Before I became a member of the ANPA Federal Laws Committee, I had the privilege of serving as chairman of the Freedom of Information Committees of the American Society of Newspaper Editors and the Associated Press Managing Editors Association.

Senate passage last year of S. 1666, the "right to know" bill, reflected a growing conviction among Members of the Congress that such legislation is necessary. It also reflected a determination to recognize the concern among informed people that Government secrecy has exceeded proper bounds. It is gratifying to our ANPA membership to note the strong bipartisan support already accorded the legislation you are considering today.

In our view, the amendments needed to implement an effective Federal public records law are badly needed. They are long overdue. This is amply demonstrated by the sorry record of experience with the secrecy loopholes in section 3 of the Administrative Procedure Act since 1946.

Let me emphasize and reiterate the point made by others in the past: Reporters and editors seek no special privileges. Our concern is the concern of any responsible citizen. We recognize that certain areas of information must be protected and withheld in order not to jeopardize the security of this Nation. We recognize legitimate reasons for restricting access to certain other categories of information, which have been spelled out clearly in the proposed legislation.

What disappoints us keenly, what we fail to comprehend is the continued opposition of Government agencies to a simple concept. That is the concept to share the legitimate business of the public with the people. It is not a new concept. It was the basis for enactment of the Administrative Procedure Act in 1946. Senator McCarran, chairman of the Committee on Judiciary, in reporting the measure to the Senate, put the concept in these words:

"The section (sec. 3) has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance."

This simple concept would take much of the mystery and the secrecy out of Government operations. It was needed in 1946 because Federal regulatory agencies had abused their power through arbitrary, capricious, and oppressive action—action that was protected then by a policy of secrecy and still is protected today.

But what happened? The results under section 3 were far different from that conceived by its framers. Instead of opening channels of information, section 3, as interpreted in practice, did precisely the opposite. The Senate Committee on the Judiciary, in its 1964 report recommending passage of S. 1666, noted that section 3, now "is cited as statutory authority for withholding of virtually any piece of information that an official or an agency does not wish disclosed."

Please note that this is not a complaint of some newspaper organization or public group. This is the conclusion of a responsible and respected committee of Congress. It is concerned with the need for a better informed public.

It is significant that the committee indictment went on to say:

"Under the present section 3, any Government official can, under cover of law, withhold almost anything from any citizen under vague standards—or, more precisely, lack of standards—in section 3. It would require almost no ingenuity for any official to think up a reason why a piece of information should not be withheld (1) as a matter of 'public interest,' (2) 'for good cause found,' or (3) that the person making the request is not 'properly and directly concerned.' And even if his reason has not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available."

Here is ample reason, based on careful evaluation of testimony and research why amendments are needed. Our citizens are being deprived of fundamental rights. As Government has grown bigger and more complex, information manipulation and control has become more sophisticated. Access to news sources, reports, findings, department rulings, and opinions comes under tighter restrictions.

A gigantic information screen, that can be penetrated only by time-consuming diligence or connivance, shields Government departments and agencies.

This screen of secrecy is a barrier to reporters, as representatives of the public, to citizens in pursuit of information vital to their business enterprises and is a formidable barrier to many Congressmen seeking to carry out their constitutional functions. Many loyal, conscientious Government employees share our concern. They recognize the right of a taxpayer to know how his money is being spent, to know how public business is conducted, the reasons for decisions that affect the lives, businesses, and future of our people.

As the Senate Committee on the Judiciary found in 1946 and found again in 1964, there is no justification for most of the secrecy. If permitted to continue, this policy of secrecy will lay the foundation for a totalitarian bureaucracy that will be an even greater threat to public welfare.

This subcommittee, I hope, will share our concern for the future as well as the present. Well educated citizens already tend to regard problems of government as too technical and too complex to follow closely. Their apathy has grown with the more intense manipulation and control of information and the frustrations of trying to cope with Government redtape. Donald N. Michael, a social psychologist and a resident fellow of the Institute for Policy Studies here in Washington, makes some pertinent points about the future in a new book, "The Next Generation." He notes that our concerned young people and adults will continue to feel frustrated and inadequate in the face of complexities and securities. He foresees a mounting trend toward developing policies through a technique of rationalization, which may be based more on technological factors than on wisdom. These techniques of rationalization can have good and bad consequences. At their worst, Dr. Michael says, they could lead to a garrison state.

(Parenthetically, we might point out that in the hearings on Senate bill S. 1666—the "right to know" bill—Government agencies appeared to utilize rationalization rather than wisdom to justify policies denying access to information.)

Some time ago in a paper presented to a symposium at the Battelle Memorial Institute in Columbus, Ohio, Dr. Michael, who is an expert in the study of cybernation, raised other questions about how computer techniques may affect democratic processes. These same questions also concern the public interest in how Government decisions are reached.

"Roughly the situation to be faced," said Dr. Michael, "is that social problems to be met will require the increasing application of computers by the Government to clarify the problems and opportunities, and to design and implement effectively the needed programs for social betterment." He notes that often defense and foreign policies are formulated through analysis of data processed by computers and that the basis for these decisions are "only dimly apprehended by the informed public and totally beyond the comprehension and often the interests of the general public."

Then Dr. Michael asks, "How then, will the interested layman be able to find out what 'models' were used that provided the 'facts' or interpretations on which the policy is based?" These are vital public questions. They will grow in importance as so-called thinking machines are used more and more in decision-making processes. Such questions make it all the more imperative that there be greater access to information in our Government agencies. The new technology is not limited to agencies charged with making defense and foreign policy. It is being utilized also by the agencies concerned with education, welfare, highways, and natural resources—agencies that are not entitled to secrecy protection on the grounds of security.

Who is responsible for the computer programming? Who is responsible for the selection of raw material fed into the computer? Who is responsible for the analysis that goes to our policymakers as a study report or policy recommendation? These questions concern social and political scientists, other informed citizens, the press, and they puzzle many members of Congress.

But there are more obvious cases involving denial and manipulation of information that have nothing to do with new technology, with security or any other legitimate reasons. The pattern is clear from reams of previous testimony. Earlier, I mentioned barriers faced by Congressmen—as representatives of the people. Let's take a look at the Congressional Record for April 21, 1964.

A member of the House Committee on Defense Appropriations, Congressman William E. Minshall, of Ohio, expressed dismay concerning changes made

in Defense Department testimony under the guise of security. After rechecking the original transcripts that were locked in the subcommittee safe, Mr. Minshall said:

"More times than not the only security involved was the political security of the present administration. It was political censorship, not national security, that was the guideline in determining what should be left for you to read in the final printed copies of the hearings * * *. The printed hearings only hint at what Secretary McNamara actually said about the interlocking of our defense and foreign policies."

Congressman Minshall contended further that half of General Curtis LeMay's testimony was censored, not because of any security data that was disclosed but, because "his remarks did not happen to agree with Secretary McNamara's views."

Out in Wichita we are somewhat prejudiced in favor of the Boeing Co. We have felt, on the basis of the McClellan committee findings, that the people would have been better served—and their tax dollars better utilized—if Boeing had received the contract to build the TFX, or what is now known as the new F-111 plan. Mr. McNamara and his press ambassador, Arthur Sylvester, gave the public and the press a real "snow job" to support the decision to award this contract to General Dynamics.

Congressman Melvin Laird of Wisconsin pinpointed the problem of news manipulation in the TFX affair with this statement during debate on defense appropriations:

"Regardless of the kind of statement which has been issued, I have a confidential memorandum from Arthur Sylvester dated March 5, 1964, in which he dictates policy in the Department of Defense regarding the TFX * * *. He dictates what the Navy, the Air Force and their contractors must say about the TFX and its development."

Congressman Laird inserted in the Record the memorandum issued by Sylvester. It is rigid control guideline making clear that the public would be given no information on troubles being experienced with the TFX ship.

The Defense Department is not the only culprit. Other administrative and regulatory agencies follow similar policies as the Moss subcommittee has reported in the past.

There is an ironic note to this widespread agency policy of restricting the right of the citizen to find out how the public business is conducted. The irony is that while Mr. Citizen finds it more difficult to surmount the walls of bureaucracy, the agents of Government pay more and more into the lives of the private citizen and his business.

Many agencies have adopted a system of "snooping espionage." Some use bugging devices and other esoteric products of our new technology. The operators of these devices have violated the privacy and individual liberties of citizens and Government employes suspected of "leaking" legitimate information to responsible people.

The Department of Justice in the past 10 years has undertaken the responsibility of protecting individual and civil rights in certain areas of our society. However, as the legal representative of Government departments it has consistently ignored the citizen's rights and, in fact, has opposed efforts by the public to learn more about agency operations.

Congress has consistently sought to broaden access to information, but the Attorney General's Office has just as consistently advised Government agencies, in effect, to impose a policy of secrecy. These policy guidelines come from the Attorney General's manual which advised, in part, that "the great mass of material relating to the internal operation of an agency is not a matter of official record." For example, access to budget information on how the taxpayer's money is spent is denied on the grounds of the Attorney General's interpretation that this is merely an internal "budget procedure." The manual advises that each agency can be the sole judge of whether a person has a legitimate interest in inspecting official records. This has led to such ridiculous rulings as that by the Controller of the Currency denying a private citizen the right to examine blank—yes, blank—forms used by his agency.

Now the Department of Justice again contends that the court enforcement provision of the proposed Federal records law is unfair. Why? Because this

provision would put on the agency the burden of proof to show why it restricted access to specific items of information.

Under the present arbitrary policy of secrecy it is absolutely necessary that there be some remedy outside the executive branch of Government. Due process of law is the obvious remedy. This proposal would arm the district court with injunctive and contempt power to make available information that is not specifically restricted by this legislation. This is reasonable and fair for all concerned. Inevitably there will be areas of legitimate doubt and misunderstanding as to whether certain information should be released. But the question should be settled by due process and not by some bureaucrat whim.

The Department of Justice philosophy that the burden of proof should lie with the citizen—and not the agency—is understandable in a totalitarian system. There the people are servants of the State. It is an absurd contention in a democratic system where the people are the masters and the State the servant. All citizens must have the right of legal recourse. Once this fundamental right is denied then we move closer to the garrison state.

In summary, what we are advocating is the right of the individual citizen to have access to accurate and freely available information about the Government of the United States. Eight legitimate categories of information are exempted from the disclosure requirements. These cover the vital areas of national defense and foreign policy, documents related solely to internal personnel rules and practices of agencies, personnel and medical files, privileged trade secrets, commercial and financial information, memorandums dealing with matters of law or policy, and investigatory files compiled for law enforcement. We do not take issue with these provisions.

We also want to emphasize that the legislation does not give the mischievously curious individual a "fishing license" to dip into Government files for secrets about his neighbor's business or about policies that would aid a potential enemy.

You may be told that reporters are looking for scandal to sell newspapers. Only a small percentage of our total newspaper circulation in this country is based on casual sales. Our products are delivered morning and afternoon to the homes of U.S. citizens, who must be better informed if they are to fulfill their responsibilities as citizens. We do not seek sensationalism. We, as newspapermen representing the public, seek facts. Concealment of legitimate facts by Government agencies often can be more detrimental to our welfare than their disclosure. We are interested in good government, in better government, and the protection of every citizen's rights.

Good government in these complex periods needs the participation, support, and encouragement of more responsible citizens. Knowing that they can depend on an unrestricted flow of legitimate information would give these citizens more confidence in our agencies and policymakers. Too many now feel frustrated and perplexed.

Therefore, it is absolutely essential that Congress take this step to further protect the rights of the people—also assure more ready access by Congress—by adopting this disclosure law. ANPA strongly favors enactment of the legislation; but we also recognize that it will impose on our reporters and editors a greater responsibility to keep the people more fully informed. Five years ago, Lyndon Baines Johnson, as Vice-President-elect, made this statement in speaking to the convention of the Associated Press Managing Editors Association:

"In the years ahead, those of us in the executive branch must see that there is no smokescreen of secrecy. The people of a free country have a right to know about the conduct of their public affairs."

There is no reason to believe that, as President, Mr. Johnson has changed his view. It is a view that was shared by the late President Kennedy, who said:

"Within the rather narrow limits of national security, the people of the United States are entitled to the fullest possible information about their Government—and the President must see that they receive it."

"No smokescreen of secrecy—the fullest possible information"—these are pledges to the people from our Nation's leaders. Congress can support the executive branch in keeping faith with the people by enacting an effective disclosure act to replace a "smokescreen of secrecy."

AMERICAN TRIAL LAWYERS ASSOCIATION,
AVIATION LAW SECTION,
New York, N.Y., April 23, 1965.

BERNARD FENSTERWALD, Jr., Esq.,
Chief Counsel, U.S. Senate, Subcommittee on Administrative Practice and Procedure, Washington, D.C.

DEAR MR. FENSTERWALD: Many thanks for your letter of April 22 concerning the public information section of the Administrative Procedure Act.

Previous trial commitments preclude my attendance at the hearings, but I have previously forwarded a letter to Senator Long and Congressmen Moss and Reid in this regard. A copy is enclosed and I would appreciate it if the subcommittee would give some consideration to the position stated in the enclosed letter.

Kindest regards.

Very truly yours,

LEE S. KREINDLER,
Chairman, Aviation Law Section.

AMERICAN TRIAL LAWYERS ASSOCIATION,
AVIATION LAW SECTION,
New York, N.Y., April 5, 1965.

Re Federal public records law bill, S. 1160; H.R. 5012.

HON. EDWARD V. LONG,
U.S. Senate,
Washington, D.C.

HON. JOHN MOSS,
House of Representatives,
Washington, D.C.

HON. OGDEN R. REID,
House of Representatives,
Washington, D.C.

DEAR SENATOR LONG AND CONGRESSMEN MOSS AND REID: In behalf of the American Trial Lawyers Association, I certainly appreciate your cooperation in forwarding copies of the bills, a press release, and the hearings conducted last year.

I understand that hearings will be conducted next week with regard to this legislation, but trial commitments preclude my personal attendance despite an earnest desire to express the views of the association.

Perhaps you are aware that our association represents approximately 18,000 trial lawyers who specialize in civil tort litigation. Our publication *Trial*, has a circulation of 50,000 trial lawyers.

We strongly support passage of this legislation, with two reservations. The principle of full disclosure by governmental agencies cannot be seriously disputed.

A problem, however, arises in formulating and articulating the exceptions to the general principle.

The proposed legislation would establish a general rule requiring every agency to disclose "all its records." Eight exceptions to the general rule are specified. Our association favors and strongly supports exceptions (1), (3), (4), and (6) through (8).

We have, however, serious reservations concerning the scope of two exceptions, (2) and (5). Exception (2) would preclude the disclosure of matters "related solely to the internal personnel rules and practices of any agency." Exception (5) would preclude the disclosure of matter relating to "interagency of intra-agency memoranda or letters dealing solely with matters of law or policy."

The United States of America has frequently been involved in civil tort litigation where in it is claimed that Government personnel carelessly performed their duties in such a way as to cause damage to others. The Federal courts are vested with exclusive jurisdiction in such suits against the United States. The Federal Rules of Civil Procedure are, therefore, applicable and they adopt the principle of broad disclosure. Rules 34 and 26(b) provide the district court in which an action is pending with the discretion to direct any party to the litigation to produce documents which are relevant to the issues. Such documentation is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence, even though the documents sought are not in and of themselves admissible.

In the past, the Federal district courts have required the United States to produce for discovery in such litigation material related to the operational practices of the governmental agency involved, interagency and intra-agency memorandums and letters dealing with the policy affecting such operational practices. For example, the United States of America has been a party to litigation based upon the carelessness of Federal Aviation Agency employees in the manner in which they provided air traffic control over aircraft. In such litigation the Government has been required to produce personnel memorandums and directives, manuals, and related matter which established the standards of operation governing the manner in which Federal Aviation Agency personnel were obligated to perform their duties in controlling aircraft.

The language of exceptions (2) and (5) is such that, if broadly construed, a district court might be required to prevent disclosure of documents obtained in the past pursuant to the Federal Rules of Civil Procedure.

Exception (2) excludes from disclosure matters related to internal personnel rules and practices. In view of the general principle adopted by the bill, we are confident that it is not intended to embrace Federal Aviation Agency manuals, and all personnel memorandums which set the standards pursuant to which Government personnel perform their duties in relation to the public. Exception (5) suffers from the same criticism because letters which establish policy to guide operational personnel may thereby be excluded from discovery.

We are frank to admit that we are unable to formulate a change in the language of exceptions (2) and (5) which would enable the discovery of material previously available, but at the same time prevent disclosure of purely internal matter not related to operational activities affecting the public.

We do, however, suggest that an attempt be made to modify exceptions (2) and (5) with the above-mentioned comments in mind. One solution might be to amend the bill to include a statement of principle which would make clear that the exceptions are to be construed narrowly and that matter previously discoverable should continue to be discoverable. Another suggestion is that exception (2) be confined to "internal personnel rules related to hiring, firing, disciplinary action, promotion, and demotion" thereby deleting "and practices of any agency." The "practices" portion of exception (2) might be construed to relate to practices or operation affecting the public. Exception (5) might, perhaps, be amended to add a clause so that it reads: "interagency or intra-agency memoranda or letters dealing solely with matters of law or policy, but not of operational practices affecting members of the public."

We truly appreciate the opportunity to express these views. We are confident they will receive your prudent consideration.

Respectfully yours,

LEE S. KREINDLER,
Chairman, Aviation Law Section.

ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS,
Washington, D.C., May 12, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On August 3, 1964, this association recorded its objection to S. 1663 in the matter of revision of the Administrative Procedure Act. This subject is again under consideration in S. 1336, and we respectfully record herewith our objection to this bill.

The membership of the association includes both attorneys and other practitioners who have been admitted to practice before the Interstate Commerce Commission, members of State commissions engage in the regulation of transportation enterprises and, on an honorary basis, members of the Interstate Commerce Commission itself. The constitution of the association includes among its objects the promotion of the proper administration of the Interstate Commerce Act and related acts. The association is, therefore, intensely interested in maintaining and improving the efficiency and effectiveness of the regulatory process and, over the years, has participated in a number of studies of the organization and procedures of the Interstate Commerce Commission, designed to assist it, not only in keeping pace with, but in improved handling of its ever-increasing administrative burden.

The association is opposed to enactment of S. 1336. Indeed, with all deference, the association believes that S. 1336 represents an erroneous approach to the problem of administrative reform. In our view, far greater progress can be made by intensive examination of the difficulties and deficiencies of individual administrative agencies and selective revisions in their procedures (either by administrative rule or statutory change, if necessary) than by wholesale revision of the Administrative Procedure Act as proposed in S. 1336 and other pending bills.

Rules of procedure perform much the same function as the rules of a game, and adoption of a comprehensive and detailed code of administrative procedure is somewhat analogous to adoption of standard rules for the games of football, baseball, basketball, tennis. There are, to be sure, some problems which are common to all and which might be regulated by a single set of rules, but those areas are, we suggest, severely limited. Similarly, any effort to devise standard rules applicable to the details of administrative proceedings involving substantial individual differences necessitates either exceptions which will allow for such differences, or resort to a rule of such generality—or ambiguity—that it is largely useless. Examination even of the Administrative Procedure Act in its present form will provide numerous illustrations of the necessity for such exceptions or generalities; S. 1336 provides even more numerous and striking illustrations. An administrative procedure act applicable to all agencies should be confined to the preservation of essential constitutional guarantees.

It may well be suggested that, in adopting the Administrative Procedure Act in 1946, the Congress made its election to utilize a general, and generally applicable, code of administrative procedure to accomplish its purposes. We do not believe that it follows, however, that further improvement in the administrative process is best achieved by expanding the act into a more comprehensive and detailed set of rules. Such an effort necessarily ignores, or tends to obliterate, the differences among the hundred-or-so agencies subject to the act and the thousands of different types of proceedings before those agencies. Moreover, it largely discards the body of judicial precedents developed during the 18 years since adoption of the original act. Even if the many agencies subject to the act could eventually accommodate their procedures to the new code without loss of efficiency and effectiveness, it would seem apparent that the transition period would be a lengthy and difficult one, in which many, if not all, of the agencies would be forced to devote substantial time and effort to a reexamination and adjustment of their organizations and procedures to the new requirements, and during which the effects of many of the statutory changes would have to be determined by litigation.

We suspect that most of the problems which the draftsmen of the bill were attempting to solve exist only in connection with particular types of proceedings in one or a few agencies. We seriously doubt that there are widespread deficiencies among the agencies subject to the act which require correction or that the changes proposed are directed to deficiencies on a widespread scale. We believe it is erroneous to deal in this wholesale fashion with problems which are peculiar to individual agencies or types of proceedings.

Without burdening the subcommittee with a section-by-section discussion of of the proposed bill and its effects upon the functioning of the Interstate Commerce Commission, we can, with minor reservations, subscribe to the views expressed by Chairman Goff of the Interstate Commerce Commission in his statement before the subcommittee on July 22, 1964. We think there can be no question that S. 1336 would require major revisions in the procedures and operations of the Interstate Commerce Commission; that it would raise questions of interpretation and implied repeal of provisions of the Interstate Commerce Act, which would be settled only after years of litigation; and that it would, at least for an extended transition period, seriously disrupt the work of the Commission. And, in our view, the gains to be achieved could not possibly justify the cost.

We do not mean to imply, either that the Interstate Commerce Commission is operating at optimum efficiency, or that its procedures have achieved a degree of perfection which admits of no further improvement, and the Commission would, we are sure, readily admit this. On the contrary, there are always improvements which can be made and we have no doubt will, in due course, be made. For the most part, however, the Commission has ample statutory authority to effect those improvements, and we anticipate that the Commission will continue, as it has in the past, to survey its procedures and make improvements, through

changes in its rules of practice and adjustments in its own internal procedures and organization. If statutory changes are needed, we are confident that they will be proposed to the Congress and, in due course, effected, either by amendment of the Interstate Commerce Act, or, if appropriate, by amendment of the Administrative Procedure Act. In our view, however, the latter course should be followed only in cases where the change is necessary or desirable for all agencies to which the act applies, or is needed to clarify or correct administrative or judicial interpretations of the present act. In the vast majority of cases, we suggest that, if additional statutory authority or direction is required, it will be better provided through the statute under which the individual agency functions.

We are most appreciative of the interest of your subcommittee in further improving the administrative process and the efforts of your subcommittee and its staff to effect improvements, and we hope that our comments will not be misconstrued or regarded as unduly critical or destructive. We feel that the studies conducted by your subcommittee and its staff will undoubtedly prove worthwhile, even if, as we strongly recommend, the effort to rewrite the Administrative Procedure Act in its entirety is abandoned. In our view, however, that approach should be regarded as a last resort, to be employed only when it is clear that wholesale and drastic measures are necessary.

The Association of Interstate Commerce Commission Practitioners appreciates the opportunity to have this expression of its position on this bill placed in the printed record of these proceedings.

Respectfully,

WILLIAM L. BUSH, *President.*

STATEMENT OF C. T. "TAD" SANDERS, GENERAL MANAGER AND COUNSEL OF THE
CERTIFIED LIVESTOCK MARKETS ASSOCIATION

INTRODUCTORY

Mr. Chairman and members of the committee, the Certified Livestock Markets Association is a business trade association of more than 800 livestock auction markets and 38 State organizations of those markets. Each market is a small business which serves its trade area as a public livestock market in rendering market services to livestock owners and selling consigned livestock openly and competitively by auction.

"Certified livestock market" is a trademark name and identity of each such business gained through qualification in the trade association and adherence to an industry developed, high level, code of business standards applicable throughout its operations and services.

My name is C. T. "Tad" Sanders. I am general manager and counsel of the association.

Each Certified Livestock Market owner, the trade association, and myself appreciate this opportunity to present this statement in respect to S. 1336 as its provisions are intended to update and perfect the Administrative Procedure Act.

SCOPE OF THE STATEMENT

This statement is intended to illustrate some aspects of one regulatory law, and the regulations promulgated under it, as administered by the U.S. Department of Agriculture and directly applicable to each of the businesses which I represent in presenting this statement.

That law is the Packers and Stockyards Act, first enacted by Congress in 1921, amended in 1943, and broadened in scope to all livestock marketing businesses in 1958 (7 U.S.C. 181 et seq.). Under its provisions, the Secretary of Agriculture is delegated the power and authority to administer and enforce it.

Related to this delegation of authority is the Schwellenbach Act (5 U.S.C. 516a, et seq.) under which the Secretary has named a judicial officer before whom formal administrative complaints involving the act and regulations are determined under adopted rules of practice. Hearing examiners conduct the formal hearings which, if favorable to the Department, result in the issuance of cease-and-desist orders prohibiting certain trade practices and orders suspending registrations under the act for varying periods of time.

It should be borne in mind that each Certified Livestock Market business is a posted stockyard, registered and bonded as a market agency and thus fully

subject to the authority of the U.S. Department of Agriculture under the Packers and Stockyards Act.

OVERPOWERING APPLICATION OF AUTHORITY

Under what the U.S. Department of Agriculture refers to as its general policies applicable to procedures followed by its Packers and Stockyards Division including some 13 field offices, there are several courses pursued in respect to what it concludes through investigation are violations of the act or regulations.

First, those which are deemed minor violations may be informally discussed with the registrant involved and a letter of mutual understanding written by the representative of the Packers and Stockyards Division conducting such discussion.

Second, in what are considered more serious violations, discussions lead to the signing of a formal stipulation in which the offenses are set forth and the registrant agrees to refrain from such further conduct.

Finally, in those instances which the Packers and Stockyards Division feels are still of more serious consequence, a formal complaint is filed with the judicial officer of the Department, specifying the charges as violations and served by mail upon the respondent named. It is in this latter procedure where an overpowering exercise of authority comes into play to an extent which wholly disregards the ordinary rights and position of the person charged. Proper regard and respect for those rights are the foremost duty and responsibility of the branch of Government initiating the proceedings by reason of the extent and scope of the authority which is exercised.

A brief outline of the steps leading up to, and which follow, the filing of the formal complaint illustrates the overpowering position asserted.

1. Investigations: In the ordinary course of administrative operations, facilitated by comprehensive reports required to be filed by registrants, investigations are initiated. This involves full access to, and review of, all records of the registrant. Discussions with the registrant by the investigative officers generally follow. Some type or form of report of investigation with supporting documents of proof is forwarded to the Washington office of the Packers and Stockyards Division for review in respect to any violations believed to exist. This may, or may not, be deemed sufficient and additional investigative work may be done.

2. Decision on the facts developed: At some point a decision is arbitrarily reached by the U.S. Department of Agriculture's Packers and Stockyards Division as to the alternate course it decides to pursue. If this is by way of a formal complaint, the services of the Office of General Council are enlisted for the formal drafting of the charges to be alleged in it.

3. Filing of formal complaint: If the decision is to file a formal complaint, the timelag from investigation until actual filing is usually extensive and from 3 to 6 months. Such filing is made in offices of the judicial officer's hearing clerk in the Department in Washington, D.C. At the time such complaint is filed, a copy is served upon the respondent by certified mail, accompanied by a letter from the hearing clerk, which advises the respondent of the rules of practice requiring an answer and request for oral hearing within 20 days and in which a copy of the Packers and Stockyards Act and regulations are enclosed. Copies likewise go forward to the district office which initiated and conducted the investigation.

4. Press release: The Office of Information of the USDA prepares a press release concerning the complaint which is mailed to the press media timed to reach destination in the area of the residence of respondent at about the time he is served with the complaint. Distribution is also made to the general district offices of USDA where there are press officers who also reprint and make distribution of the release. A study of the context of these releases by weight of their sheer repetition raises a number of questions as to proper administrative procedure.

5. Office of General Counsel: Again, shortly after service of the complaint upon the respondent by mail, he receives a letter with the heading of the Office of General Counsel and signed by an attorney of that office which states that "this matter may be disposed of by consent order procedure, without hearing, if you desire." Copies of a form of answer consenting to an order are enclosed with instructions for execution and return. The respondent is also advised in this letter as to the name of the area supervisor

of the Packers and Stockyards Division with whom he may get in touch in respect to any questions he may have. This is the same office that initiated and handled the investigation, submitting its report to the Washington, D.C., office of the Packers and Stockyards Division with its recommendations. It should be borne in mind that this letter is mailed and received prior to expiration of the 20 days for answer by the respondent. It does not suggest nor refer to the advisability of consulting an attorney. It does not mention, if the answer is signed and an oral hearing thus avoided, upon the entry and service of the order, that again the whole press release routine is repeated in respect to such order similar to that involving the complaint. The suggested answer likewise contains an indication of the sanction intended to be included in the order proposed to be entered. This reflects wholly the judgment and policy of the agency and completely overlooks any judicial consideration of the severity of such sanction in the light of evidence presented bearing upon the circumstances.

6. Oral hearing: Such hearing results only if formally requested by the respondent and an answer is filed.

7. Order entered: In either instance, an order is eventually entered by the judicial officer without his ever having the parties, other than personnel of the U.S. Department of Agriculture, before him.

In the ordinary nature of human affairs, it is readily understandable that the respondent subject to this procedure feels that the whole punitive arm of government has been brought to bear on him to the disregard of other matters. He is confronted with what appears to be an imposing and overpowering force against which he has slight chance for consideration other than that predetermined by the arm of the U.S. Department of Agriculture.

This is a specific example repeated hundreds of times over each year directly affecting as many respondents, their businesses, their families, and positions in their respective communities. Still it is repeatedly stated by the U.S. Department of Agriculture that a criminal statute is not involved; probably so because the persons charged with a crime have far greater safeguards for the recognition and protection of their ordinary rights in such situations.

This unjust and unfair procedure is further illustrated in contrast to that applicable where the U.S. Department of Agriculture has no other recourse than to proceed in a court of law in respect to enforcement or administration of the provisions of the act.

A simple example in this respect is where a person subject to the act fails to register under it when required to do so. In such instance the matter is detailed and referred to the Department of Justice. If the evidence appears to justify such action, a complaint would be filed in Federal district court and served upon the person charged. The law and rules of Federal court procedure apply as to appearance, trial and determination of penalty. Amazingly, this is done repeatedly without the suggestive role of the agency so heavily played in the administrative procedure. No press releases, no suggested consent answer, no indicated source for helpful advice from the persons who initiated and completed the investigation leading to the formal proceedings, are present.

CONCLUSION

There are many alternate courses of action in bringing about a correction of the inequities so graphically illustrated by the examples of the policies and procedures followed by this one regulatory agency within a department of the Federal Government which I have set forth.

Our association, and the livestock market owners and businessmen that make it up, are not unmindful of the most desirable of these. It lies in the potentialities of simplification, mutual understanding, and confidence, which all pave the way for the maximum in voluntary compliance with that which is fundamentally rights, practical, and reasonable in the public interest. We shall continue to strive toward this end in our relations with those in Government who are involved.

At the same time, I hope that the example as related from repeated experiences in countless instances may assist the committee in its consideration of the whole perspective, looking toward improvements in the Administrative Procedure Act. These improvements will require and insure a proper basis of relationship.

We fully support the work the committee has undertaken and have every confidence in the merits of the results of its work and efforts.

COLUMBIA BROADCASTING SYSTEM, INC.,
New York, N.Y., June 1, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee
on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: CBS respectfully requests this opportunity to comment on some aspects of S. 1336 and S. 1879, now being considered by the subcommittee, which would amend the Administrative Procedure Act.

CBS, as a licensee of the Federal Communications Commission, has a direct interest in the structure of administrative procedures, and, as a news medium, has a direct interest in the freedom of information provisions. CBS is in general accord with the objectives of both bills and has the following comments with respect thereto.

1. Section 3 of S. 1336 and section 1002 of S. 1879 are the freedom-of-information provisions. Both sections go far toward achieving that full access to agency activities and information which is lacking under existing law, and CBS supports them. Because it is more specific, and, thus, less subject to question as to its meaning and intent, CBS favors section 3 of S. 1336. However, for clarification, we would suggest one change. Section 3(e)(4) exempts from the operation of section 3 "trade secrets and commercial or financial information obtained from the public and privileged or confidential." [Emphasis added.] This language was previously described as being designed to:

"* * * protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection * * *." Senate Report No. 1219, Committee on the Judiciary (88th Cong., 2d sess., to accompany S. 1666 (p. 13—1964)).

Considering the intent of this exemption, the words "obtained from the public" do not adequately define its reach. We recommend, therefore, that the words "the public" be deleted from 3(e)(4) and the words "any person," as defined in section 2(b), be substituted therefore.

2. Both S. 1336 and S. 1879 contain provisions for the issuance of "emergency rules" by agencies. Section 4(d) of S. 1336 authorizes the issuance of such rules without prior notice to, or opportunity to be heard by, the persons affected, when the agency finds that such action is "necessary in the public interest." In contrast, section 1003(d) of S. 1879 permits the issuance of such rules when the agency finds that "compliance with [administrative procedures] would be contrary to the public interest." As licensees of the Federal Communications Commission are aware, virtually every action taken by that agency pursuant to rulemaking is considered by it to be necessary in the public interest. Indeed, it will invariably so find in every opinion and order adopting a rule. To apply such a broad standard, then, to the operation of emergency rules would be to arm that agency, and other agencies, with the power to suspend the essential protection which is the *raison d'être* of any Administrative Procedure Act—due process. If agencies are to be granted such powers, at the very least, we submit, they should be required to meet the heavier burden of finding that protections otherwise accorded by law are not in the public interest—if, indeed, even that authority may constitutionally be granted to an agency.

We note also that section 1003(d) of S. 1879 restricts the authority to issue such rules to situations where they are "imperatively necessary for the preservation of public health, safety, or welfare"; in contrast, section 4(d) of S. 1336 is not so restrictive. In addition, section 1003(d) of S. 1879 limits the life of such rules, as "emergency rules" to a period of 6 months whereas section 4(d) of S. 1336 permits such rules to operate as "emergency rules" for a total of 18 months. For these reasons, if agency authority to issue emergency rules is considered necessary and desirable by Congress, we believe that, as between the two, section 1003(d) of S. 1336 is preferable.

3. Section 6(a) of S. 1336 and section 1005(a) of S. 1879 both assure the right of a person appearing before an agency in the course of an investigation or other proceeding to be accompanied, represented, and advised by counsel. CBS supports these provisions. It is desirable to make clear that these rights pertain to such proceedings since they have been questioned in some agency proceedings.

4. Section 6(e) of S. 1336 and section 1005(b) of S. 1879 deal with the issuance of subpoenas. Section 1005(b) authorizes subpoenas to be issued, on request, to any party to an adjudication and provides that such subpoenas "shall be enforced with discrimination between public and private parties." Section 6(e), in contrast, provides:

"Agency subpoenas authorized by law shall be issued to any party to rulemaking proceeding upon request upon a showing of general relevance and reasonable scope of the evidence sought."

Rulemaking is defined in section 2(c) of S. 1336 as the "agency process for the formulation, amendment, repeal of, or exception from a rule * * *." Rulemaking differs from an adjudication in that rulemaking is usually directed toward the adoption of procedural or substantive results that often directly and immediately affect many persons, indeed, entire industries, in a single stroke; whereas, adjudication more usually involves a limited number of parties litigating a specific factual situation.

Another significant difference is that unlike adjudication, industry representatives, as well as members of the public, are often encouraged by the agency to participate. For instance, in the presently pending Federal Communications Commission's Notice of Proposed Rulemaking, Docket No. 15971, relating to the distribution of television broadcast signals by community antenna television systems (CATV), the notice states: "All interested persons are invited to file comments on the rule amendments * * *" (par. 67); and then states: "It is also contemplated that oral testimony may be solicited * * *" (par. 68). Moreover, many rulemaking proceedings, and, as a consequence, procedural and substantive improvements in agency matters are generated by petitions for rulemaking filed by private parties.

CBS believes that the benefits now derived by responses to such invitations would be lost to the agency, if, by responding—or petitioning—a person thereby subjects himself to the possibility of subpoena by others. For this reason, and to continue to encourage the free exchange of ideas and arguments now occurring in rulemaking proceedings, CBS suggests the deletion of the above quoted section appearing in section 6(e). We note, in this connection, that the American Bar Association in its comments filed before this committee on May 13, 1965, said:

"We are inclined to think that the first sentence of section 6(e) providing for the issuance of subpoenas upon request of any party to an adjudication, should be limited to formal adjudication under section 5(a) * * *" (p. 17).

We support this American Bar Association recommendation, and the deletion of the above-quoted sentence.

5. Section 6(h) of S. 1336 provides for the availability of deposition and discovery "to the same extent and in the same manner" as in Federal district court civil proceedings. S. 1879 does not contain a similar provision. It is not clear whether section 6(h) would be applicable to rulemaking. The availability of these procedures to rulemaking would needlessly prolong the disposition of such proceedings, and are totally inappropriate thereto. For the same reasons discussed in paragraph 4 above, relating to subpoenas, we feel that participation in rulemaking proceedings will be discouraged if deposition and discovery were to be applied to those who might otherwise participate. We recommend, therefore, that section 6(h) be clarified to assure that deposition and discovery will be available only in formal adjudications under section 5(a).

6. Section 1009(g) of S. 1879 provides:

"If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the petitioner in such proceeding costs, a reasonable sum for attorney's fees (or any equivalent sum in lieu thereof), and damages (which may include damages to the public interest) incurred by other parties, including the United States."

CBS opposes this provision. Its inevitable effect will be to restrain genuine appeals from agency action. It threatens punitive damages, based on the vaguely worded concept "damages to the public interest," as a penalty for seeking review of agency actions.

The difficulties of statutory construction—the basis of all agency jurisdiction and authority—are well known. Justice Frankfurter has described them:

"The difficulties are inherent not only in the nature of words, of composition, and of legislation generally. They are often intensified by the subject matter of an enactment. The imagination which can draw an income tax statute to cover

the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself. Moreover, government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding * * *." "Some Reflections on the Reading of Statutes," 2 the Record of the Association of the Bar of the City of New York, No. 6 (1947).

By definition, a frivolous pleading is so manifestly insufficient, on its face, that it is unnecessary to delay judgment. If, therefore, a pleading is frivolous, it may be stricken and any delay caused thereby will be de minimus. On the other hand, if there is room for questioning agency jurisdiction or authority, our system of due process requires that the person shall have his day in court if he seeks it. To discourage it, by threat of punitive damages, is in effect to deny it. This provision should be deleted.

We appreciate this opportunity to record our views.

Very truly yours,

LEON R. BROOKS.

STATEMENT BY JULIUS FRANDSEN, WASHINGTON MANAGER OF UNITED PRESS INTERNATIONAL, IN CONNECTION WITH THE INFORMATION PROVISIONS OF S. 1160 AND S. 1336

United Press International is an American corporation engaged in the collection and dissemination of news throughout most of the world.

Since the day of its inception as United Press Associations in 1907, the United Press International has been a leader in combating all manner of barriers to the free flow of news—whether by exclusive contractual relationships, peacetime censorship, or, in the area with which these bills come to grips, the withholding of U.S. Government information at the source.

United Press International does not presume to comment on the legal concepts of the bills at hand or the scope of the eight specified exceptions, although some of the latter would seem to be susceptible to rather broad interpretations.

The management of United Press International, however, has directed me to state that it fully supports the objective of the bills, which as we understand it is to promote the freest possible flow of Federal Government information consistent with national security and those individual rights that must remain inviolate.

MAY 12, 1965.

MR. WILLARD W. GATCHELL,
Attorney at Law,
Washington, D.C.

DEAR MR. GATCHELL: Thank you most sincerely for your letter of May 10, 1965, with respect to our hearings on S. 1336.

Am taking the liberty of making your letter and attached suggestions a part of the record of the hearings.

Certainly appreciate your interest.

Kind regards.
Sincerely,

EDWARD V. LONG, *Chairman.*

MAY 10, 1965.

MR. BERNARD FENSTERWALD, JR.,
Chief Counsel, Committee on the Judiciary,
U.S. Senate.

DEAR MR. FENSTERWALD: You have been most helpful in keeping us informed of matters before the Subcommittee on Administrative Practice and Procedure, for which I am very grateful.

Being in practice for myself, I regret exceedingly that I find it impossible to be present during the hearings, but hope you will be able to at least read our suggestions for amendments to the bill S. 1336.

Sincerely yours,

WILLARD W. GATCHELL.

WASHINGTON, D.C., May 10, 1965.

HON. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate,
 Washington, D.C.*

DEAR SENATOR LONG: The hearings to be held by your subcommittee, starting May 12, on S. 1336 to amend the Administrative Procedure Act, are of great interest to those who practice before administrative agencies. Four of us were asked to suggest amendments for your consideration and I am enclosing our suggestions.

Mr. Howard Anderson is general counsel for the C. & P. Telephone Co., Washington, D.C. Mr. Starr Thomas is general counsel for the Santa Fe Railway, Chicago, Ill. Mr. Robert H. Young, with Morgan, Lewis & Bockius, 2107 Fidelity-Philadelphia Trust Building, Philadelphia, Pa., has had extensive practice before the Interstate Commerce Commission, Federal Communications Commission, and the Federal Power Commission. My own practice has been principally before the Federal Power Commission on whose staff I served for many years, the last seven as general counsel. Only the absolute necessity for taking care of pressing business of my clients precludes attendance at the hearing, for this is a most important occasion for practitioners.

Respectfully yours,

WILLARD W. GATCHELL.

SUGGESTED AMENDMENTS TO S. 1336 AND SUGGESTIONS FOR CLARIFICATION OF
 LEGISLATIVE INTENT

Taking up the bill by sections on which comment in this connection seems appropriate, the first suggestion is for clarification of legislative intent.

Section 2(d) does not, as did S. 1663, expressly include ratemaking as subject to adjudication. Nevertheless, under section 2(d) an order subject to adjudication is the final disposition by an agency "in any proceeding, including licensing, to determine the rights, obligations, and privileges of named parties." We, therefore, interpret section 2(d) as including ratemaking among the orders subject to adjudication.

An accounting order directed to a named party would also be adjudicatory, for it would determine the rights and obligations of the party, although the general prescription of a system of accounts would be rulemaking as applied to some general class. By the time an accounting order is issued against any party, the agency policy set out by a general rule prescribing a system of accounts would seem to be rather insulated against genuine judicial review. This has particular pertinency currently in connection with accelerated depreciation, deferred taxes, and similar questions. An agency policy on these questions should not be immune to judicial scrutiny through the device of a statement of policy adopted in another proceeding without judicial review. Section 2(d) purports to afford opportunity for such judicial review of ratemaking and accounting orders. If this is not the legislative intent, clarification is necessary.

Section 4(h) exempts five types of rules from rulemaking procedures, including "(4) minor exceptions from, revisions of, or refinements of rules which do not affect protected substantive rights." What rights are "protected"? The bill does not say and the provision opens the way for plenty of controversy, with the parties being placed at serious disadvantage by the agencies. Also, procedural rights should not be within the exemption.

Amendment suggested: Amend the fourth clause of section 4(h), page 12, lines 7 and 8 to read: "minor exceptions from, revisions of, or refinements of the rules which do not affect substantive or procedural rights: and (5)".

Section 6(e) authorizes the issuance of subpoenas in adjudicatory cases "upon request". In rulemaking, subpoenas authorized by law shall be issued to any party "upon request upon a showing of general relevance and reasonable scope of the evidence sought." There does not appear to be any reasonable basis for distinguishing the two types of actions when subpoenas should be issued. In all cases, general relevance and the reasonable scope of the evidence sought should be demonstrated. To open adjudicatory proceedings to the issuance of subpoenas merely upon request affords unequalled opportunity for parties to abuse the privilege and does not give any protection to the party against whom the subpoena is issued.

Amendment suggested: In section 6(e), page 19, line 1, after the word "adjudication", insert a comma and the words: "upon a showing of general relevance and reasonable scope of the evidence sought,".

Section 7(c), page 23, authorizes a presiding officer to require the submission of all or part of the evidence in written form. This is a reasonable provision and strengthens the role of the presiding officer. However, he should not be authorized to require the submission of answering or rebuttal evidence prior to the completion of cross-examination of testimony which it is answering or rebutting. The Federal Power Commission has been following this practice and it has worked uniformly to the disadvantage of the parties and of staff counsel. It is not due process and does not serve the ends of justice. The right of cross-examination should be preserved by the amendment which we suggest.

Suggested amendment: In section 7(c), page 23, at the end of line 21, change the period to a semicolon and add: "*Provided, however,* That written evidence in answer to, or rebuttal of, prior evidence shall not be required until cross-examination has been completed on the evidence or testimony which it is answering or rebutting."

Section 8(c)(1) authorizes an appeal from the decision of a presiding officer through the medium of exceptions which state specifically and concisely, among other things, the manner in which prejudicial error was committed in the conduct of the proceeding. By requiring a showing to be made that the error was "prejudicial," the section thus interposes an element which may well deprive a party of consideration, notwithstanding the fact that the presiding officer's conduct was in error. What is probably meant is merely that the party filing the exceptions has been hurt, but the injury comes from the error. Proof of prejudice should not be the decisive factor.

Amendment suggested: In section 8(c)(1), page 26, in the first line strike the word "prejudicial".

Section 8(c)(1) also authorizes exceptions appealing a decision of a presiding officer upon the ground (B) that the findings or conclusions of material fact were "clearly erroneous." Much has been written about the clearly erroneous doctrine. As a practical matter, in the day-to-day conduct of cases it frequently happens that erroneous decisions of presiding officers rest upon shadings of meaning and refinement of interpretation which would make absolute proof extremely difficult of clearly erroneous findings and conclusions of material fact. The following clause (C) merely calls for allegations that conclusions of law are "erroneous" and allegations concerning findings of material facts should be equally broad.

Amendment suggested: Clause (B) of section 8(c)(1), page 26, should be amended in line 3 by striking the word "clearly".

Section 10(a) gives to any person "adversely affected in fact" standing to seek judicial review of reviewable agency action. Many present statutes give such a right to any person "aggrieved" by an agency order; for example, Natural Gas Act, 15 U.S.C. 717r; Federal Power Act, 16 U.S.C. 825l. A considerable body of law has been developed to outline the meaning of "aggrievement." If the bill intends to broaden or restrict the authorization for judicial review by requiring a showing of "adverse effect", or some other connotation of "aggrievement" not apparent from the proposed language, the bill should be more precise in defining what is meant or the present statutory language should be retained. Moreover, in view of the present statutory authorizations for judicial review of administrative actions, the bill should state whether the new right to judicial review is to be in addition to or in substitution of the present right.

Amendment suggested: Amend section 10(a), page 29, lines 23 to 25, to read: "(a) RIGHT OF REVIEW.—Any person aggrieved by any reviewable agency action shall have standing and be entitled to judicial review thereof."

This report expresses the individual views of the undersigned for the information of others who may be interested. We do not purport to speak for any committee or section of any bar association. The limitations of time and distance have precluded our group discussion of a number of other practical problems of administrative and review procedures which seem to be treated inadequately in the bill. We are in agreement, however, that the bill will greatly prolong contested administrative proceedings and add to the cost to all parties, including the agencies and those results are not in the public interest.

Respectfully submitted.

WILLARD W. GATCHELL, *Chairman.*
HOWARD ANDERSON.
STARR THOMAS.
ROBERT H. YOUNG.

JUNE 9, 1965.

Mr. CHARLES D. ABLARD,
Vice President, Magazine Publishers Association, Inc.
New York, N.Y.

DEAR MR. ABLARD: Have received your recent letter concerning S. 1336 and S. 1758 and am taking the liberty of inserting it in the record of our hearings.

On behalf of the subcommittee, may I thank you and your association for your support and assistance on this legislation.

Kind regards,
 Sincerely,

EDWARD V. LONG, *Chairman.*

MAGAZINE PUBLISHERS ASSOCIATIONS, INC.,
New York, N.Y., May 17, 1965.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: On behalf of the Magazine Publishers Association and the American Society of Magazine Editors which represent 113 companies publishing over 300 magazines in the United States, I would like to add our voice in support of section 3 of S. 1336 and S. 1879 pending before your subcommittee which relates to public information.

Magazine publishers and editors believe that there should be the maximum interchange of information between the Government and the people and that the magazines of our Nation are effective disseminators of information to the people. The purpose of section 3 of the above bills is to require Government agencies to make "records promptly available to any person" unless that information falls within certain specified exempted categories. For too long, too many Government agencies have unduly restricted the availability of information. Much of this has been to protect officials from criticism in the press without any substantial security reason for withholding the information.

When the Administrative Procedure Act (5 U.S.C. 1001 et seq.) was enacted in 1946, the Senate Judiciary Committee described the basic intent of the public information section of that act as follows:

"* * * that administrative operations and procedures are public property which the general public * * * is entitled to know or have the ready means of knowing with definiteness and assurance." (S. Doc. 248, 79th Cong., 2d sess., p. 198, 1946.)

The House Judiciary Committee explained that: "all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required." (Id. 251-252.)

The expectations expressed in those reports have not been fulfilled. The act which was to have made information available has been used as authority for withholding thus necessitating amendments such as are included in the bills under consideration.

Magazine publishers and editors seek no special privileges on access to Government information. We recognize the need for restriction of certain information for security purposes. However, we believe that all categories of information which are not specifically exempted under the Constitution or the provisions of section 3 of the above bills should be available to the public and the press.

The enactment of S. 1336 and S. 1879 would recognize the right of the public to information relating to the operation of its Government. We support its enactment.

Sincerely,

CHARLES D. ABLARD.

STATEMENT OF VINCENT T. WASILEWSKI, PRESIDENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS, IN CONNECTION WITH S. 1160, S. 1336, AND S. 1879

This statement is presented by Vincent T. Wasilewski as president of the National Association of Broadcasters. The National Association of Broadcasters, or NAB, is a nonprofit corporation whose members include 2,141 AM, 864 FM, and 452 television stations, and all the national radio and television networks in the United States.

The NAB supports S. 1160, introduced by Senator Long of Missouri for himself and Senators Bartlett, Bayh, Boggs, Burdick, Case, Dirksen, Ervin, Fong, Hart, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff, Smathers, and Symington. The NAB also supports section 3 of S. 1336 introduced by Senator Dirksen and Senator Long of Missouri, and it looks with favor upon the general objective of S. 1879 introduced by Senator Ervin. S. 1160 and S. 1336 would define clearly the responsibility of Federal officers and agencies to make information available to the public; they would provide a procedure to compel the production of information improperly withheld; and they would provide that agency organization, policies, procedures, rules, opinions, and orders be accessible to the public.

The National Association of Broadcasters and its Freedom of Information Committee have long been opposed to any barriers to a free flow of information from Government to the American people. Broadcasters, as responsible journalists, are dedicated to serving and protecting the interest of the public in gaining access to information that is, or of right ought to be, public.

While it is recognized that one of the basic purposes of the Administrative Procedure Act was to require agencies to keep the public informed about their proceedings, there has been legitimate concern over the years that the exceptions and qualifications in the public information section of the act have served in some cases to suppress information in which the public has a legitimate interest, rather than to make it available as the Congress intended.

The problem of availability to the public of Government information has been before the Congress for several years. In the 85th Congress an amendment to the "housekeeping" statute (5 U.S.C. 22) was enacted to prevent agencies from using this statute as a basis for withholding information. NAB endorsed and actively supported that measure, but efforts to enact legislation defining in adequate terms a general public information policy for Government agencies have not been successful.

An informed people, capable of self-government, is the cornerstone of American democracy. Not only must voters have information upon which to judge the qualifications of their elected representatives; they must also know about the affairs of Government in order to render other vital judgments.

Administrative law in the United States is a growing body of information which affects the daily lives of all the people. It has been wisely said that to be just, the law must be certain. And if the law is to be certain, it must be known. The actions of administrative agencies intended to govern the rights of our citizens must be spread upon the public record.

We recognize the need for carefully designed exceptions which S. 1160 and section 3 of S. 1336 include. The NAB does not propose, and no responsible journalist proposes, that our Government lay the national security bare to potential enemies. Neither do we seek to disrupt the orderly procedures of government or expose information which is private in nature. Thus we view section 3(e)(4) as an essential part of both bills.

In the broadcasting industry, there are increasing demands from the licensing agency for information of a confidential business nature. This information concerns financial activities and business operations. At present under section 0.417 of the Rules of the Federal Communications Commission such information is not open to public inspection. This policy has the same logical basis as that expressed in section 6103 of the Internal Revenue Code which provides that, for reasons of public policy, tax returns are not open to examination and inspection. The subcommittee should make clear its intent in approving this legislation that section 3(e)(4) excepts from operation of the act all information submitted in confidence pursuant to statute or administrative rules or regulations, the disclosure of which would be a violation of personal privacy.

Over the years there have been numerous instances of unjustifiable withholding of information by government offices. Some cases are very serious—others simply ludicrous. The natural enemies of an informed public are secrecy without legitimate reason, automatic overclassification, "leaks," anonymous spokesmen, "handouts" that do not tell the whole story, and old-fashioned laziness. Some officials find it easier to draw the blinds than to keep the house in order, and complacent newsmen find it easier to rely on handouts and leaks than to seek the whole truth.

We believe that the spirit of the proposed law is at least as important as its letter. In some way there must be infused into all branches of government a dedication to disclosure of the truth to the American people. Every officer of

government should know that it is his duty to conceal only that which the law requires be concealed. All else belongs to the people. The doctrine of freedom of information ought to be confirmed in law.

NATIONAL EDITORIAL ASSOCIATION,
Washington, D.C., May 18, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: It has been my privilege and that of Mr. Walter Potter, publisher, Culpeper, Va., Star Exponent, and chairman of the National Editorial Association Legislative Committee, to appear on two occasions before your subcommittee to advise you of the support of our membership. Specifically we expressed our favor with S. 1666 sponsored by you and several of your colleagues in the 88th Congress and passed unanimously by the Senate last year.

Again we wish to be recorded as supporting S. 1160 and the companion section 3 of S. 1336 now being considered and which requires that Government agencies make records available to the public, subject to certain specific restrictive language.

To review our position:

On October 30, 1963, Mr. Potter and I appeared before your subcommittee to advise you that our more than 6,600 weekly and community daily newspapers have been informed of the bill then under discussion (a bill almost identical with S. 1160) and that explanatory articles had been carried in the publications of the association.

Full discussion of this pending legislation was held with representatives of several hundred newspapers at the 1963 fall meeting of the association in Memphis. At this meeting the NEA passed unanimously a resolution commending you and your fellow committee members for vigorously sponsoring this legislation.

We quote briefly from our statement of that date:

"As the voice of the hometown press, NEA is particularly concerned about denial of access to information at the local level * * * The Federal Government has representatives in every county of the Nation, all of whom would be affected by this bill * * *."

"All of these Federal officials are prospective news sources * * * and all of these officials are bound by rules established in Washington. This bill does not just affect the headquarters bureaucrats but those in the field as well * * *."

We also pointed out that NEA's interest in this legislation is the byproduct effect that Federal practices have upon State and local practices. News suppression at the national level begets news suppression at the local level.

In the 32 years since I first came to Washington, D.C. to work for a newspaper in March 1933, I have seen agencies and bureaus of Federal Government proliferate under the goading pressures of a depression, recovery, world war, overseas police actions, atomic energy, and space rocketry.

If we had the knowledge then that we have now of the tremendous changes in government that have occurred in these last three decades we may well have incorporated the necessary safeguards in the legislation creating all these new bodies of government.

But, the need for haste to get the task underway, and the pressures for action prevented many new agencies from having incorporated in their enabling acts an example of which we cite—namely, section 303 of Public Law 85-568 creating the National Aeronautics and Space Agency. It reads:

"Sec. 303. Information obtained or developed by the Administrator in the performance of his functions under the Act shall be made available for public inspection, except (A) information authorized or required by Federal statute to be withheld, and (B) information classified to protect the national security: *Provided*, That nothing in this Act shall authorize the withholding of information by the Administrator from the duly authorized committees of the Congress."

Would that more language of this kind were to be found for other boards, agencies, and commissions of the Federal Government.

On July 21, 1964, we wrote to you that "we (NEA) are somewhat perturbed that your committee seems to have leaned over backward to write into the bill safeguards urged by departments and agencies of the Federal Government." At the same time we complimented you on the consideration given at our request

to Richard Cardwell, general counsel of the Hoosier State Press Association who asked for unmistakably "clear limits upon the definition of 'public interest' and the 'right of privacy.'"

We reiterate what we said then—namely, that we must leave to learned counsel the exact phrasing of this worthwhile legislation. And we must conclude with the same remarks we made to the House Foreign Operations and Government Information Subcommittee, last month when we appeared in support of a companion bill before that committee.

These words:

"This subject has had a full airing. The laws of this country are made by Congress and it is high time that secrecy-minded Federal officials are given a reminder of that fact.

We respectfully submit that the Congress enact such legislation as is contained in S. 1160 (and sec. 3 of S. 1336). By so doing you have the support of the grassroots press of America and our continued gratitude.

Most sincerely,

THEODORE A. SERRILL,
Executive Vice President for Walter Potter, Chairman, Legislative Committee, on behalf of the National Editorial Association.

NATIONAL MILK PRODUCERS FEDERATION,
Washington, D.C., June 1, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee, Administrative Practice and Procedure, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: We shall greatly appreciate it if you will place in the record of the hearing on S. 1336, this statement opposing the bill.

The National Milk Producers Federation is a national farm organization. It represents dairy farmers and the dairy cooperative associations which they own and operate and through which the act together to process and market the milk and butter fats produced on their farms.

The federation is directly concerned with the administration and operation of Federal milk marketing orders issued under the authority of the Agricultural Marketing Agreement Act of 1937.

In general, these orders insure orderly marketing of milk in metropolitan areas by providing Federal supervision over prices paid to dairy farmers for milk. The price for milk utilized for fluid consumption is higher than that used in the manufacture of dairy products. The Federal orders set the minimum price for each class of milk and the market administrators in the respective markets see that each processor pays the correct price on the portions of milk used in each class.

The proceeds of all milk delivered by all farmers on the market is pooled, and a blend price paid to the farmers. Thus all farmers share equally in the use made of milk in the market without regard to the actual use made of any particular milk. In some markets the milk is pooled as to all farmers supplying each processor rather than as to all farmers supplying all processors.

The result is a stabilized market at the farmer level because all farmers share alike in the pooled milk and are not pitted against each other. Furthermore, processors in the regulated markets compete on equal terms since the basic cost of milk to each is the same. One important aspect of the Federal order program is that the minimum price to the farmers tends to isolate the farmers against price wars between competing processors. Otherwise, these conflicts are often waged at the farmers' expense.

The Federal order program is very important to the Nation as a whole because it assures adequate supplies to high-quality milk at prices which are reasonable both to consumers and the farmers.

The Department of Agriculture administers the program from a national level while market administrators under the direction of the Department of Agriculture administer the orders at the local levels.

There are in effect about 75 Federal milk marketing orders. They regulate roughly half of the milk marketed in the United States. Milk regulated under the orders in 1964 was approximately 54.4 billion pounds having a value of over \$2 billion.

The regulation of this milk is extremely delicate and requires expert knowledge and administrative discretion. In addition to providing for the needs of in-

dividual markets, the various markets must be kept closely related to each other to avoid undesirable shifts of supplies between markets.

Marketing orders are issued after a hearing and upon a hearing record as provided in the statute. They, therefore, would fall under the formal requirements for rulemaking set out in section 7 of the proposed bill.

S. 1336, if enacted in its present form, would present serious problems in the administration of Federal milk marketing orders including those summarized below.

Reenactment with some rewording of the whole Administrative Procedure Act by adoption of S. 1336 may raise new questions of interpretation which now are settled by precedents.

A formalized judicial type of procedure has one value with respect to adjudicatory matters which are more or less adversary in nature and adapted to court procedure. Rulemaking, however, is quite another matter, because here the hearing is legislative in character rather than judicial. Marketing order hearings are, in effect, an extension of the legislative process, Congress having adopted general rules and directed the agency to develop the details and fit them to the respective markets.

We are concerned about whether the proposed administrative procedures would extend to the administrators in the individual markets. If so, regulation of the markets would be seriously impaired. Decisions made by the administrators range from billing processors for milk based on audits to apportioning proceeds of milk among the farmers.

The requirement of S. 1336 that initial decisions in rulemaking be made by the hearing officer would be impractical in the case of Federal milk marketing orders. The decisions are made now by the Secretary of Agriculture. This is necessary because of the very great importance of keeping markets aligned and the need to provide a uniform policy.

There also is need to coordinate the order programs, with the sector of the dairy industry which is not subject to such regulation.

Section 10(a) of S. 1336 would permit judicial review to any person adversely affected in fact by any reviewable agency action. This would create problems with respect to Federal milk marketing orders where review is restricted and processors are required first to exhaust an administrative review remedy provided in the statute.

The statute also provides that the marketing order can be enforced while review proceedings are pending. The purpose of the statute is to put an end to disorderly marketing. Any provision which permits disorderly marketing to continue pending review or other time-consuming procedures would be contrary to the objective of the statute and not in the public interest.

The bill places great emphasis on formal procedure over substance. Section 10(e) provides that a reviewing court shall hold unlawful and set aside agency action found to be without observance of procedures required by law. There is no limitation here that the procedural defect shall have been substantial or have contributed to the decision which the complaining party wishes to set aside.

Elevating procedure over substance would be a reversal of the important trend which has been developing in the last few years to attach less importance to form and more to substance.

The following quotation from the policy resolutions of the federation states quite clearly our position.

"The federation is opposed to changes in the procedures relating to Federal milk marketing orders which would make them more judicial or place decisions as to the details of milk marketing regulations in the hands of judicial rather than milk marketing experts."

Sincerely,

E. M. NORTON, *Secretary.*

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, INC.,

May 17, 1965.

Senator EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: Thank you for your letter of May 5 regarding the hearings involving freedom of the press.

Going along with your thinking, I feel that this letter will suffice to set forth that the National Press Photographers Association endorses the legislation being

considered, feeling that anything that intends to guarantee the right of the public to know is in the best interests of this Nation.

Sincerely yours,

OLLIE ATKINS,
Chairman, Freedom of Information Committee.

MAY 5, 1965.

Mr. OLLIE ATKINS,
*President, Freedom of Information Committee,
National Press Photographers, Fairfax, Va.*

DEAR MR. ATKINS: Thank you most sincerely for your recent letter.

Do not believe it will be necessary to have a representative at our hearings, but a statement on behalf of your association would certainly be helpful.

Believe normally that "copying" would be by means of a reproduction machine. However, if facilities are available, I see no reason why documents could not be either photostated or photographed. Modern photography being what it is, I can foresee circumstances where making copies would be safer and easier by photographing than any other way.

We look forward to any statement you might wish to submit.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, INC.,
April 5, 1965.

Senator EDWARD V. LONG,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR LONG: Thank you for your letter of March 30 with regard to the freedom of information bills pending in Congress.

Just last week Joe Costa represented the National Press Photographers Association before the Moss committee on this same general subject.

We are certainly in favor of these bills which tend to give the public more sight into government operations of all kinds. Looking through S. 1336 I just wonder if in the section entitled "Public Information" and specifically on page 5, line 5, that information includes the right to make photographs. On page 6, line 3, it mentions "public inspection and copying." I ask, Does copying mean the right to photograph?

We have found in past experience that unless the word "photograph" is included in public instructions, it often takes a group of Philadelphia lawyers to interpret the instructions so that the right to photograph is allowed. Except for this, the bill certainly meets with our approval and we endorse it heartily.

If you feel you would like a representative of our organization to testify from the visual media's point of view, I shall be happy to have a competent representative appear before the committee at your pleasure.

Sincerely yours,

OLLIE ATKINS,
Chairman, Freedom of Information Committee.

NEW ENGLAND PRESS ASSOCIATION,
NORTHEASTERN UNIVERSITY,
Boston, Mass., June 16, 1965.

Senator EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure,
U.S. Senate, Washington, D.C.*

DEAR SENATOR LONG: I am writing to have the New England Press Association placed on record as enthusiastically supporting your freedom of information legislation, bills S. 1160 and S. 1336.

The New England Press Association numbers nearly 200 weekly and community daily newspapers in the 6-State area and its members have been following with great interest your repeated efforts on behalf of the people's right to know.

You are to be commended for your diligent and effective work in this regard. This is truly a public service.

As you well know, one of the major responsibilities of a free press in an enlightened society is to help keep the flow of information moving. This flow from our Government is not possible, however, if the information is stopped at its source. The Founding Fathers of our country were well aware of this as have been the courts over the decades. Now is the time for our legislative branch of Government to recognize this problem. You have recognized it and are doing something about it.

On behalf of the more than 2 million New Englanders served by our newspapers, we salute you for what you are doing and wish you Godspeed in your efforts.

Sincerely yours,

GEORGE SPEERS, *General Manager.*

STATEMENT BY RALPH SEWELL, NATIONAL PRESIDENT OF SIGMA DELTA CHI; JULIUS FRANDSEN, CHAIRMAN OF THE SDX FREEDOM OF INFORMATION COMMITTEE; AND CLARK MOLLENHOFF, VICE CHAIRMAN, IN SUPPORT OF S. 1160 AND THE INFORMATION PROVISIONS OF S. 1336

Sigma Delta Chi, the professional journalism society of 17,000 news reporters, editors, and others, favors the legislation proposed by Senator Long and others to, as stated in S. 1160, "clarify and protect the right of the public to information."

The intent of the legislation as spelled out by the Senate Committee on the Judiciary in the report of July 22, 1964, on S. 1666 is certainly in the spirit of open government and is a step forward in the general area of freedom of information.

We were encouraged by the Senate's passage of S. 1666 last year, and hope very much that S. 1160 (or the equivalent language as incorporated in S. 1336) will be finally enacted by this session of Congress.

We urge passage of this legislation, even though at the same time we urge the committee to take a closer look at some of the language covering exceptions.

We are particularly pleased with those sections of the bills that are designed to make it possible for citizens or representatives of news media to go into the Federal court to force the production of information that is not covered by one of the eight exempted areas.

Of course, it would be preferable if there were no exempted areas of information and if this legislation could be drawn to force all government to be handled in the open. We are realistic about the need for some exemptions, but believe that the list of exemptions should be as small as is possible and as specific as possible.

If the categories of exemptions are spelled out in too vague a manner, we know from past experience that there will be great danger that some bureaucrats will use these new laws to make broad new claims of a legal right for unjustified secrecy.

While we understand the arguments behind each of the eight exempt areas, we wish to point out that it is likely that there will be abuse and distortion of these exemptions unless the legislative history is so clear that it cannot be misinterpreted. We recall that the so-called housekeeping statute, 5 U.S.C. 22, was not intended to be a law to authorize the withholding of information from the press or the public. However, a survey by Senate and House committees a few years ago demonstrated clearly that officials of the executive branch of government were taking a few phrases in that law and twisting them into misguided legal opinions authorizing the withholding of Government information and documents.

Regardless of the intent of the sponsors in introducing this legislation, we know that it is possible that this legislation can be warped into something not intended by the men who introduced it. There will always be a few political figures who wish to stretch or distort the law to hide their crimes or mismanagement. There will always be some bureaucrats who will take the view that the Government agency that pays their salaries has become their personal property, and is not subject to examination and criticism by the public, Congress, or the press.

With that reality in mind, let us examine each of the categories of exception.

Certainly we could not quarrel with a provision that permits the withholding of information when it is deemed essential for the protection of the national defense or foreign policy. However, even as we agree that this secrecy is needed, we should understand that the claim of "national security" has been used to hide mismanagement in the past. All of us can remember some incidents when "national security" demanded that there be no discussion of certain information when disclosure tended to embarrass an administration. However, we have seen the same type of information distributed freely by a President, a Defense Secretary, or a Secretary of State when it served the political purposes of an administration.

The second exception relates to the internal personnel rules and practices of an agency of Government. There are many personnel cases, and there are some rules and practices that probably should not be made a matter of public discussion. However, this appears to be a broad exception that could be stretched to hide all types of arbitrary and unfair activities in the handling of Government personnel.

The third exception deals with protecting those matters which are "specifically exempted from disclosure by statute." This is less susceptible to any general misinterpretation since the withholding is under specific statutes.

The fourth exception deals with "trade secrets and commercial or financial information obtained from the public and privileged or confidential." This provision would seem to follow an agreed area.

The fifth exception would exempt "intraagency or interagency memorandums or letters dealing solely with matters of law or policy." Even if this is closely restricted in its application, it can be used to hide a great deal of information dealing with legal opinions and policy. It is often the erratic policy papers or the cleverly worded legal opinion that is the key document in such controversies as the tax scandals, the Dixon-Yates scandal, the stockpiling scandals, or the Billie Sol Estes scandals. The danger of the broadest secrecy flowing from this exception should be apparent to anyone who has examined the details of these scandals. The argument that all agency business cannot be carried on "in a goldfish bowl" may have some merit from a standpoint of efficiency. However, it is a short step to the philosophy the secrecy promotes efficiency, and that therefore secret government is something that should be promoted. It is precisely that philosophy that we are trying to end by supporting the pending legislation.

Exception six is for the purpose of protecting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We have no quarrel with the exception if administered within the spirit of the report issued by the Senate Judiciary Committee last year, but we are aware of how this so-called protection of personnel files has been twisted in the past. The secrecy is for the purpose of protecting the individual government employee from embarrassment and from "unwarranted invasion of personal privacy." Yet, the secrecy on personnel files has often been used to the detriment of the individual Government employee who has been barred from seeing his own file, and has been prevented from letting his own lawyer or doctor examine his personnel files. It is well to keep some of those more unfortunate experiences in mind as classic examples of what should not be done in administering the exceptions.

There is no quarrel with the exemption for investigatory files.

Exception eight deals with the insuring of a secrecy on reports submitted by financial institutions to the Government agencies responsible for regulating and supervising these financial institutions. This would appear to be a reasonable exception to assure the banking institutions that the information submitted on a confidential basis to a regulatory authority will not be distributed publicly to the detriment of the firm submitting the material. Of course, there are instances when the whole problem of reports must be made public—as in the current McClellan subcommittee investigation of the events surrounding the closing of the San Francisco National Bank. However, this information should be secret until such unusual circumstances exist that require a full review of all acts by Federal bank examiners and all information submitted by bank officials.

We realize that it would be impossible to draw legislation that would be a certain safeguard against all of the tendencies toward excessive secrecy that prevail. We hope that the warnings we have given on possible misuse of this legislation will be helpful, and will alert the Senate and the House to make

the strongest possible legislative history in opposition to the philosophy of broad withholding.

We are glad to see that this legislation spells out clearly the right of Congress to obtain even the information in the eight excepted categories.

Sigma Delta Chi is in agreement with what you are trying to do by this legislation, and we are hopeful that it will achieve the goals it is designed to achieve.

WESTERN OIL AND GAS ASSOCIATION,
Los Angeles, Calif., May 7, 1965.

Re section 3 of S. 1336; 89th Congress.

HON. EDWARD V. LONG,

U.S. Senate, Subcommittee on Administrative Practices and Procedures, New Senate Office Building, Washington, D.C.

DEAR SENATOR LONG: The Western Oil and Gas Association respectfully submits this statement for filing in connection with the public hearings on S. 1336, the proposed bill to amend the Administrative Procedure Act. We also wish to thank the committee for this opportunity to express our views on this proposed legislation.

The association is deeply appreciative of the great amount of time and energy which has been spent in the preparation of this measure.

There are many departments and agencies affected by the bill. They exercise legislative, executive, and judicial functions which regulate both big and little business.

The heart of the matter to which we speak is that the people who operate these departments are able and competent and should be given adequate discretion in their operations.

This same view was recently expressed by an administration spokesman whose testimony before the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations, House of Representatives, on H.R. 5012, another "freedom of information" bill, which contains a section identical to the "trade secrets" provision referred to below, was reported in the Los Angeles Times on March 31, 1965. Mr. Norbert A. Schlei, Assistant Attorney General of the United States, was there quoted as saying that the administration is "unalterably opposed" to legislation which would permit public inspection of most Federal department records. He said that, while the administration appreciates "the public's right to know," it, nevertheless, is committed to the view that the public interest can only be protected if the executive branch of the Government retains a degree of discretion as to what should and should not be made public. He added that "the situation is too complicated to be resolved by a set of rules written into law." With this latter statement, we are in complete agreement if that law were to be one of stereotyped inflexibility.

From the foregoing, it is obvious that we are not here concerned with S. 1336 in its entirety, but only with section 3 of the act, covering public information. More accurately, perhaps, we are concerned with the legislative history of similar legislation which underscores the dangers inherent in section 3 of S. 1336.

S. 1666 was introduced on June 4, 1963, for the purpose of amending section 3 of the Administrative Procedure Act. Its provisions are much like those contained in the comparable section of S. 1336. This is particularly true in the case of section 3(c)(4) of S. 1666 and section 3(e)(4) of S. 1336, relating to the so-called "trade secrets."

As amended, S. 1666 provides that there shall be exempt from disclosure "trade secrets and other information obtained from the public and customarily privileged or confidential."

S. 1336 exempts "trade secrets and commercial or financial information obtained from the public and privileged or confidential."

While we found some solace in these words when first read, our perturbation again arose upon reading the Senate Committee on the Judiciary Report No. 1219, to accompany S. 1666, dated July 22, 1964. That report makes it quite clear that it was not the legislative intent to give to the quoted words their full significance, but rather that their usage should be sharply restricted and confined to the specific situations described in the report.

On page 6 of the report we find the following:

"This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but

which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges.

To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection, subject to the payment of lawfully prescribed fees to cover the expense of making the information available, such as bringing it from storage warehouses. [Emphasis added.]

That the committee quite clearly intended that the "trade secrets" exemption should be given this restricted interpretation is further evidenced by its statement in the report at page 8 where it is said that the purpose of the bill (S. 1666) is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language * * *."

On the other hand, the present provisions of the Administrative Procedure Act (as set forth in 5 United States Code Annotated) provide in subsection 1002(b) that:

"Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (*except those required for good cause to be held confidential and not cited as precedents*) and all rules." [Emphasis added.]

In commenting upon this provision, the report states that "Although subsection (b) requires the agency to make available to public inspection 'all final opinions or orders in the adjudication of cases,' it negates this comment by adding the following limitation: '* * * except those required for good cause to be held confidential * * *.'"

The report continues by saying that "As to public records generally, subsection (c) requires their availability *'to persons properly and directly concerned except information held confidential for good cause found.'* This is a double-barreled loophole because not only is there the vague phrase 'for good cause found,' but there is also a further excuse for withholding if persons are not 'properly and directly concerned.'" [Emphasis added.]

From the foregoing it is obvious that, under the present provisions of the act, the agencies have had at least some discretion with respect to what shall and shall not be made available to the public. We respectfully submit that some such degree of agency discretion is essential to the equitable administration of the act. Our position in this regard may best be illustrated by citing a case in point.

In 1963, one of the member companies of our association spent approximately \$1½ million on geophysical and seismic survey work in the northern slope area of Alaska's Kenai Peninsula. Other companies had spent added millions. After completion of this work, the first-mentioned company filed approximately 78 oil and gas entry cards offering to lease designated parcels of land. However, it was the successful drawee on only three offers to lease out of the total number filed.

After the drawing, it was brought to the company's attention that a scouting service and certain lease brokers were attempting to secure, from the Bureau of Land Management office in Alaska, the legal descriptions contained in the offers to lease which had been submitted by all unsuccessful applicants, and especially those submitted by the oil companies. This information was desired, of course, so that the scouting services and brokers could then sell it to interested persons or beat the oil companies to the successful lessees so that they could then deal with them as middlemen. Obviously, by securing the legal descriptions of the land on which the oil companies had sought leases, the service or broker would then have a complete geological map showing the structures or areas where the expenditure of a vast amount of time and money and the utilization of technological skills had indicated that further expenditures for exploratory drilling might be justified. The ready availability of this information would obviously greatly increase the cost of acquisition of leases by the oil companies and make it almost impossible to block up sufficient acreage to justify exploration by any one company.

Upon learning of the intent of the scouting service and brokers, the company filed a protest with the Bureau of Land Management, and pursued the matter further by sending two men to Washington, D.C., in connection with the protest.

As a result of these protests, the State Director of the Bureau in Alaska was instructed not to permit inspection of the entry cards of unsuccessful offerors pending consideration of the protest.

However, a decision subsequently was reached holding that entry cards are public records and available for inspection under departmental regulations, 43 CFR, part 2. That regulation reads as follows:

"Unless the disclosure of matters of official record would be prejudicial to the interests of the Government, they shall be made available for inspection or copying, and copies may be furnished, during regular business hours at the request of persons properly and directly concerned with such matters. Requests for permission to inspect official records or for copies will be handled with due regard for the dispatch of other public business."

It should be particularly noted that only matters "prejudicial to the interests of the Government" are exempt from disclosure. We believe that this highly restrictive regulation, disregarding as it does both public and private interests, is contrary to the letter and spirit of both section 3 of the Administrative Procedure Act, and of section 3 of S. 1336, here under consideration.

Nevertheless, a subsequent published notice of availability for noncompetitive oil and gas leasing of northern Alaska lands (F.R. doc. 65-914; filed January 27, 1965) specifically provided that the drawing entry cards of unsuccessful applicants would be made available for public inspection 60 days after the drawing had been completed, thus giving the oil companies a 60-day period in which to try to put blocks of leases together without broker interference. Under the regulation, the Bureau might well have provided for the immediate release of the information without the 60-day delay unless, of course, the applicants were determined to be persons not "properly and directly concerned with such matters."

Because of the Bureau regulation and the notice that entry cards of unsuccessful applicants would be made public as indicated, some major oil companies wholly refrained from filing any applications although additional millions had been spent on exploratory work.

For all of these reasons we urge that appropriate amendments to protect both private and public interests be incorporated in section 3 of S. 1336, or that it be made crystal clear that it is the legislative intent that the "trade secrets" exemption shall be given a reasonably broad interpretation so as to preclude the possibility of unconscionable disclosures of confidential information.

In addition to the cited experience in Alaska, we feel that there must be many business activities in other fields involving the submission of applications and documents which contain information which ought to be retained as confidential by the agency to which it is submitted.

Within our own industry, applications for designation and approval of unit areas and unitization agreements must be filed with the U.S. Geological Survey. Knowledge of these areas, if obtained by oil and gas scouting services and brokers, would greatly increase the cost of lease acquisitions, and would delay and be highly detrimental to the further exploration for oil and gas on the public domain. These applications, and the geological information contained in them, are presently held confidential by the Geological Survey office. We seriously question that the confidential status of these documents could be lawfully maintained either under the provisions of S. 1666 or under the present provisions of section 3 of S. 1336.

Respectfully submitted.

FELIX CHAPPELLET,
Vice President and General Manager.

EXHIBITS

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Portsmouth, Va., June 8, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your kindness in having forwarded my letter of May 12 re S. 1336 to Senator Edward V. Long, chairman of the Subcommittee on Administrative Practice and Procedure.

Any efforts you can bring to bear in amending said bill to include the realistic designation of "administrative judge" in lieu of the multiplicitous titles, "presiding officer," etc., will be greatly appreciated.

Sincerely yours,

ALFRED F. CHATTERTON, *Hearing Examiner.*

MAY 19, 1965.

MR. ALFRED F. CHATTERTON,
Hearing Examiner, Treasury Department,
Portsmouth, Va.

DEAR MR. CHATTERTON: Have received your recent letter with respect to S. 1336.

Appreciate very much hearing from you and having your comments on this measure.

Shall pass the information along to the staff of the subcommittee which is looking into this proposal.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Portsmouth, Va., May 12, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
Washington, D.C.

DEAR SENATOR LONG: You are to be congratulated for your efforts seeking to overhaul the Administrative Procedure Act, particularly with the fruition of this zeal as encapsuled within S. 1336 captioned "A Bill To Amend the Administrative Procedure Act, and for Other Purposes." I know this bill results from fabulous industry and ingenuity, plugging up this hole and casting out that net against all possible evasions. However, I submit this outstanding bill can be substantially improved by the deletion of the multiplicitous designations of "officer," "presiding officer," "examiner," and "hearing examiner" appearing therein and substituting in lieu thereof the realistic term "administrative judge," a title suggested by the Honorable E. Barrett Prettyman in his remarks as made to the Federal Trial Examiners Conference on May 9, 1962.

We who have had to thread the path of the Administrative Procedure Act through its fantastic labyrinths these many years have, I submit, earned this status; for, as with the judiciary, our duties involve composing inconsistencies, unraveling confusions, announcing unrecognized implications, and having made, in Holmes' now hackneyed phrase, "interstitial" advances in the field of administrative law—an area dealing preeminently with law in the making; with fluid tendencies and tentative traditions, accomplishments totally foreign to the connotation of the title "Hearing Examiner."

Of course, in proposing this amendment of S. 1336, I have tried to observe certain canons of criticism that are usually neglected because they are so obvious, for as headlines announce the occasional egregious blunder, the day-by-day achievement is unchronicled. Virtue is proverbially not news, and appreciation of achievement in Government, except when attained on the colossal scale of a moon shot or in the dramatized conflict of foreign relations, is all too dependent on dull technical details. This, apparently, has been the case with our accomplishments under the Administrative Procedure Act.

I am well aware that you have a passion for fairness and, therefore, I trust will lend support and assist me in my efforts seeking this recognition.

Thank you for your consideration in my behalf.

Sincerely yours,

ALFRED F. CHATTERTON, *Hearing Examiner.*

JUNE 2, 1965.

MR. ALFRED F. CHATTERTON,
Hearing Examiner,
Portsmouth, Va.

DEAR MR. CHATTERTON: Senator Eastland has forwarded your letter of May 12 to me for reply.

See my letter to you of May 20. We will give your suggestions every consideration.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Portsmouth, Va., May 12, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Currently the Subcommittee on Administrative Practice and Procedure of your Committee on the Judiciary has under consideration a bill in which I am vitally interested; i.e., S. 1336, captioned, "A bill to amend the Administrative Procedure Act, and for other purposes." I know this bill results from fabulous industry and ingenuity, plugging up this hole and casting out that net against all possible evasions. However, I submit this outstanding bill can be substantially improved by the deletion of the multiplicitous designations of "officer," "presiding officer," "examiner," and "hearing examiner" appearing therein and substituting in lieu thereof the realistic term "administrative judge," a title suggested by the Honorable E. Barrett Prettyman in his remarks as made to the Federal Trial Examiners Conference on May 9, 1962.

We who have had to thread the path of the Administrative Procedure Act through its fantastic labyrinths these many years have, I submit, earned this status; for, as with the judiciary, our duties involve composing inconsistencies, unraveling confusions, announcing unrecognized implications, and having made, in Holmes' now hackneyed phrase, "interstitial" advances in the field of administrative law—an area dealing preeminently with law in the making; with fluid tendencies and tentative traditions, accomplishments totally foreign to the connotation of the title "hearing examiner."

Of course, in proposing this amendment of S. 1336, I have tried to observe certain canons of criticism that are usually neglected because they are so obvious, for as headlines announce the occasional egregious blunder, the day-by-day achievement is unchronicled. Virtue is proverbially not news, and appreciation of achievement in government, except when attained on the colossal scale of a moon shot or in the dramatized conflict of foreign relations, is all too dependent on dull technical details. This, apparently, has been the case with our accomplishments under the Administrative Procedure Act.

I am well aware that you have a passion for fairness and, therefore, I trust will lend support and assist me in my efforts seeking this recognition.

Thank you for your consideration in my behalf.

Sincerely yours,

ALFRED F. CHATTERTON, *Hearing Examiner.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Portsmouth, Va., May 24, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: I sincerely appreciate your speedy reply to my letter of May 12, 1965, concerning S. 1336.

Any efforts you can bring to bear in amending said bill to include the realistic designation of "administrative judge" in lieu of the multiplicitous titles, "presiding officer," etc., will be greatly appreciated.

Sincerely yours,

ALFRED F. CHATTERTON, *Hearing Examiner.*

MAY 20, 1965.

Mr. ALFRED F. CHATTERTON,
Hearing Examiner, Treasury Department,
Portsmouth, Va.

DEAR MR. CHATTERTON: Your letter of May 12, 1965, addressed to Senator Robertson has been forwarded to me for reply.

Believe that your letter to me of the same date is substantially identical and, therefore, I refer you to my reply of yesterday.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Portsmouth, Va., May 12, 1965.

HON. A. WILLIS ROBERTSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ROBERTSON: Currently the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary is conducting hearings on S. 1336 captioned, "A bill to amend the Administrative Procedure Act, and for other purposes." I know this bill results from fabulous industry and ingenuity plugging up this hole and casting out that net against all possible evasions. However, I submit this outstanding bill can be substantially improved by the deletion of the multiplicitious designations of "officer," "presiding officer," "examiner," and "hearing examiner" appearing therein and substituting in lieu thereof the realistic term "Administrative Judge," a title suggested by the Honorable E. Barrett Prettyman in his remarks as made to the Federal Trial Examiners Conference on May 9, 1962.

We who have had to tread the path of the Administrative Procedure Act through its fantastic labyrinths these many years have, I submit, earned this status; for, as with the judiciary, our duties involve composing inconsistencies, unraveling confusions, announcing unrecognized implications, and having made in Holmes' now hackneyed phrase, "interstitial" advances in the field of administrative law—an area dealing preeminently with law in the making; with fluid tendencies and tentative traditions, accomplishments totally foreign to the connotation of the title "Hearing Examiner."

Of course, in proposing this amendment of S. 1336, I have tried to observe certain canons of criticism that are usually neglected because they are so obvious, for as headlines announce the occasional egregious blunder, the day-by-day achievement is unchronicled. Virtue is proverbially not news, and appreciation of achievement in government, except when attained on the colossal scale of a moon shot or in the dramatized conflict of foreign relations, is all too dependent on dull technical details. This, apparently, has been the case with our accomplishments under the Administrative Procedure Act.

I am well aware that you have a passion for fairness and, therefore, I trust will lend support and assist me in my efforts seeking this recognition.

Thank you for your consideration in my behalf.

Sincerely yours,

ALFRED F. CHATTERTON,
Hearing Examiner.

JUNE 17, 1965.

MR. CHARLES J. CARROLL, JR.,
*Hearing Examiner, U.S. Coast Guard, Ninth Coast Guard District,
Cleveland, Ohio*

DEAR MR. CARROLL: Your letter concerning S. 1336 has been received and read with interest.

Appreciate having your comments with respect to a change in the title: "Hearing Examiner." Have passed the information along to the staff of the subcommittee which is looking into this proposal.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Cleveland, Ohio, June 11, 1965.

HON. EDWARD V. LONG,
U.S. Senator,
Washington, D.C.

DEAR SENATOR LONG: Senate bill S. 1336 amending the Administrative Procedure Act, now before your subcommittee on the Judiciary, continues the title "Examiner" for the quasi-judicial position of the presiding officer, whose duty it is to initially decide litigated questions according to applicable law, and, in some instances, impose sanctions.

The title "Examiner" or "Hearing Examiner" is not descriptive of the position. It implies an audition. "Administrative Law Judge" or "Administrative Judge"

is more descriptive, adds to the dignity of those operating within the Federal system of administrative justice, and gives to the general public, including those holding Federal licenses, a description of the hearing officer's adjudicatory function. It enhances the feeling of the interested party that the presiding and deciding officer is performing a real function, not merely serving as a recorder or notary.

Would you invite the members of your subcommittee to consider a further amendment to the act so as to change the title to "Administrative Law Judge."

I am forwarding a similar letter to Senator James O. Eastland, chairman of the Judiciary Committee. Thanking you for your good office, I am,

Respectfully yours,

CHARLES J. CARROLL, Jr.,
Hearing Examiner.

JUNE 17, 1965.

MR. FRANCIS X. J. COUGHLIN,
Hearing Examiner, U.S. Coast Guard, New York, N.Y.

DEAR MR. COUGHLIN: Your letter concerning S. 1336 has been received and read with interest. Have also received from Senator Eastland your letter addressed to him on the same subject, which he forwarded to me for reply.

Appreciate having your comments with respect to a change in the title: "Hearing Examiner." Have passed the information along to the staff of the subcommittee which is looking into this proposal.

Kind regards.
Sincerely,

EDWARD V. LONG, *Chairman.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
New York, N.Y., June 9, 1965.

HON. EDWARD V. LONG,
U.S. Senator, Washington, D.C.

MY DEAR SENATOR LONG: I note with great pleasure that you and the honorable gentleman from Illinois, Senator Everett M. Dirksen, are the cosponsors of Senate bill, S. 1336. I have read the bill with great care. I believe it makes more evident than the current Administrative Procedure Act the real importance and inherent judicial responsibility of the office of the examiner. U.S. Civil Service Commission current announcement No. 318 likewise makes evident that the examiner must be a member of the bar of suitable experience to discharge the duties and judicial obligations of that office. I know this to be so, since I have been an examiner in the U.S. Coast Guard since 1948.

I therefore respectfully urge you to move the committee to amend the text of S. 1336 by deleting the term "examiner" therefrom and inserting in lieu thereof the term "administrative judge". You and the committee will appreciate that such a designation as "administrative judge" will properly recognize the dignity of the examiner position, yet such title will clearly differentiate examiners from Federal judges. The Senate has before it a bill, S. 2018, which seeks to correct a comparable situation which presently exists under the Uniform Code of Military Justice wherein the "judge" of general courts-martial is referred to as the "law officer". Under the pending bill S. 2018, the title of "law officer" would be changed to "military judge".

I am pleased to take this opportunity to request your assistance in this matter.
Sincerely,

FRANCIS X. J. COUGHLIN.

TREASURY DEPARTMENT, U.S. COAST GUARD,
New York, N.Y., June 9, 1965.

HON. JAMES O. EASTLAND,
*U.S. Senator,
Washington, D.C.*

MY DEAR SENATOR EASTLAND: I have the honor to communicate with you with reference to Senate bill S. 1336, which is presently under active consideration by your distinguished Committee on the Judiciary. Section 11 of S. 1336 continues the use of the term "examiner" to designate the presiding officer appointed

pursuant to that section, who conducts hearings in the various Federal regulatory agencies. Being a member of the bar for many years and being an examiner in the U.S. Coast Guard since 1948, I know from experience that it is not uncommon for attorneys who appear at Federal agency hearings to address the examiner as "Judge" or "Your Honor". It is, however, my considered opinion that the term "examiner" does not convey the real importance and inherent judicial responsibilities of that office. A reading of the U.S. Civil Service Commission current Announcement No. 318 with respect to hearing examiners and the provisions of the present Administrative Procedure Act (5 U.S.C. 1001 ff.), as well as the provisions of the said bill, S. 1336, will demonstrate that the "examiner" is, save only in name, a judge.

I, therefore, respectfully request that the Judiciary Committee cause the text of S. 1336 be amended so as to delete the term "examiner" and to insert in lieu thereof "administrative judge." As chairman of the Judiciary Committee and you (and your committee, two members of which are the sponsors of S. 1336) will appreciate that such a designation as "administrative judge," while properly recognizing the dignity of the examiner's position, will clearly differentiate the examiner from Federal judges. A companion situation presently exists under the Uniform Code of Military Justice wherein the "judge" in a general courts-martial is referred to as "law officer." However, Senate bill S. 2018 now seeks to correct this by changing the title of "law officer" to that of "military judge."

I appreciate this opportunity of being able to lay before you my thoughts with respect to Senate bill S. 1336.

Thanking you for your attention, I am

Sincerely,

FRANCIS X. J. COUGHLIN.

JUNE 15, 1965.

Mr. JAMES M. DONAHUE,
Hearing Examiner, U.S. Coast Guard, Seattle, Wash.

DEAR MR. DONAHUE: Senator Eastland has forwarded to me for reply, your letter of June 7, 1965, concerning S. 1336.

Appreciate having your comments. I can assure you we shall give careful consideration to your suggestion.

Kind regards.

Sincerely,

BERNARD FENSTERWALD, Jr., *Chief Counsel.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
Seattle, Wash., June 7, 1965.

HON. JAMES O. EASTLAND,
U.S. Senator, Washington, D.C.

MY DEAR SENATOR EASTLAND: This letter is directed to you as chairman of the Judiciary Committee of the U.S. Senate. It is understood that your committee has before it S. 1336 concerning certain proposed amendments to the Administrative Procedure Act.

The writer has been serving as civilian hearing examiner attached to the U.S. Coast Guard since 1948. During this period of time it has been my experience that the term "hearing examiner" as a designation for these appointments is confusing, not only to the general public, but also to the members of the bar. It is in no way descriptive of the quasi-judicial position held by the individuals who preside over administrative proceedings in various agencies of the Government. This nomenclature is not in keeping with the dignity and decorum which must be upheld in these administrative hearings.

It is, therefore, hereby respectfully requested that very sincere consideration be given by your committee to further amend the Administrative Procedures Act by changing the designation of "hearing examiner" to one more appropriate; namely, "administrative law judge."

Respectfully yours,

JAMES M. DONAHUE,
Hearing Examiner, A.P.A.

JUNE 17, 1965.

Mr. TILDEN H. EDWARDS,
Hearing Examiner, U.S. Coast Guard,
San Francisco, Calif.

DEAR MR. EDWARDS: Your letter addressed to Senator Eastland has been referred to me for reply.

Appreciate having your comments with respect to S. 1336 and shall pass the information along to the staff of the subcommittee which is looking into this proposal. Your humorous example of the confusion arising from the term "hearing examiner" is quite apropos.

Kind regards.
Sincerely,

EDWARD V. LONG, *Chairman.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
San Francisco, Calif., June 11, 1965.

HON. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D.C.

DEAR SENATOR EASTLAND AND COMMITTEE MEMBERS: It has just come to my attention that several hearing examiners under the Administrative Procedure Act have requested that this committee give consideration to changing the title of "hearing examiner" to a more apt title. I wish to join in urging this need. There are literally thousands of widely varied jobs in both Federal and State Government bearing the title "examiner" so that the term has become meaningless and confusion. Secondly, our hearings are conducted as trials in hearing rooms which duplicate standard courtroom arrangements, and adhere to the rules of procedure and the principles of evidence followed in law cases in the courts. I find that attorneys frequently feel uncomfortable in addressing the examiner and it is commonplace for an attorney to inquire how he should address the bench and then ask permission to use the terminology of the courts with which he is familiar.

A humorous example of use of this confusing term "hearing examiner" occurred when I had my civil service physical examination. My doctor said: "I have to report that your colon condition is chronic, but that shouldn't affect your job of testing peoples hearing." For a time our group tried using the term "trial examiner." Since we are in maritime we found that people in this industry thought the designation meant test trials of ships and boats. It seems appropriate to simply establish the designation "judge (APA)" meaning the Administrative Procedure Act. The vast majority of lawyers could readily recognize this designation.

Thanking you for your time and consideration, I am,
Very truly yours,

TILDEN H. EDWARDS, *Hearing Examiner.*

JUNE 17, 1965.

Mr. HARRY J. GARDNER,
Hearing Examiner, U.S. Coast Guard,
Long Beach, Calif.

DEAR MR. GARDNER: Your letter addressed to Senator Eastland has been referred to me for reply.

Appreciate having your comments with respect to S. 1336 and shall pass the information along to the staff of the subcommittee which is looking into this proposal.

Kind regards.
Sincerely,

EDWARD V. LONG, *Chairman.*

U.S. COAST GUARD,
Long Beach, Calif., June 8, 1965.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D.C.

MY DEAR SENATOR EASTLAND: It is respectfully requested that you give favorable consideration to a further amendment to S. 1336 (which would amend the Administrative Procedures Act of 1946, 5 U.S.C. 1001 et seq.) which is before the

Judiciary Committee of the Senate, of which you are chairman. The proposed amendment for which I seek your support would change the designation of "hearing examiner" to "administrative law judge."

The undersigned has been closely associated with the maritime field for over 20 years as an officer in the American merchant marine, a lawyer, a Coast Guard officer, and a civilian hearing examiner with the Coast Guard and is firmly convinced that the term "hearing examiner" not only fails to accurately describe the duties of the officer presiding over the quasi-judicial adversary proceedings of the regulatory Government agencies but rather tends to mislead and detract from the decorum which is required in carrying out our functions effectively.

An analogous situation is exemplified in S. 2018 where one of the proposed amendments to the Uniform Code of Military Justice, 50 U.S.C. 551-736, provides that a civilian "military judge" replace the "law officer." The undersigned was certified as a law officer while on active duty in 1957 and believes that the term "military judge" more accurately describes the functions of the present law officer just as "administrative law judge" more accurately describes the functions of the hearing examiner.

It is my firm and sincere belief that the aforesaid amendment would be in furtherance of the public interest in that hearing examiners' functions would be more readily understood and such a change would enhance the prestige of the administrative law within our Federal Government. Your consideration and support is respectfully requested.

Very truly yours,

HARRY J. GARDNER, *Hearing Examiner.*

JUNE 15, 1965.

Mr. HOWARD T. LONG,
Hearing Examiner, U.S. Coast Guard,
Philadelphia, Pa.

DEAR MR. LONG: Senator Eastland has forwarded to me for reply your letter of June 8, 1965, concerning S. 1336.

Appreciate having your comments. I can assure you we shall give careful consideration to your suggestions.

Kind regards.

Sincerely,

BERNARD FENSTERWALD, Jr., *Chief Counsel.*

TREASURY DEPARTMENT,
U.S. COAST GUARD,
June 8, 1965.

HON. JAMES O. EASTLAND,
Washington, D.C.

MY DEAR SENATOR: I understand that S. 1336, having to do with the proposed amendments to the Administrative Procedure Act, 5 U.S.C. 1001 et seq., is now before your committee. May I respectfully suggest that the act be amended in that the designation of "hearing examiner" be changed to the more descriptive title, "administrative judge."

Respectfully yours,

HOWARD T. LONG,
Hearing Examiner.

JUNE 15, 1965.

Mr. THOMAS L. MACKIN,
Hearing Examiner, U.S. Coast Guard,
Boston, Mass.

DEAR MR. MACKIN: Senator Eastland has forwarded to me for reply your letter of June 7, 1965, concerning S. 1336.

Appreciate having your comments. I can assure you we shall give careful consideration to your suggestions.

Kind regards.

Sincerely,

BERNARD FENSTERWALD, Jr.,
Chief Counsel.

U.S. COAST GUARD,
Boston, Mass., June 7, 1965.

HON. JAMES O. EASTLAND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: I am informed that it has been suggested to you, as chairman of the Judiciary Committee of the U.S. Senate, that the Administrative Procedure Act (5 U.S.C. 1001 et seq.) be further amended in S. 1336 by substituting the designation "administrative law judge" for that of "hearing examiner" wherever those words appear in the Administrative Procedure Act.

As the person who has held the position of hearing examiner for the U.S. Coast Guard for the 1st Coast Guard District since 1948 I would like to join in that suggestion. It has been my observation that although those who have had occasion to appear before hearing examiners are aware of the stature and significance of that title, all others on first hearing the words "hearing examiner" have no understanding of the nature of such a position, and particularly of its quasi-judicial functions. To the uninitiated, the words "hearing examiner" are completely without meaning or import, and they are, therefore, inappropriate. The title "administrative law judge," standing alone, would have an accurate and meaningful connotation to those without previous experience in that field of law as well as to the general public.

Very truly yours,

THOMAS L. MACKIN,
Hearing Examiner.

JUNE 17, 1965.

Mr. MARTIN J. NORRIS,
Hearing Examiner, U.S. Coast Guard,
New York, N.Y.

DEAR MR. NORRIS: Senator Eastland has forwarded your letter, addressed to him, to me for reply.

Appreciate having your comments with respect to S. 1336 and shall pass the information along to the staff of the subcommittee which is looking into this proposal.

Kind regards.
Sincerely,

EDWARD V. LONG,
Chairman.

TREASURY DEPARTMENT,
U.S. COAST GUARD,
New York, N.Y., June 11, 1965.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D.C.

MY DEAR SENATOR EASTLAND: Senate bill S. 1336 is presently under consideration before your distinguished Committee on the Judiciary. Section 11 of S. 1336 speaks of the presiding officer of the administrative proceedings of the various Federal regulatory agencies as the "examiner." It is respectfully submitted that the term "examiner" or "hearing examiner" is an inexact and somewhat misleading term for one who under the Administrative Procedure Act must preside in a judicial capacity. That the title of "hearing examiner" is one which is misleading and misunderstanding by the public is exemplified by an incident of my personal knowledge. When a friend of my wife was told that I was a hearing examiner with the U.S. Coast Guard, she politely inquired, after stating that her husband's hearing was impaired, whether it would be possible to have his hearing examined.

Since 1932 I have been a member of the bar of the State of New York and a maritime law specialist. I am presently serving as a hearing examiner with the U.S. Coast Guard. In that capacity I am called upon to preside at adversary proceedings involving collisions at sea, strandings, negligent navigation, personal misconduct, etc. The position requires a thorough and consummate knowledge of admiralty law, the rules of evidence, administrative law, Federal practice and procedure, etc. It is not uncommon for attorneys appearing at administrative hearings to address the hearing examiner as "your honor," "judge," and "the court." In all respects, but in name, the examiner functions as an administrative judge.

It is respectfully requested that the Judiciary Committee give serious consideration to amend section 11 of S. 1336 so as to delete the word "examiner" and in place thereof substitute "administrative judge." May I say that there is corollary thinking in connection with Senate bill 2018 wherein the author of the bill has designated the term "military judge" in hearings under the Uniform Code of Military Justice in place of the title "law officer."

I sincerely appreciate the opportunity of placing these thoughts before your honorable committee.

I am,

Sincerely,

MARTIN J. NORRIS,
Hearing Examiner.

MAY 19, 1965.

Mr. RICE A. HERSHEY,
*President, Akron Bar Association,
Akron, Ohio.*

DEAR MR. HERSHEY: Have received your letter concerning S. 1758.

Certainly appreciate hearing from you and having the support of your association. Am taking the liberty of having your letter inserted in the record of our hearings on this bill.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

AKRON BAR ASSOCIATION,
Akron, Ohio, May 17, 1965.

HON. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure,
Committee on the Judiciary,
Senate Office Building, Washington, D.C.*

DEAR SENATOR LONG: Enclosed you will find copy of our letter of June 19, 1963, covering the resolution of our association relating to Senate bill 1466.

We wish to reiterate the position of our association in regard to the purpose of this bill, to eliminate many of the bewildering and confusing regulations now promulgated.

Copy of this letter is going to our Senators and Congressman.

Very truly yours,

RICE A. HERSHEY, *President.*

MAY 19, 1965.

Mr. ROBERT S. MUCKLESTONE,
*Chairman, Junior Bar Conference,
American Bar Association,
Seattle Wash.*

DEAR MR. MUCKLESTONE: Have received your recent letter with respect to S. 1758.

Am most pleased to have the support of the Junior Bar Conference.

Am taking the liberty of having your letter inserted in the record of our hearings on this proposal.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

AMERICAN BAR ASSOCIATION,
Chicago, Ill., May 12, 1965.

HON. EDWARD LONG,
U.S. Senate, Washington D.C.

DEAR SENATOR LONG: It is my understanding that you and nine other members of the Senate Judiciary Committee have introduced S. 1758, to provide that members of the bar in good standing may practice before all Federal departments and agencies without submitting to special enrollment, examinations, or other requirements.

As I am sure you know, this legislation has been supported actively by the American Bar Association and by the Junior Bar Conference. In 1963 the then chairman of the conference, James R. Stoner of Washington, D.C., testified for the legislation.

As chairman of the Junior Bar Conference I would like to reaffirm our support for this legislation and urge its passage. If our section can be of any assistance in this connection please let me know.

As a lawyer who, from time to time practices before various Federal departments, I am personally very interested in the passage of this legislation. I am convinced that special agency admission requirements are unduly burdensome and that they violate the fundamental principle of permitting a person to be represented by course of his choice.

Yours very truly,

ROBERT S. MUCKLESTONE, *Chairman.*

JUNE 4, 1965.

Mr. ROBERT L. KEHOE,
*Secretary, the Cleveland Bar Association,
Cleveland, Ohio*

DEAR MR. KEHOE: Have received your recent letter concerning S. 1758.

Certainly appreciate hearing from you and having the support of your association. Am taking the liberty of having your letter inserted in the record of our hearings on this proposal.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

THE CLEVELAND BAR ASSOCIATION,
Cleveland, Ohio, May 27, 1965.

HON. EDWARD V. LONG,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR LONG: The officers and membership of the Cleveland Bar Association strongly support S. 1758 which would permit members of the bar to represent clients before Federal agencies without being subjected to special admission requirements.

We believe this legislation is long overdue and commend you for its introduction in the present session.

We will also communicate our thoughts on this matter to Ohio's Senators Frank J. Lausche and Stephen M. Young, both of whom are members of our association.

With best wishes for success in this undertaking, I am,

Very truly yours,

ROBERT L. KEHOE, *Secretary.*

JUNE 4, 1965.

Mr. LLOYD G. POOLE,
*President, Cole County Bar Association,
Jefferson City, Mo.*

DEAR MR. POOLE: Thank you most sincerely for your recent letter concerning S. 1758.

Am delighted to have the support of the Cole County Bar Association on this measure and am taking the liberty of having your letter inserted in the record of our hearings.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

COLE COUNTY BAR ASSOCIATION,
Jefferson City, Mo., May 28, 1965.

HON. EDWARD V. LONG,
*U.S. Senator,
Washington, D.C.*

DEAR SENATOR LONG: I am pleased to inform you that on May 27, 1965, the Cole County Bar Association adopted a resolution urging the passage of Senate bill 1758, introduced April 9, 1965.

The members of the association wish to express to you their appreciation of your efforts in behalf of the interest of all attorneys in sponsoring this legislation.

Respectfully,

LLOYD G. POOLE, *President.*

MAY 18, 1965.

Mr. LEONARD J. STERN,
President, the Columbus Bar Association,
Columbus, Ohio.

DEAR MR. STERN: Have received your recent letter with respect to S. 1758.
 Certainly appreciate having the continued endorsement of your association.
 Am taking the liberty of inserting your letter in the record of our hearings.

Kind regards.
 Sincerely,

EDWARD V. LONG, *Chairman.*

THE COLUMBUS BAR ASSOCIATION,
May 13, 1965.

Re S. 1758.

HON. EDWARD V. LONG,
Chairman of the Subcommittee on Administrative Practice and Procedure of the
Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR LONG: In 1963, this association expressed its support of S. 1466
 of the 88th Congress. Our attention has been directed to the fact that S. 1758 is a
 similar bill.

Our association is in favor of the enactment of S. 1758.

We want to express our thanks to you for having sponsored this much needed
 legislation.

Very truly yours,

LEONARD J. STERN, *President.*

MAY 12, 1965.

Mr. BERNARD H. TRAGER,
President, Connecticut Bar Association,
Hartford, Conn.

DEAR MR. TRAGER: Thank you most sincerely for your letter of May 10, 1965,
 with respect to S. 1758.

Your continued support is greatly appreciated and I am taking the liberty
 of having your letter inserted in the record of the hearings on this proposal.

Kind regards.
 Sincerely,

EDWARD V. LONG, *Chairman.*

CONNECTICUT BAR ASSOCIATION,
Bridgeport, Conn., May 10, 1965.

Senator EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Senate
Judiciary Committee, Washington, D.C.

DEAR SENATOR LONG: It has been brought to our attention that hearings on
 Senate bill 1758 will be held during the period of May 12, 13, and 14. This
 bill, as you know, would permit lawyers to practice before Federal agencies
 without being subjected to special admissions requirements.

On behalf of the Connecticut Bar Association, I want to reiterate the posi-
 tion that we took in favor of S. 1466 in the 88th Congress. I am told that
 S. 1758 is substantially the same legislation as S. 1466, and we want to go on
 record strongly in favor of S. 1758.

We hope that you will support this important legislation.

Cordially,

BERNARD H. TRAGER, *President.*

MAY 18, 1965.

Mr. ROBERT C. ALEXANDER,
President, Dayton Bar Association,
Dayton, Ohio.

DEAR MR. ALEXANDER: Have received your recent letter with respect to S. 1758.
 Certainly appreciate having the endorsement of your association. Am taking
 the liberty of inserting your letter in the record of our hearings.

Kind regards.
 Sincerely,

EDWARD V. LONG, *Chairman*

HARSHMAN, YOUNG, COLVIN & ALEXANDER,
Dayton, Ohio, May 11, 1965.

Re S. 1758.

Senator EDWARD V. LONG,
Senate Judiciary Committee,
Washington, D.C.

DEAR SIR: It has come to my attention that S. 1758 has been introduced in the Senate and that it is very similar to S. 1466 which was passed by the Senate in 1963, but failed to pass the Judiciary Committee and the House.

Once again the Dayton Bar Association would like to go on record as being in favor of this legislation and to urge its support by your committee.

Very truly yours,

ROBERT C. ALEXANDER,
President, Dayton Bar Association.

MAY 19, 1965.

Mr. WILLIAM R. MOLLER,
Secretary, the Hartford County Bar Association,
Hartford, Conn.

DEAR MR. MOLLER: Have received your recent letter with respect to S. 1758 and attachments.

Certainly appreciate having the continued support of your association. Am taking the liberty of having your correspondence inserted in the record of the hearings on this bill.

Kind regards.
Sincerely,

EDWARD V. LONG, Chairman.

THE HARTFORD COUNTY BAR ASSOCIATION,
Hartford, Conn., May 12, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure of the Senate
Judiciary Committee, Washington, D.C.

DEAR SENATOR LONG: The Hartford County Bar Association, at its executive meeting held on May 10, 1965, again adopted its prior stand in complete favor of Senate bill 1758, which would deem it inherent in the admission of an attorney to the bar of the State in which he practices that he is qualified to appear before Federal agencies. We, therefore, heartily recommend the adoption of this bill.

We enclose herewith copies of the resolution which have been sent to the Honorable Thomas J. Dodd and Hon. Abraham Ribicoff.

Very truly yours,

WILLIAM R. MOLLER, Secretary.

THE HARTFORD COUNTY BAR ASSOCIATION,
Hartford, Conn., May 12, 1965.

HON. THOMAS J. DODD,
Senate Office Building,
Washington, D.C.

DEAR SENATOR DODD: We are writing you on behalf of the Hartford County Bar Association in support of Senator Long's Senate bill 1758 which permits representation by attorneys before Federal agencies without requiring individual admission by the Federal agency. At the executive meeting of May 10, 1965, the following resolution was unanimously adopted:

"Resolved, That the Hartford County Bar Association be, and hereby is, strongly in favor of Senate bill 1758, since it seems inherent in an attorney's admission to the bar of his own State that he has the requisite abilities to appear before any Federal agency without having to be admitted by said agency; and be it further

"Resolved, That a copy of this resolution be sent to Hon. Thomas J. Dodd and Hon. Abraham A. Ribicoff."

We know that as a result of your long association with the Hartford County Bar Association, you will give this matter proper and adequate consideration.

Very truly yours,

WILLIAM R. MOLLER, Secretary.

THE HARTFORD COUNTY BAR ASSOCIATION,
Hartford, Conn., May 12, 1965.

HON. ABRAHAM A. RIBICOFF,
Senate Office Building,
Washington, D.C.

DEAR SENATOR RIBICOFF: We are writing you on behalf of the Hartford County Bar Association in support of Senator Long's Senate bill 1758 which permits representation by attorneys before Federal agencies without requiring individual admission by the Federal agency. At the executive meeting of May 10, 1965, the following resolution was unanimously adopted:

"Resolved, That the Hartford County Bar Association be, and hereby is, strongly in favor of Senate bill 1758, since it seems inherent in an attorney's admission to the bar of his own State that he has the requisite abilities to appear before any Federal agency without having to be admitted by said agency; and be it further

"Resolved, That a copy of this resolution be sent to Hon. Thomas J. Dodd and Hon. Abraham A. Ribicoff."

We know that as a result of your long association with the Hartford County Bar Association, you will give this matter proper and adequate consideration.

Very truly yours,

WILLIAM R. MOLLER, *Secretary.*

JUNE 4, 1965.

MR. EDWARD H. JONES,
Secretary, the Iowa State Bar Association,
Des Moines, Iowa.

DEAR MR. JONES: Have received your recent letter concerning S. 1758. Am taking the liberty of inserting your letter in the record of our hearings.

On behalf of the subcommittee, may I thank you and your association for your support and assistance on this important piece of legislation.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

THE IOWA STATE BAR ASSOCIATION,
Des Moines, Iowa, May 24, 1965.

Re S. 1758.

HON. EDWARD LONG,
Senate Office Building,
Washington, D.C.

DEAR SENATOR LONG: This is to advise that the board of governors of the Iowa State Bar Association has unanimously endorsed the above legislative proposal.

This bill is strongly favored by the vast majority of Iowa lawyers who would prefer not to have to go through the redtape necessary to practice before some agencies.

Respectfully,

EDWARD H. JONES.

MAY 18, 1965.

MR. LOYD E. ROBERTS,
President, the Missouri Bar,
Joplin, Mo.

DEAR MR. ROBERTS: Have received your recent letter with respect to S. 1758. Certainly appreciate having the endorsement of your association. Am taking the liberty of inserting your letter in the record of our hearings.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

THE MISSOURI BAR,
Joplin, Mo., May 13, 1965.

HON. EDWARD V. LONG,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: The Executive Committee of the Missouri Bar Association has endorsed your Senate bill 1758 in principle.

This action means that our committee speaks for the entire Missouri Bar, and the committee's approval is the endorsement of the Missouri Bar Association for your bill.

We hope your bill will receive favorable consideration and ultimately pass.
Sincerely yours,

LOYD E. ROBERTS.

ROSE & ROSE,
Casper, Wyo., May 14, 1965.

Re S. 1758. A bill to provide for the right of persons to be represented by attorneys in matters before Federal agencies.

Hon. MILWARD SIMPSON,
*Senate Office Building,
Washington, D.C.*

DEAR MILWARD: Today at the regular meeting of the Natrona County Bar Association, that body resolved that you be informed that they are unanimously in favor of the above numbered Senate file and urge and hope that you will lend your support to the bill.

I send you my warm personal regards.
Sincerely,

ROBERT R. ROSE, Jr.,
President of the Natrona County Bar Association.

JUNE 4, 1965.

Mr. MICHAEL M. IRWIN,
*President, New Orleans Bar Association,
New Orleans, La.*

DEAR MR. IRWIN: Have received your recent letter concerning S. 1758. Am taking the liberty of inserting your letter in the record of our hearings. On behalf of the subcommittee, may I thank you and your association for your continued support and assistance on this important piece of legislation.

Kind regards.
Sincerely,

EDWARD V. LONG, *Chairman.*

NEW ORLEANS BAR ASSOCIATION,
New Orleans, La., May 20, 1965.

Hon. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure, Senate
Judiciary Committee, Washington, D.C.*

DEAR SENATOR LONG: Mr. F. Joseph Donohue, chairman of the Standing Committee on Federal Legislation of the American Bar Association, has recently brought to the attention of our association your bill, S. 1758, re "to provide for the right of persons to be represented by attorneys in matters before Federal agencies."

Since in all respects this bill is substantially the same as S. 1466, which the House Judiciary Committee failed to act on during the 88th Congress, and which our association endorsed, we wish to again notify you that your bill has our approval and endorsement, and we do hope that without any great difficulty it will receive the support of both the Senate and the House of Representatives.

It is a fine bill and one that would benefit the legal profession.

Attached are copies of letters addressed to our two Senators showing our endorsement and approval of your bill.

Respectfully yours,

MICHAEL M. IRWIN, *President.*

NEW ORLEANS BAR ASSOCIATION,
New Orleans, La., May 20, 1965.

Hon. ALLEN J. ELLENDER,
Senate Office Building, Washington, D.C.

DEAR SENATOR ELLENDER: Enclosed you will find copy of letter addressed to Hon. Edward V. Long, U.S. Senator from Missouri, whereby the New Orleans Bar Association has given its sanction and approval to Senate bill

1758, and we hope that you will do all possible to assist Senator Long in the passage of this bill, since it benefits all attorneys.

Respectfully yours,

MICHAEL M. IRWIN, *President.*

NEW ORLEANS BAR ASSOCIATION,
New Orleans, La., May 20, 1965.

HON. RUSSELL B. LONG,
Senate Office Building, Washington, D.C.

DEAR SENATOR LONG: Enclosed you will find copy of letter addressed to Hon. Edward V. Long, U.S. Senator from Missouri, whereby the New Orleans Bar Association has given its sanction and approval to Senate bill 1758, and we hope that you will do all possible to assist Senator Long in the passage of this bill, since it benefits all attorneys.

Respectfully yours,

MICHAEL M. IRWIN, *President.*

MAY 13, 1965.

Mr. WM. J. BAIRD,
*President, Omaha Bar Association,
Omaha, Nebr.*

DEAR MR. BAIRD: Have received your recent letter with respect to S. 1758. Certainly appreciate having the endorsement of your association. Am taking the liberty of inserting your letter in the record of our hearings.

Kind regards,
Sincerely,

EDWARD V. LONG, *Chairman.*

OMAHA BAR ASSOCIATION,
Omaha, Nebr., May 11, 1965.

Re S. 1758.

HON. EDWARD V. LONG,
*Senate Judiciary Committee,
Washington, D.C.*

DEAR SENATOR LONG: On behalf of the Omaha Bar Association, I am writing to convey the endorsement of the association of S. 1758 which would eliminate the admission requirements of various Federal agencies before attorneys can appear before them on behalf of clients.

We feel strongly that any lawyer who is admitted to practice and is in good standing in his own State should automatically have the right to represent a client before any kind of Federal agency, and that the enactment into law of S. 1758 will be of considerable benefit, not the enactment into law of S. 1758 will be of considerable benefit, not only to the legal profession but to the general public which it serves.

Yours very truly,

WM. J. BAIRD, *President.*

MAY 12, 1965.

Mr. PATRICK M. FIANDACA,
*Secretary, St. Charles County Bar Association,
St. Charles, Mo.*

DEAR MR. FIANDACA: Thank you most sincerely for your letter of May 6, 1965, with respect to S. 1758.

The support of your bar is greatly appreciated and am taking the liberty of having your letter inserted in the record of the hearings.

Kind regards,
Sincerely,

EDWARD V. LONG, *Chairman.*

NIEDNER, NIEDNER & MOESCHEL,
St. Charles, Mo., May 6, 1965.

Re bill S. 1758.

HON. EDWARD V. LONG,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR LONG: The president of the St. Charles County Bar Association has directed me to inform you that on May 3, 1965, the association

unanimously approved to support your efforts in passing the above captioned Senate bill. With best personal regards, I remain.

Yours very truly,

PATRICK M. FIANDACA,
Secretary, St. Charles County Bar Association.

JUNE 4, 1965.

Mr. CHARLES VANCE,
*President, Southwest Kansas Bar Association,
Liberal, Kans.*

DEAR MR. VANCE: Have received your recent letter concerning S. 1758. Am taking the liberty of inserting your letter in the record of our hearings.

On behalf of the subcommittee, may I thank you and your association for your continued support and assistance on this important piece of legislation.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

VANCE, HOBBLE, NORDLING & SHARP,
Liberal, Kans., May 19, 1965.

HON. EDWARD V. LONG,
*U.S. Senate,
Washington, D.C.*

DEAR SIR: As president of the Southwest Kansas Bar Association, I wish to reiterate the support of the association for the principle of S. 1466 of the 88th Congress as now embodied in S. 1758.

I personally appreciate your interest in protecting the lawyer in general practice from the annoyance of qualifying to appear before first one agency and then another.

Very truly yours,

CHARLES VANCE,
President, Southwest Kansas Bar Association.

JUNE 9, 1965.

Mr. JAMES AMADEI,
*Chairman, Committee on Unlawful Practice of Law, Brooklyn Bar Association,
Brooklyn, N.Y.*

DEAR MR. AMADEI: Thank you for your further letter concerning S. 1758, which will also be made a part of the record of the hearings on this proposal.

Your name has been placed on the mailing list of the subcommittee to receive all publications with respect to this bill.

Kind regards.

Sincerely,

BERNARD FENSTERWALD, Jr., *Chief Counsel.*

BROOKLYN BAR ASSOCIATION,
Brooklyn, N.Y., June 3, 1965.

Re Senate bill S. 1758.

HON. EDWARD V. LONG,
*Committee on Judiciary,
Senate Office Building, Washington, D.C.*

DEAR SENATOR: Supplementing my letter to you of May 13, 1965, relative to the above bill which you have introduced on behalf of yourself and other Senators, I am enclosing a copy of a memorandum of this association setting forth its views in respect thereto. Copies thereof are being forwarded to the other members of the Senate Judiciary Committee, of which you are a member.

I trust that this memorandum will be of assistance to you and your committee in its deliberations.

Sincerely yours,

JAMES AMADEI,
Chairman, Committee on Unlawful Practice of Law.

BROOKLYN BAR ASSOCIATION,
Brooklyn, N.Y., May 24, 1965.

Re Senate bill 1758.

BERNARD FENSTERWALD, Jr., Esq.,
*Chief Counsel, Committee on the Judiciary,
 U.S. Senate, Washington, D.C.*

DEAR MR. FENSTERWALD: Many thanks for the information contained in your letter of May 19 relative to the above bill.

In order to set the record straight with reference to the position taken by this association, I note that on June 7, 1963, Robert A. Morse, chairman of the committee on Federal legislation of this association, wrote Senator Edward V. Long of your committee, indicating our association's support of similar bills then known as S. 318 and S. 1466. I only learned of this action today upon receipt of a letter, under date of May 20, from Donald E. Channell, director of the Washington Office of the American Bar Association. Upon receipt thereof, I spoke to Mr. Morse and read to him the letter which I had written to Mr. F. Joseph Donohue, chairman of the American Bar Association Committee on Federal Legislation, and he stated that he concurred in the views set forth in my letter to Mr. Donohue under date of May 12; and in particular he stated that if section 101, subdivision b, is to be retained in the bill, it should be amended as indicated in my letter by adding the following: "The foregoing is not to be construed that such person may engage in the practice of law before any agency." This association appreciates the fact that there are many matters in which laymen may appear and represent parties or persons before administrative agencies which do not in themselves constitute the practice of law; and on the other hand, there are many proceedings, especially adversary proceedings, where formal hearings are held before hearing officers, which in and of themselves, and by their very nature, do constitute the practice of law. It is for this reason that we feel that such an amendment should be added to this subdivision if it is not otherwise omitted from the bill. Even though this bill states: "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding," etc., we cannot close our eyes to the fact that numerous Federal agencies do grant authority for laymen to appear and represent persons and parties in matters pending before it.

It will be of help to me and my committee if you would be good enough to arrange to have at least a dozen copies of this bill forwarded to me at your convenience.

Your cooperation in this respect is greatly appreciated.

Sincerely yours,

JAMES AMADEI,
Chairman, Committee on Unlawful Practice of Law.

MAY 27, 1965.

HON. JOHN J. ROONEY,
*House of Representatives,
 Washington, D.C.*

DEAR CONGRESSMAN ROONEY: Your letter addressed to Senator James O. Eastland concerning S. 1758 has been referred to me.

Mr. Amadei's letter and other material has been forwarded to the staff of the Subcommittee on Administrative Practice and Procedure and will be printed in the record of hearings on this bill.

Thank you for forwarding the material.

With kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

HOUSE OF REPRESENTATIVES,
Washington, D.C., May 14, 1965.

HON. JAMES O. EASTLAND,
*Chairman, Senate Committee on the Judiciary,
 Washington, D.C.*

DEAR MR. CHAIRMAN: I am enclosing herewith a copy of a letter addressed to me by my good friend, the Honorable James Amadei, chairman of the Committee on Unlawful Practice of Law, Brooklyn Bar Association, in which he expresses

the views of the association relative to the Senate bill, S. 1758, which would provide for the right of persons to be represented by attorneys in matters before Federal agencies.

I am enclosing herewith, too, a copy of a memorandum which Mr. Amadei submitted to the New York State Judiciary Committee which has to do with a similar subject matter.

Inasmuch as Mr. Amadei has requested me to bring the views of the Brooklyn Bar Association to your attention, I shall be grateful for any consideration you might give to the enclosures.

With kindest regards,
Sincerely,

JOHN J. ROONEY.

BROOKLYN BAR ASSOCIATION,
Brooklyn, N.Y., May 13, 1965.

Re Senate bill S. 1758.

HON. JOHN J. ROONEY,
House Office Building,
Washington, D.C.

DEAR JOHN: May I call upon you for your assistance in bringing to the attention of the members of the Senate Judiciary Committee, with whom I am sure you are well acquainted, the views of this association with respect to a certain Senate bill S. 1758, introduced by Senator Edward V. Long of Missouri, and also on behalf of Senators Bayh, Burdick, Dirksen, Ervin, Fong, Hart, McClellan, Scott, and Tydings. I understand hearings are being scheduled on this bill commencing May 12, and that at that time a representative of the American Bar Association will appear in support of the legislation.

Although this association is in support of the legislation, the primary purpose of which is to permit the practice of attorneys before Federal administrative agencies without formally applying to be admitted to practice before such agencies as the Patent Office, Interstate Commerce Commission, etc., nevertheless it is opposed to section 101, subdivision b thereof, which provides: "Nothing herein shall be construed to either grant or to deny to any person who is not a lawyer, the right to appear for or represent others before any agency or in any agency proceeding." The reasons for such opposition to this provision are set forth in detail in the enclosed copy of a memorandum which I submitted to the State judiciary committee, having to do with a similar subject matter at the public hearing on May 11, 1965. It seems to me that this subdivision has no relationship whatsoever to the primary purpose of the bill, and I have been given to understand that it was inserted as a compromise to assure its passage. I fail to understand why such a compromise provision is necessary. However, if it is to remain in the bill, our committee suggests that the following words be added thereto: "The foregoing is not to be construed that such person may engage in the practice of law before any agency."

The views which I have expressed above were presented for the consideration of the board of trustees of our association at its meeting on May 12, and they were unanimously approved.

Your cooperation and assistance in this matter will, I am sure, be greatly appreciated by the members of the bar of Brooklyn. I trust that you are enjoying good health, and with warm personal regards, I am,

Sincerely yours,

JAMES AMADEI,
Chairman, Committee on Unlawful Practice of Law.

MEMORANDUM IN OPPOSITION TO ARTICLE 4, SECTION 401, AND ARTICLE 6, SECTION 601, RELATIVE TO AUTHORIZING "OTHER QUALIFIED REPRESENTATIVE" TO APPEAR BEFORE ADMINISTRATIVE AGENCIES

The above bills were introduced as a result of the report and recommendations of the Law Revision Commission relative to establishing a Uniform Administrative Procedure Act and Administrative Rule Making Procedure Act.

Committees on unauthorized practice of the law of the American Bar Association, the New York State Bar Association and various local bar associations are particularly concerned with so much of these bills which provide that any person compelled to appear or voluntarily appearing before an agency, and all parties,

"shall be accorded the right to appear in person or by or with counsel or *other qualified representative.*" These bills do not define who a qualified representative may be, nor do they limit or indicate the extent of such representation, nor the particular agency or agencies to which such provision may apply. However, the Commission's report does state the conclusion that "Lay representation is widespread and not necessarily inappropriate before a number of agencies," without setting forth the details upon which such conclusion is reached. Communications received by this committee indicate that lay representation is limited to a certain few agencies in nonadversary matters. In lieu of specifying at least uniform minimum educational requirements for such representatives, the report states, "By specifying 'other qualified representatives' the proposed bill enables agencies to set forth their own standards and requirements for permitting qualified lay representation under appropriate circumstances." It is quite apparent that to leave this to each and every agency would encourage the creating of a hodgepodge of so-called qualified representatives with no uniform requirements as to educational background, supervision and control, or the extent to which such representative may participate in a proceeding before the agency.

The bar associations, through its committees, function at their own expense in the investigation and prosecution of individuals and corporations violating the provisions of the penal law having to do with the unlawful practice of law. Public interest demands constant vigilance in uncovering such violations by unqualified and unlicensed individuals and corporations. To now permit laymen untrained in the law to represent clients before administrative agencies is to revert to the corrupt conditions found to exist at that time which brought about the need for licensing of an individual to practice law after he has met the rigid educational requirements established by the court of appeals, submitting to a bar examination as to his legal knowledge conducted by the Board of Law Examiners, and thereafter satisfying the committee on character and fitness that he is a fit person and of good moral character which he is required to maintain so long as he continues to practice law. All of this in order to protect the public from incompetent and unqualified persons representing the interest of a client in a most confidential relationship. No less requirement should be exacted from a lay representative, as every matter of a client should be treated with the same degree of importance and confidence. Why then open the door by cutting away the protection to which the public is entitled? The bills under consideration encourage this without any basic reason except to create a group of lay specialists of limited scholastic attainments, if any, depending upon the rules of the particular agency involved.

Attention is called to the fact that the Moreland Act Commission's report of its investigation of 1942, 1943, and 1944 with respect to the Workmen's Compensation Board, then the Industrial Board (the only State board authorized to license lay representatives), sets forth in detail the abuses engaged in by licensed representatives, such as rebates, splitting fees, solicitations, and exacting fees in excess of those allowed by the referees, etc. As a result, the board promulgated rules of conduct for licensees. To be qualified for such a license, an applicant must be a citizen, 21 years of age, a resident of the State for at least a year, of good moral character, have an *adequate* education and have a competent knowledge of the compensation law and regulations. No written examination is conducted, adequate education is not defined, and an applicant need only show competent knowledge of the law and regulations by self-study. Compensation cases are adversary proceedings and there is no limitation on the type of claims a licensee may prosecute whether it be controverted or not.

It is common knowledge that laws which administrative agencies are called upon to interpret and administer have become more technical and complex from a legal standpoint, so much so that lawyers who specialize in a particular field of law have found it necessary to keep abreast of the law to take special courses at the Practising Law Institute, and also attend symposiums and conferences. The undersigned, as a former member of the Workmen's Compensation Board for 10 years, can attest to the fact that the compensation laws of this State are becoming more complex and technical in many respects than when originally enacted in 1913. Further, in many cases such licenses have utilized the privilege only on a part-time basis, separate and apart from their usual occupation rather than as a career in the particular law speciality. As a result they seldom, if ever, keep abreast of the changes in the law or the rules and regulations of the board. Anyone whose knowledge is only limited to the laws affecting a particular agency is wholly unqualified to properly represent and protect his client's interests before such an agency, because in many cases issues of law may arise

for which he would be utterly unprepared to give proper advice and counsel, all which he would be utterly unprepared to give proper advice and counsel, all detrimental to the best interest of his client. The danger is clearly apparent and it is not worth the risk when there are about 50,000 lawyers in the State who are readily available to give competent advice without limitation because of their broad legal knowledge. In addition, there are the legal aid societies and bar association referral services available.

Bar associations are unalterably opposed to such legislation for the following reasons:

(1) Since there is no protection of a client's confidential and privileged communication with a lay representative, he may be disinclined or hesitate in making a full disclosure of the facts, without which his best interests cannot properly be presented or protected.

(2) A client has no means of ascertaining the degree of confidence he may repose in a so-called qualified representative who has no professional status, such as the badge of competency and character which a license implies to a lawyer or any other licensed professional whose professional conduct is closely supervised and controlled either by the courts or the board of regents of this State.

(3) The public interest, which should be the primary concern of the legislature, is not served or protected by licensing lay persons who only have a limited knowledge of law in a particular field. Expediency or the accommodation of a limited few clients, who do not care to have adequate and competent representation, should not be the motivating cause for urging the passage of this type of legislation.

(4) The creation of a so-called lay specialist group not only tends to demolish but clearly contravenes the purpose and intent of the legislature and the court of appeals in providing for strict rules for admission to the bar as an attorney insofar as character, fitness, and scholastic attainments are concerned.

(5) The establishment of a group of "qualified representatives" opens the door and encourages the resumption of the abuses and conditions which prevailed at the time of the Moreland Act Commission investigation of the workmen's compensation board referred to above.

(6) Anyone connected with administrative agencies can attest to the fact that lay representatives who have been appearing before them have impeded rather than helped the administration of justice and the proceedings before administrative agencies.

(7) Courts of this State, as well as a majority of other States, have recognized that it is primarily within the province of the courts to control the practice of law. Section 90, subdivision 2(a) of the judiciary law specifically provides that a disbarred attorney may not practice before "any court, judge, justice, board, commission, or other public authority." It would appear that these bills are inconsistent with such authority of the courts to prohibit a disbarred or suspended attorney from practicing before an administrative agency under pain of a contempt proceeding if perchance an agency should find him to be otherwise qualified to be a representative.

(8) Many administrative agencies in determining questions of law and fact are functioning in a quasi-judicial character which is no less judicial in character than when exercised in a judicial proceeding. Adversary proceedings, in particular, before administrative agencies for all intents and purposes constitute the practice of law. Of course, every type of activity before such an agency is not necessarily the practice of law. However, when trial work is involved there can be no question about it. Even where there is no trial work involved, the preparation of legal documents, their legal interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity is involved, these activities are still the practice of law. On the other hand, where pure engineering, accounting or clerical work is involved, the practice of law is not present, and in these latter areas the laymen can adequately perform.

See:

West Virginia State Bar v. Airley, 109 S.E. 2d 420.

State v. Sperry, 140 So. 2d 587.

State v. Keller, 114 N.W. 2d 796.

Denver Bar Association v. Public Utilities Commission, 391 P. 2d 467.

New York County Lawyers Association v. Ola C. Cool, etc., Labor Relations Institute, 294 N.Y. 853.

New York County Lawyers Association v. Roel, 3 N.Y. 2d 224, 231.

(9) In the case of *In re Dawkins* (262 App. Div. 56, affirmed 289 N.Y. 553), the court held that proceedings before the Board of Assessors of the City of

New York are judicial in nature and the appellant was properly enjoined in the public interest from continuing his acts. It further held that the hearings in such proceedings, wherein testimony is reported stenographically, are judicial in essence. Further, that recognition may not be given to the distinction which the appellant sought to make between simple and complex matters, citing *People v. Lawyers Title Corp.*, (282 N.Y. 513, 521).

(10) Finally, the legislature should bear in mind the proliferation of administrative tribunals in recent years and extended scope of their jurisdictions in determining the propriety of representation before such bodies by persons other than lawyers. The distinction between appearances before administrative and judicial bodies is no longer a varied or controlled consideration. See: *Realty Appraisals Co. v. Astor-Broadway Holding Corp.*, 5 App. Div. 2d Series, p. 36; also *Matter of New York County Lawyers Assn. v. Bercu*, 273 App. Div. 524, affirmed 299 N.Y. 728.

Accordingly, it is respectfully submitted that these bills insofar as they provide for "or other qualified representatives" should be deleted therefrom.

Respectfully submitted.

COMMITTEE ON UNLAWFUL PRACTICE OF LAW,
BROOKLYN BAR ASSOCIATION,
JAMES AMADEI, *Chairman.*

MAY 20, 1965.

Mr. JAMES AMADEI,
*Chairman, Committee on Unlawful Practice of Law, Brooklyn Bar Association,
Brooklyn, N.Y.*

DEAR MR. AMADEI: Have received your recent correspondence in regard to S. 1758.

Your letter and attachments will be printed in the record of the hearings.

Appreciate your interest and thoughtfulness in writing.

Am sending you 12 copies of this bill, as you requested.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

BROOKLYN BAR ASSOCIATION,
Brooklyn, N.Y., May 13, 1965.

Re: Senate bill S. 1758.

HON. EDWARD V. LONG,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR: This association has been informed by Mr. F. Joseph Donohue, chairman of the Committee on Federal Legislation of the American Bar Association, that you have introduced a bill on behalf of yourself and Senators Bayh, Burdick, Dirksen, Ervin, Fong, Hart, McClellan, Scott, and Tydings, providing for the right of persons to be represented by attorneys in matters before Federal agencies, known as S. 1758. I am enclosing a copy of my letter to him with reference to this bill and also copies of my report and memorandum referred to therein.

I would appreciate it if you would be good enough to consider the views expressed and so inform the members of the Committee on Judiciary of the Senate.

I would also appreciate it if you would forward to me about a dozen copies of the bill.

Respectfully yours,

JAMES AMADEI, *Chairman.*
Committee on Unlawful Practice of Law.

MAY 12, 1965.

Re Senate bill S. 1758.

F. JOSEPH DONOHUE, ESQ.,
Washington, D.C.

DEAR MR. DONOHUE: Your letter of May 6 directed to the president of this Association, together with enclosures, were referred to me as chairman of the Committee on Unlawful Practice of Law of this association. I note that among the list of bar associations on the list submitted by you to the Senate Judiciary Committee this association is included. I have been endeavoring to ascertain

who on behalf of the association so informed you of its support of this bill, as I have no recollection of having written such a letter. It was not until the receipt of your communication that I read the provisions of the bill itself, which was enclosed.

I have discussed this bill with Mr. Raymond Reisler, formerly a member of the Committee on Unauthorized Practice of the Law of the American Bar Association and chairman of both the New York State Bar Association and Brooklyn Bar Association Committees, and he informs me that section 101, subdivision b, was inserted in the bill as a compromise in order to assure its passage. It is my opinion that such a compromise provision impliedly recognizes the fact that lay persons do in fact appear and represent parties or witnesses before Federal administrative agencies even though it states that "Nothing herein shall be construed to either grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." It is my opinion, and I believe that of my committee, that this is a heavy price to pay to permit attorneys to practice before Federal agencies without formally applying and being admitted by the particular agency to practice before it. It seems to me that it is highly improper for any agency to compel an attorney who has been duly licensed to practice in any State or the District of Columbia to submit to any requirement that unless they make formal application they are not permitted to practice before it. It is my view that this subdivision should be omitted from the bill; if not, that it should specifically contain a provision along the following lines: "The foregoing is not to be construed that such person may engage in the practice of law before any agency."

I am enclosing herewith copies of the report of the Committee on Unlawful Practice of Law of this association which was unanimously adopted on November 12, 1964, having to do with the proposed recommendation to permit persons and parties to appear and be represented before administrative agencies in New York State by "other representative," and also my memorandum to the Senate Judiciary Committee of this State which is considering the Law Revision Commission's bill in which it refers to "other qualified representative" appearing or representing a person or party as indicated above. The New York State Bar Association through its Committee on Unlawful Practice of Law appeared at the public hearing in opposition to this bill, as well as other bar associations in the State of New York.

I would therefore appreciate it if when you are presenting the views of the various bar associations to the Senate Judiciary Committee that you express to them the conditions under which this bar association supported the bill.

Your cooperation in this respect will be greatly appreciated.

Sincerely yours,

JAMES AMADEI,

Chairman, Committee on Unlawful Practice of Law.

P.S. Since dictating this letter, the board of trustees of this association at its meeting today, unanimously approved the views expressed herein.

MEMORANDUM IN OPPOSITION TO ARTICLE 4, SECTION 401, AND ARTICLE 6, SECTION 601, RELATIVE TO AUTHORIZING "OTHER QUALIFIED REPRESENTATIVE" TO APPEAR BEFORE ADMINISTRATIVE AGENCIES

The above bills were introduced as a result of the report and recommendations of the Law Revision Commission relative to establishing a Uniform Administrative Procedure Act and Administrative Rule Making Procedure Act.

Committees on Unauthorized Practice of the Law of the American Bar Association, the New York State Bar Association and various local bar associations are particularly concerned with so much of these bills which provide that any person compelled to appear or voluntarily appearing before an agency, and all parties, "shall be accorded the right to appear in person or by or with counsel or *other qualified representative.*" These bills do not define who a qualified representative may be, nor do they limit or indicate the extent of such representation, nor the particular agency or agencies to which such provision may apply. However, the Commission's report does state the conclusion that "Lay representation is widespread and not necessarily inappropriate before a number of agencies," without setting forth the details upon which such conclusion is reached. Communications received by this committee indicate that lay representation is limited to a certain few agencies in nonadversary matters. In lieu of specifying at least uniform

minimum educational requirements for such representatives, the report states, "By specifying 'other qualified representatives' the proposed bill enables agencies to set forth their own standards and requirements for permitting qualified lay representation under appropriate circumstances." It is quite apparent that to leave this to each and every agency would encourage the creating of a hodgepodge of so-called qualified representatives with no uniform requirements as to educational background, supervision and control, or the extent to which such representative may participate in a proceeding before the agency.

The bar associations, through its committees, function at their own expense in the investigation and prosecution of individuals and corporations violating the provisions of the penal law having to do with the unlawful practice of law. Public interest demands constant vigilance in uncovering such violations by unqualified and unlicensed individuals and corporations. To now permit laymen untrained in the law to represent clients before administrative agencies is to revert to the corrupt conditions found to exist at that time which brought about the need for licensing of an individual to practice law after he has met the rigid educational requirements established by the court of appeals, submitting to a bar examination as to his legal knowledge conducted by the board of law examiners, and thereafter satisfying the committee on character and fitness that he is a fit person and of good moral character which he is required to maintain so long as he continues to practice law. All of this in order to protect the public from incompetent and unqualified persons representing the interest of a client in a most confidential relationship. No less requirement should be exacted from a lay representative, as every matter of a client should be treated with the same degree of importance and confidence. Why then open the door by cutting away the protection to which the public is entitled? The bills under consideration encourage this without any basic reason except to create a group of lay specialists of limited scholastic attainments, if any, depending upon the rules of the particular agency involved.

Attention is called to the fact that the Moreland Act Commission's report of its investigation of 1942, 1943, and 1944 with respect to the workmen's compensation board, then the industrial board (the only State board authorized to license lay representatives) sets forth in detail the abuses engaged in by licensed representatives, such as rebates, splitting fees, solicitations, and exacting fees in excess of those allowed by the referees, etc. As a result, the board promulgated rules of conduct for licensees. To be qualified for such a license, an applicant must be a citizen, 21 years of age, a resident of the State for at least a year, of good moral character, have an *adequate* education and have a competent knowledge of the compensation law and regulations. No written examination is conducted, adequate education is not defined, and an applicant need only show competent knowledge of the law and regulations by self-study. Compensation cases are adversary proceedings and there is no limitations on the type of claims a licensee may prosecute whether it be controverted or not.

It is common knowledge that laws which administrative agencies are called upon to interpret and administer have become more technical and complex from a legal standpoint, so much so that lawyers who specialize in a particular field of law have found it necessary to keep abreast of the law to take special courses at the Practising Law Institute, and also attend symposiums and conferences. The undersigned, as a former member of the workmen's compensation board for 10 years, can attest to the fact that the compensation laws of this State are becoming more complex and technical in many respects than when originally enacted in 1913. Further, in many cases such licensees have utilized the privilege only on a part-time basis, separate and apart from their usual occupation rather than as a career in the particular law specialty. As a result they seldom, if ever, keep abreast of the changes in the law or the rules and regulations of the board. Anyone whose knowledge is only limited to the laws affecting a particular agency is wholly unqualified to properly represent and protect his client's interests before such an agency, because in many cases issues of law may arise for which he would be utterly unprepared to give proper advice and counsel, all detrimental to the best interests of his client. The danger is clearly apparent and it is not worth the risk when there are about 50,000 lawyers in the State who are readily available to give competent advice without limitation because of their broad legal knowledge. In addition, there are the legal aid societies and bar associations referral services available.

Bar associations are unalterably opposed to such legislation for the following reasons:

(1) Since there is no protection of a client's confidential and privileged communication with a lay representative, he may be disinclined or hesitate in making a full disclosure of the facts, without which his best interests cannot properly be presented or protected.

(2) A client has no means of ascertaining the degree of confidence he may repose in a so-called qualified representative who has no professional status, such as the badge of competency and character which a license implies to a lawyer or any other licensed professional whose professional conduct is closely supervised and controlled either by the courts or the board of regents of this state.

(3) The public interest, which should be the primary concern of the legislature, is not served or protected by licensing lay persons who only have a limited knowledge of law in a particular field. Expediency or the accommodation of a limited few clients, who do not care to have adequate and competent representation, should not be the motivating cause for urging the passage of this type of legislation.

(4) The creation of a so-called lay specialist group not only tends to demolish but clearly contravenes the purpose and intent of the legislature and the court of appeals in providing for strict rules for admission to the bar as an attorney insofar as character, fitness, and scholastic attainments are concerned.

(5) The establishment of a group of "qualified representatives" opens the door and encourages the resumption of the abuses and conditions which prevailed at the time of the Moreland Act Commission investigation of the workmen's compensation board referred to above.

(6) Anyone connected with administrative agencies can attest to the fact that lay representatives who have been appearing before them have impeded rather than helped the administration of justice and the proceedings before administrative agencies.

(7) Courts of this State, as well as a majority of other States, have recognized that it is primarily within the province of the courts to control the practice of law. Section 90, subdivision 2(a) of the judiciary law specifically provides that a disbarred attorney may not practice before "any court, judge, justice, board, commission, or other public authority." It would appear that these bills are inconsistent with such authority of the courts to prohibit a disbarred or suspended attorney from practicing before an administrative agency under pain of a contempt proceeding if per chance an agency should find him to be otherwise qualified to be a representative.

(8) Many administrative agencies in determining questions of law and fact are functioning in a quasi-judicial character which is no less judicial in character than when exercised in a judicial proceeding. Adversary proceedings, in particular, before administrative agencies for all intents and purposes constitute the practice of law. Of course, every type of activity before such an agency is not necessarily the practice of law. However, when trial work is involved there can be no question about it. Even when there is no trial work involved, the preparation of legal documents, their legal interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity is involved, these activities are still the practice of law. On the other hand, where pure engineering, accounting, or clerical work is involved, the practice of law is not present, and in these latter areas the laymen can adequately perform.

See:

West Virginia State Bar v. Airley, 109 S.E. 2d 420.

State v. Sperry, 140 So. 2d 587.

State v. Keller, 114 N.W. 2d 796.

Denver Bar Association v. Public Utilities Commission, 391 P. 2d 467.

New York County Lawyers Association v. Ola C. Cool, etc., Labor Relations Institute, 294 N.Y. 853.

New York County Lawyers Association v. Roel, 3 N.Y. 2d 224, 231.

(9) In the case of *In re Dawkins* (262 App. Div. 56, affirmed 289 N.Y. 553), the court held that proceedings before the Board of Assessors of the City of New York are judicial in nature and the appellant was properly enjoined *in the public interest* from continuing his acts. It further held that the hearings in such proceedings, wherein testimony is reported stenographically, are judicial in essence. Further, that recognition may not be given to the distinction which the appellant sought to make between simple and complex matters, citing *People v. Lawyers Title Corp.*, (282 N.Y. 513, 521).

(10) Finally, the legislature should bear in mind the proliferation of administrative tribunals in recent years and extended scope of their jurisdictions in determining the propriety of representation before such bodies by persons other than lawyers. The distinction between appearances before administrative and judicial bodies is no longer a varied or controlled consideration. See: *Realty Appraisals Co. v. Astor-Broadway Holding Corp.*, 5 App. Div. 2d Series, p. 36; also *Matter of New York County Lawyers Assn. v. Bercu*, 273 App. Div. 524, affirmed 299 N.Y. 728.

Accordingly, it is respectfully submitted that these bills insofar as they provide for "or other qualified representatives" should be deleted therefrom.

Respectfully submitted.

COMMITTEE ON UNLAWFUL PRACTICE OF LAW,
BROOKLYN BAR ASSOCIATION,
JAMES AMADEI, *Chairman.*

THE FOLLOWING REPORT RELATIVE TO THE APPEARANCE OF LAYMEN BEFORE ADMINISTRATION AGENCIES WAS APPROVED AT A MEETING OF THE BROOKLYN BAR ASSOCIATION HELD ON NOVEMBER 12, 1964

To the Members of the Brooklyn Bar Association:

At a meeting of the board of trustees of this association held on October 14, 1964, the undersigned committee, together with the committees on administrative boards and State legislation, were directed to submit a report of its recommendations at the November meeting of the association relative to the draft Administrative Procedure Act presently being considered by the Law Revision Commission of the State of New York. By a concurrent resolution of the 1964 legislature, the commission was directed to confine its activities for the present to a specific study and evaluation, at the State level, of the desirability and type of legislation needed in connection with the promulgation of rules and regulations of administrative agencies and of existing laws relating to the scope of judicial review of administrative acts and determinations. The commission is requesting suggestions which will be helpful in its final determination before submitting its recommendation to the 1965 legislature.

The committee on unlawful practice is concerned with so much of the act, as drafted, having to do with sections 2 and 11 thereof. Section 2 contains the definitions as used in the act, and section 11 reads as follows:

"Any person compelled to appear in person, or who voluntarily appears before any agency or representative thereof, shall be accorded the right to be accompanied, represented and advised by counsel or other representative. In a proceeding before an agency, every party or person shall be accorded the right to appear in person or by or with counsel or other representative."

As to section 2, nowhere is the word "representative" defined so as to indicate: (a) what qualifications or educational requirements are needed; (b) whether such representative was to be licensed by the agency; and (c) if licensed, whether it should be on a yearly or permanent basis.

As to section 11, no provision is made therein authorizing the particular agency to set up rules and regulations with respect to the supervision and control of such representative or a code of ethics whereby such a representative could be disciplined when guilty of misconduct.

The foregoing are some observations of the committee without considering the merits as to whether or not it would be in the public interest to authorize laymen to appear and practice before governmental agencies.

The committee at its meeting held on November 6 considered the foregoing provisions not only from the viewpoint of the draft act but also generally as it affects the practice of law. The committee feels that rules and regulations, directives and decisions of administrative agencies have a great effect not only upon the economic welfare and activities of the individual parties involved but also the community or industry over which they have jurisdiction. It is well known that they have a far-reaching effect, more so than individual litigation. About 30 years or more ago, there were very few such governmental agencies, and since then, however, many such boards and agencies have been created not only to determine the individual rights of parties but also matters involving large community and industrial interests. The laws which they are called upon to interpret and administer have over the years become more complex and technical from a legal standpoint, so much so that many lawyers have

found it necessary to take courses in order to specialize in a particular field of administrative law, mainly because of the technicalities and intricacies involved. Under the circumstances, your committee believes that to permit laymen who have no legal background to appear and represent parties before administrative agencies is not only doing a disservice to the clients whom they represent, but also would be most detrimental to the public interests. In addition, unqualified individuals who may appear before such agencies, because of their lack of knowledge and understanding of the law and procedures, impede the prompt and proper administration of the act under which such agency is operating. It is common knowledge among hearing officers of administrative agencies that it is most difficult to have the law and the facts presented, and by reason thereof, prevents the expeditious handling of the matter when the parties appear by unqualified lay representatives rather than by lawyers.

Of equal importance is the fact that the client would be denied the very important right and protection of privileged communications such as exists in the relationship between an attorney and client. This privilege should not be negated by permitting representation by laymen. There is no doubt that the client relies upon this protection in disclosing confidential matters to their representative. The laws, throughout this country, recognize the importance of this right for the purpose of encouraging a full disclosure of all the facts in order that the client can be properly represented in presenting or protecting his interests in the particular matter involved.

It is not uncommon for such lay representatives to represent themselves to be attorneys in a particular field of law, such as "patent attorney," "labor relations consultant," "tax consultant," "tax counsel," etc. Such designations do not represent any degree or designation awarded by any court, college, or statute, nor do they attempt to indicate any standards of competency, of good character or fitness which might entitle them to be represented to the public as such specialists. To permit the public to be deceived into employing them in a particular field in which they claim to be a specialist thwarts the public protections that exist with respect to giving legal advice. If misrepresentations as to alleged expertness in any professional field by unqualified or unauthorized persons were permitted, all of the existing public protections as to such service can be evaded. Such persons are not subject to the penalties provided by the laws, as lawyers are subjected to, which seek to protect the public from the danger inherent in the representation by unauthorized persons that they are qualified to practice law or give legal advice or service in a particular field or specialty.

It has come to the attention of the committee that in instances where agencies are authorized to either register or license a lay representative to appear before them, it has been used as a subterfuge solely for the purpose of noticing his appearance of record in the proceeding and then farming out or forwarding the matter to an attorney in order to justify the splitting of the fee between them. Although this would be unethical for the attorney to split any fee he receives, it might not be considered unethical for a licensed representative to split the fee that he receives in the particular matter with the attorney whom he has engaged to handle the matter in his behalf. This encourages a vicious practice which should not be countenanced.

With over 50,000 lawyers admitted to practice in New York State, there is an adequate supply of lawyers available to meet the needs of the community. In addition, a deserving individual has available the lawyers referral service of the various bar associations and the legal aid society where representation can be secured either at no fee or at a nominal fee.

Aside from the foregoing reasons, there is a serious question as to whether or not the jurisdiction over the practice or the unlawful practice of the law comes within the province of the legislature or the judiciary. In some of the other jurisdictions it has been held to be within the province of the court to regulate the practice of law. Some jurisdictions have held that the legislature may pass statutes in aid of judiciary, but cannot exclude the judiciary from its constitutional power to regulate and define the practice of law. The Unlawful Practice Committee of the New York State Bar Association is presently undertaking a study of this phase of the matter, and Assistant Dean John J. Murphy of St. John's University School of Law, a member of the committee, has been assigned the task of making a study and research as to the constitutionality of any statute that regulates the practice of law by legislation rather than by rules and regulations of the courts. He is expected to submit his findings and conclusions at a symposium being sponsored by that association on Saturday, November 21, 1964, at the Hotel Biltmore.

For the reasons above stated, your committee believes that it is not in the best interests of the public to permit anyone, other than lawyers, to appear or represent parties before any administrative agency, and, accordingly, disapproves so much of section 11 of the Draft Act which authorizes a person to be "accompanied, represented, and advised by * * * other representative," and also so much thereof as accords "the right to appear * * * by * * * other representative."

Your committee recommends that a copy of this report be forwarded to the Law Revision Commission, the New York State Bar Association, the American Bar Association, the Governor, the legislative leaders and the chairman of the respective legislative committees of the senate and assembly having to do with administrative agencies.

Respectfully submitted.

James Amadei, Chairman; Michael M. Kirsch, Vice Chairman; Alfred E. Buck; Michael Caputo; Milton L. Fleiss; Samuel L. Greenberg; Julien W. Newman; Max Schwartz; Daniel M. Cohen; John C. Corbett; Harold L. Cowin; Philip G. Fitz; John J. Hal-leron, Jr.; Paula L. Levitt; Marie L. McCann; Robert A. Morse; William A. Anzalone; Noah Goldstein; William B. Jacobs; Guy J. Mangano; Sadie A. O'Brien; Alfred F. Ritter; Harold Rosenbaum; Morris H. Schneider.

MAY 19, 1965.

Mr. JAMES AMADEI,
*Chairman, Committee on Unlawful Practice of Law, Brooklyn Bar Association,
Brooklyn, N.Y.*

DEAR MR. AMADEI: Senator Eastland has forwarded to me your letter of May 13, 1965, with respect to S. 1758.

We are very pleased, indeed, to have your letter and the attachments thereto, all of which will be made a part of the record of the hearings on this measure. Your suggestions will be given every possible consideration.

Best wishes.

Sincerely,

BERNARD FENSTERWALD, Jr., *Chief Counsel.*

BROOKLYN BAR ASSOCIATION,
Brooklyn, N.Y., May 13, 1965.

Re Senate bill S. 1758.

HON. JAMES EASTLAND,
*Chairman of Committee on the Judiciary, Senate Office Building, Washington,
D.C.*

DEAR SENATOR: This association has been informed by Mr. F. Joseph Donohue, chairman of the Committee on Federal Legislation of the American Bar Association, that a bill introduced by Senator Edward V. Long of Missouri on behalf of himself and Senator Bayh, Burdick, Dirksen, Ervin, Fong, Hart, McClellan, Scott, and Tydings, providing for the right of persons to be represented by attorneys in matters before Federal agencies, known as S. 1758, is scheduled for a public hearing commencing May 12 before the Committee on the Judiciary, of which you are chairman. I have written to Mr. Donohue under date of May 12 expressing the views of this association, a copy of which is enclosed and is self-explanatory, and therefore requires no reiteration of the views expressed therein in this letter.

I trust that if your committee does not see it fit to eliminate section 101, subdivision b, thereof, that it will give favorable consideration to the amendment thereof to the extent indicated in my letter to Mr. Donohue, that is to add the following: "The foregoing is not to be construed that such person may engage in the practice of law before any agency."

For the information of you and your committee, I am enclosing a copy of the memorandum which was submitted to the State judiciary committee of the senate at a public hearing on May 11 on the subject of laymen appearing before administrative agencies in this State.

Your favorable consideration of the above will be greatly appreciated.

Respectfully yours,

JAMES AMADEI,
Chairman, Committee on Unlawful Practice of Law.

MAY 12, 1965.

Re Senate bill, S. 1758.

F. JOSEPH DONOHUE, Esq.,
Washington, D.C.

DEAR MR. DONOHUE: Your letter of May 6 directed to the president of this association, together with enclosures, were referred to me as chairman of the committee on unlawful practice of law of this association. I note that among the list of bar associations on the list submitted by you to the Senate Judiciary Committee this association is included. I have been endeavoring to ascertain who on behalf of the association so informed you of its support of this bill, as I have no recollection of having written such a letter. It was not until the receipt of your communication that I read the provisions of the bill itself, which was enclosed.

I have discussed this bill with Mr. Raymond Reiser, formerly a member of the Committee on Unauthorized Practice of the Law of the American Bar Association and chairman of both the New York State Bar Association and Brooklyn Bar Association committees, and he informs me that section 101, subdivision b, was inserted in the bill as a compromise in order to assure its passage. It is my opinion that such a compromise provision impliedly recognizes the fact that lay persons do in fact appear and represent parties or witnesses before Federal administrative agencies even though it states that, "Nothing herein shall be construed to either grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." It is my opinion, and I believe that of my committee, that this is a heavy price to pay to permit attorneys to practice before Federal agencies without formally applying and being admitted by the particular agency to practice before it. It seems to me that it is highly improper for any agency to compel an attorney who has been duly licensed to practice in any State or the District of Columbia to submit to any requirement that unless they make formal application they are not permitted to practice before it. It is my view that this subdivision should be omitted from the bill; if not, that it should specifically contain a provision along the following lines: "The foregoing is not to be construed that such person may engage in the practice of law before any agency."

I am enclosing herewith copies of the report of the committee on unlawful practice of law of this association which was unanimously adopted on November 12, 1964, having to do with the proposed recommendation to permit persons and parties to appear and be represented before administrative agencies in New York State by "other representative," and also my memorandum to the Senate Judiciary Committee of this State which is considering the Law Revision Commission's bill in which it refers to "other qualified representative" appearing or representing a person or party as indicated above. The New York State Bar Association through its Committee on Unlawful Practice of Law appeared at the public hearing in opposition to this bill, as well as other bar associations in the State of New York.

I would therefore appreciate it if when you are presenting the views of the various bar associations to the Senate Judiciary Committee that you express to them the conditions under which this bar association supported the bill.

Your cooperation in this report will be greatly appreciated.

Sincerely yours,

JAMES AMADEI,

Chairman, Committee on Unlawful Practice of Law.

P.S.—Since dictating this letter, the board of trustees of this association, at its meeting today, unanimously approved the views expressed herein.

MEMORANDUM IN OPPOSITION TO ARTICLE 4, SECTION 401 AND ARTICLE 6, SECTION 601, RELATIVE TO AUTHORIZING "OTHER QUALIFIED REPRESENTATIVES" TO APPEAR BEFORE ADMINISTRATIVE AGENCIES

The above bills were introduced as a result of the report and recommendations of the Law Revision Commission relative to establishing a Uniform Administrative Procedure Act and Administrative Rule Making Procedure Act.

Committees on unauthorized practice of the law of the American Bar Association, the New York State Bar Association, and various local bar associations are particularly concerned with so much of these bills which provide that any person compelled to appear or voluntarily appearing before an agency, and all parties, "shall be accorded the right to appear in person or by or with

counsel or *other qualified representative.*" These bills do not define who a qualified representative may be, nor do they limit or indicate the extent of such representation, nor the particular agency or agencies to which such provision may apply. However, the Commission's report does state the conclusion that, "lay representation is widespread and not necessarily inappropriate before a number of agencies," without setting forth the details upon which such conclusion is reached. Communications received by this committee indicate that lay representation is limited to a certain few agencies in nonadversary matters. In lieu of specifying at least uniform minimum educational requirements for such representatives, the report states: "By specifying 'other qualified representatives' the proposed bill enables agencies to set forth their own standards and requirements for permitting qualified lay representation under appropriate circumstances." It is quite apparent that to leave this to each and every agency would encourage the creating of a hodgepodge of so-called qualified representatives with no uniform requirements as to educational background, supervision, and control, or the extent to which such representative may participate in a proceeding before the agency.

The bar associations, through its committees, function at their own expense in the investigation and prosecution of individuals and corporations violating the provisions of the penal law having to do with the unlawful practice of law. Public interest demands constant vigilance in uncovering such violations by unqualified and unlicensed individuals and corporations. To now permit laymen untrained in the law to represent clients before administrative agencies is to revert to the corrupt conditions found to exist at that time which brought about the need for licensing of an individual to practice law after he has met the rigid educational requirements established by the court of appeals, submitting to a bar examination as to his legal knowledge conducted by the board of law examiners, and thereafter satisfying the committee on character and fitness that he is a fit person and of good moral character, which he is required to maintain so long as he continues to practice law. All of this in order to protect the public from incompetent and unqualified persons representing the interest of a client in a most confidential relationship. No less requirement should be exacted from a lay representative, as every matter of a client should be treated with the same degree of importance and confidence. Why then open the door by cutting away the protection to which the public is entitled? The bills under consideration encourage this without any basic reason except to create a group of lay specialists of limited scholastic attainments, if any, depending upon the rules of the particular agency involved.

Attention is called to the fact that the Moreland Act Commission's report of its investigation of 1942, 1943, and 1944 with respect to the workmen's compensation board, then the industrial board (the only State board authorized to license lay representatives) sets forth in detail the abuses engaged in by licensed representatives, such as rebates, splitting fees, solicitations, and exacting fees in excess of those allowed by the referees, etc. As a result, the board promulgated rules of conduct for licensees. To be qualified for such a license, an applicant must be a citizen, 21 years of age, a resident of the State for at least a year, of good moral character, have an *adequate* education and have a competent knowledge of the compensation law and regulations. No written examination is conducted, adequate education is not defined, and an applicant need only show competent knowledge of the law and regulations by self-study. Compensation cases are adversary proceedings and there is no limitation on the type of claims a licensee may prosecute, whether it be controverted or not.

It is common knowledge that laws which administrative agencies are called upon to interpret and administer have become more technical and complex from a legal standpoint, so much so that lawyers who specialize in a particular field of law have found it necessary to keep abreast of the law to take special courses at the Practising Law Institute, and also attend symposiums and conferences. The undersigned, as a former member of the workmen's compensation board for 10 years, can attest to the fact that the compensation laws of this State are becoming more complex and technical in many respects than when originally enacted in 1913. Further, in many cases such licensees have utilized the privilege only on a part-time basis, separate and apart from their usual occupation rather than as a career in the particular law specialty. As a result they seldom, if ever, keep abreast of the changes in the law or in the rules and regulations of the board. Anyone whose knowledge is only limited to the laws affecting a particular agency is wholly unqualified to properly represent and protect his client's interests before such an agency, because in many cases issues of law may

arise for which he would be utterly unprepared to give proper advice and counsel, all detrimental to the best interests of his client. The danger is clearly apparent and it is not worth the risk when there are about 50,000 lawyers in the State who are readily available to give competent advice without limitation because of their broad legal background. In addition, there are the legal aid societies and bar association referral services available.

Bar associations are unalterably opposed to such legislation for the following reasons:

(1) Since there is no protection of a client's confidential and privileged communication with a lay representative, he may be disinclined or hesitate in making a full disclosure of the facts, without which his best interests cannot properly be presented or protected.

(2) A client has no means of ascertaining the degree of confidence he may repose in a so-called qualified representative who has no professional status, such as the badge of competency and character which a license implies to a lawyer or any other licensed professional whose professional conduct is closely supervised and controlled either by the courts or the board of regents of this State.

(3) The public interest, which should be the primary concern of the legislature, is not served or protected by licensing lay persons who only have a limited knowledge of law in a particular field. Expediency or the accommodation of a limited few clients, who do not care to have adequate and competent representation, should not be the motivating cause for urging the passage of this type of legislation.

(4) The creation of a so-called lay specialist group not only tends to demolish but clearly contravenes the purpose and intent of the legislature and the court of appeals in providing for strict rules for admission to the bar as an attorney insofar as character, fitness, and scholastic attainments are concerned.

(5) The establishment of a group of "qualified representatives" opens the door and encourages the resumption of the abuses and conditions which prevailed at the time of the Moreland Act Commission investigation of the workmen's compensation board referred to above.

(6) Anyone connected with administrative agencies can attest to the fact that lay representatives who have been appearing before them have impeded rather than helped the administration of justice and the proceedings before ministrative agencies.

(7) Courts of this State, as well as a majority of other States, have recognized that it is primarily within the province of the courts to control the practice of law. Section 90, subdivision 2(a) of the judiciary law specifically provides that a disbarred attorney may not practice before "any court, judge, justice, board, commission, or other public authority." It would appear that these bills are inconsistent with such authority of the courts to prohibit a disbarred or suspended attorney from practicing before an administrative agency under pain of a contempt proceeding if per chance an agency should find him to be otherwise qualified to be a representative.

(8) Many administrative agencies in determining questions of law and fact are functioning in a quasi-judicial character which is no less judicial in character than when exercised in a judicial proceeding. Adversary proceedings, in particular, before administrative agencies for all intents and purposes constitute the practice of law. Of course, every type of activity before such an agency is not necessarily the practice of law. However, when trial work is involved there can be no question about it. Even where there is no trial work involved, the preparation of legal documents, their legal interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity is involved, these activities are still the practice of law. On the other hand, where pure engineering, accounting or clerical work is involved, the practice of law is not present, and in these latter areas the laymen can adequately perform.

See:

West Virginia State Bar v. Airley, 109 S.E. 2d 420.

State v. Sperry, 140 So. 2d 587.

State v. Keller, 114 N.W. 2d 796.

Denver Bar Association v. Public Utilities Commission, 391 P. 2d 467.

New York County Lawyers Association v. Ola C. Cool, etc., Labor Relations Institute, 294 N.Y. 853.

New York County Lawyers Association v. Roel, 3 N.Y. 2d 224, 231.

(9) In the case of *In re Dawkins* (262 App. Div. 56 affirmed 289 N.Y. 553), the court held that proceedings before the Board of Assessors of the City of New York

are judicial in nature and the appellant was properly enjoined *in the public interest* from continuing his acts. It further held that the hearings in such proceedings, wherein testimony is reported stenographically, are judicial in essence. Further, that recognition may not be given to the distinction which the appellant sought to make between simple and complex matters, citing *People v. Lawyers Title Corp.*, (282 N.Y. 513, 521).

(10) Finally, the legislature should bear in mind the proliferation of administrative tribunals in recent years and extended scope of their jurisdictions in determining the propriety of representation before such bodies by persons other than lawyers. The distinction between appearances before administrative and judicial bodies is no longer a varied or controlled consideration. See: *Realty Appraisals Co. v. Astor-Broadway Holding Corp.*, 5 App. Div. 2d Series, p. 36; also *Matter of New York County Lawyers Assn. v. Bercu*, 273 App. Div. 524, affirmed 299 N.Y. 728.

Accordingly, it is respectfully submitted that these bills insofar as they provide for "or other qualified representatives" should be deleted therefrom.

Respectfully submitted.

JAMES AMADEI,
Chairman, Committee on Unlawful Practice of Law,
Brooklyn Bar Association.

JUNE 9, 1965.

Mr. HERBERT DUBNO,
Registered Patent Agent,
Brooklyn, N.Y.

DEAR MR. DUBNO: Thank you most sincerely for your letter of May 26, 1965, concerning S. 1758.

As you have requested, am having it made a part of the record of the hearings on this proposal.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

BROOKLYN, N.Y., *May 26, 1965.*

CHAIRMAN, SENATE SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE,
Washington, D.C.

MR. CHAIRMAN: It has come to my attention that your subcommittee is currently holding hearings in connection with a modification of the Administrative Procedure Act to admit to practice before an agency of the Federal Government, including the U.S. Patent Office, all attorneys who are members in good standing of any State bar.

I should like to place on record my opposition to this modification inasmuch as it concerns the qualifications of practitioners who must represent inventors before the U.S. Patent Office. I feel—as does the American Chemical Society, the Patent Office, and other professional and scientists' organizations—that admission of persons with limited or no technical qualification to practice before the Patent Office would have tragic consequences with respect to the level of patent practice and will open the door to a flood of patent applications by persons who would have the right to hold themselves out as practitioners without the qualifications to do so.

It is not to be doubted that a member of a State bar is compelled, by the rigid ethical standards of the bar, to refrain from holding himself out as competent practitioner when he is in reality not fully qualified; so, too, it is logical that most of the unqualified attorneys at law, who would represent clients in patent prosecution, will obtain qualified assistance and even turn such prosecution over to individuals now qualified for such practice.

I must, however, underscore that this reflects the present state of affairs since most attorneys who do not themselves practice before the Patent Office direct inventors to qualified attorneys. To accomplish this end, there is no need for a modification for the standards of law practice before the Patent Office.

I should like to direct this communication, however, to a contention widely voiced by a few members of the legal profession; namely, that technical qualification is not a requisite for practicing patent matters before the courts having jurisdiction therein and, therefore, such technical qualification should not be required of practitioners before the Patent Office. To the extent that this allegation is a call for greater legal competency of law practicing before the Patent

Office, it cannot be applauded too greatly. To the extent, however, that this contention is considered to support an argument that technical qualification is unnecessary, it is totally unacceptable.

A member of the bar of the highest court of a particular State is assumed to have attained a minimum level of qualification in the law of his State and is constrained to conform to a standard of ethics closely supervised by the regional organizations. Patent law is not, however, State law and, although recognized as an exception among the various legal disciplines for many years, has only been defined as a Federal body of law, under exclusive Federal jurisdiction and conforming to Federal standards, by the decision rendered several years ago in *Alexander Sperry v. The Florida State Bar* (S. Ct. October 1962 term).

It must now be stated conclusively that practice before the U.S. Patent Office and practice in patent matters before the Federal courts is the practice of a Federal body of law under a Federal jurisdiction.

Should the American Bar Association call for a national patent bar under the supervision and control of, for example, the U.S. Court of Customs and Patent Appeals, with standards enforced by a Federal patent bar examination not unlike the State bar examinations and designed to fulfill the Patent Office requirements for practice, the bar association's stand would be unimpeachable. In fact, such a national patent bar was proposed some years ago by Mr. Karl F. Ross, then president of the American Association of Registered Patent Agents & Attorneys, New York, to the Commerce Secretary's Advisory Committee on Patent Matters.

I take this opportunity to urge that your subcommittee consider writing a national patent bar into law and exempting the Patent Office from the proposed bill admitting all attorneys to practice before all Federal agencies. This recognition of a Federal body of law under Federal administration and conforming to Federal standards would be a logical outgrowth of the decision in the *Sperry* case and conform to the bar association's demands of elevated standards in a legal sense for those qualified to practice in patent matters. At the same time, it would apply standards of competency akin to those required for membership in a State bar on the Federal level.

I would appreciate your consideration of the foregoing matter and its presentation to the subcommittee at the present or forthcoming hearings; it is also respectfully requested that this communication be made part of the official records of the hearings upon the proposed bill.

Very truly yours,

HERBERT DUBNO,
Registered Patent Agent.

NATIONAL ASSOCIATION OF
ENROLLED FEDERAL TAX ACCOUNTANTS,
Chicago, Ill., May 14, 1965.

Re S. 1336 and S. 1758.

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
U.S. Senate,
Washington, D.C.

GENTLEMEN: The National Association of Enrolled Federal Tax Accountants is the only national organization in the United States whose membership is limited to those persons who have passed the 2-day written special enrollment examination of the Internal Revenue Service, or the written examination for nonlawyers who wish to practice before the Tax Court of the United States. All of our members are enrolled to practice before the Internal Revenue Service.

The basic aim of the National Association of Enrolled Federal Tax Accountants is to maintain professional and ethical standards, to develop educational and technical services which will assist our members in their day-to-day work, and to protect the interests of the public.

Our code of ethics includes the 30 examples of disreputable conduct spelled out in the Treasury Department Circular No. 230 (revised).

Our accrediting body grants the use of our private, professional membership service mark designation, "Enrolled Federal Tax Accountant," only to those persons who meet our high standards of admission and agree to comply with the opinions of our Committee on Professional Conduct.

It is in the best public interest to continue to have the Office of the Director of Practice of the U.S. Treasury Department, check on the integrity, character,

and reputation of all persons who desire to obtain the privilege of holding the coveted Treasury card.

These bills would permit preferential treatment to one of the four categories of enrolled tax practitioners, which is not accorded to the other three classes. These bills would not be fair to the more than 4,000 practitioners who, since 1959, were required to pass the 2-day written, comprehensive special enrollment examination which is prepared, given, and graded by the Internal Revenue Service. Approximately 77,000 attorneys and agents were enrolled to practice before the Internal Revenue Service at the end of the fiscal year ended June 30, 1964. Almost 50 percent of the enrollees are lawyers.

The enactment of these bills which would authorize automatic enrollment of lawyers would be ill advised and detrimental to the public interest. This is "special purpose" legislation which is based upon a misunderstanding that lawyers may freely interchange their right to practice from one State jurisdiction to another.

These bills would impose a financial hardship on the other three categories of tax practitioners who would be expected to pay increased fees to cover the cost of maintaining the Office of the Director of Practice of the U.S. Treasury Department. If fees to these other persons were not substantially raised it would lower the budget of the Office of the Director of Practice to the point where they would not be able to perform their duties to the extent necessary to protect the public interest in maintaining the high caliber of the Treasury bar.

This written statement is being submitted, as requested in your letter of May 7, 1965, so that it may be inserted in the hearings record. We want to emphasize that the automatic admission of lawyers to practice before the Internal Revenue Service is neither necessary nor appropriate.

Cordially,

S. A. RISH, EFTA, *Executive Secretary.*

MAY 19, 1965.

Senator QUENTIN N. BURDICK,
U.S. Senate.

DEAR QUENTIN: Have received your recent letter enclosing letter and attachment from Mr. R. B. Ludvigson, president of the North Dakota Society of CPA's.

Have asked the staff of the subcommittee to insert Mr. Ludvigson's correspondence in the record of our hearings on S. 1758.

Warm regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

R. B. LUDVIGSON,
Valley City, N. Dak., April 30, 1965.

Re S. 1758, and sections 6 (b) and (c) of S. 1336.

Hon. QUENTIN BURDICK,
U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: It is my duty as president of the North Dakota Society of Certified Public Accountants to relay to you the original resolution concerning the above legislation, which was adopted by the advisory council of our society at a special meeting on April 22, 1965.

It was my intention to deliver this to you in person recently when you were in the Fargo area. As this was not possible, I hope that our vice president, Adam Thiel, was able to make contact with you. There are certain personal comments I would like to make concerning the resolution and the legislation. Thus, the following:

1. The resolution does not cover the present requirement of power of attorney authorization when representing a client before the Treasury Department. I personally feel that this should be retained for all practitioners before the Treasury as it is a simple instrument to execute and protects the client by giving him an opportunity to limit the power to certain subjects, areas, or periods, and at the very least, informs him of such representation.

2. The present practice of Treasury card screening for lawyers and certified public accountants at first glance seems unnecessary as we both are subject to rigid standards of conduct and performance. However, on a national

level, there is always the danger of abuse by the few, and there should be some type of screening. Perhaps this screening could be done by our professional groups better than by the Treasury officials.

3. Relative to those that represent clients before the Treasury that are not lawyers and certified public accountants, I favor the present practice of Treasury card examinations and screening.

Would you please introduce the enclosed resolution into the proceedings of the May 12-14 subcommittee hearings? Your cooperation will be most appreciated.

Respectfully,

R. B. LUDVIGSON,
President, North Dakota Society of CPA's.

EXCERPT OF THE PROCEEDINGS OF THE ADVISORY COUNCIL OF THE NORTH DAKOTA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS SPECIAL MEETING AT CARRINGTON, N. DAK., APRIL 22, 1965

A discussion was held concerning pending legislation before the Senate of the United States. The following resolution was adopted and unanimously approved:

RESOLUTION

We, the officers and advisory council of the North Dakota Society of Certified Public Accountants, resolve that S. 1758 and section 6 (b) and (c) of S. 1336, are improper and unduly restrictive in that they would permit lawyers to practice before the Treasury Department (as well as other Federal administrative agencies) without obtaining prior departmental approval. It is in the public interest that this legislation should provide similar treatment for certified public accountants since both professions serve an identical function when practicing before the Treasury Department, and lacking such a qualification, the bill is unacceptable to this council and not in the public interest.

Members in attendance:

Lloyd E. Orser, Bismarck, N. Dak.
Herman Doeling, Carrington, N. Dak.
Warren Anderson, 210 Walker Building, Fargo, N. Dak.
*Adam Thiel, 210 Walker Building, Fargo, N. Dak.
Donald H. Ford, University Station, Grand Forks, N. Dak.
*R. D. Koppenhaver, University Station, Grand Forks, N. Dak.
Harold B. Ikelman, Grand Forks, N. Dak.
Richard Korsmo, University Station, Grand Forks, N. Dak.
Garry A. Pearson, Grand Forks, N. Dak.
Russell Anderson, Minot, N. Dak.
Baldwin Martz, Minot, N. Dak.
*Rudolph B. Ludvigson, Valley City, N. Dak.

*Indicates officers of the North Dakota Society of Certified Public Accountants (Mr. Ludvigson is president, Mr. Koppenhaver is secretary-treasurer, and Mr. Thiel is vice president).

Attest:

APRIL 22, 1965.

RUDOLPH B. LUDVIGSON,
President of North Dakota Society and Chairman of the Council.

U.S. SENATE,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
May 13, 1965.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practices and Procedures, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed herewith is a letter I have received from Mr. R. B. Ludvigson, president of the North Dakota Society of CPA's, along with a resolution which I am forwarding to be made a part of the official records on S. 1758 and sections 6 (b) and (c) of S. 1336.

With kind regards, I am,
Sincerely,

QUENTIN N. BURDICK.