

SENATE JUDICIARY COMMITTEE PRINT, JUNE 1945

NOTE.—*In May 1945 the Committee on the Judiciary of the Senate issued a Committee Print containing in two columns the text of the bill as originally introduced by Senator McCarran, Chairman of the Committee, on January 6, 1945, together with a parallel column consisting of a "revised text developed through informal conferences with interested parties" and some notes explaining shifts of language from one provision to another. This Print was reproduced in the later one of June 1945, to which was added a third column containing an "explanation of provisions with references" and a fourth column of "suggestions and objections of interested parties with reference to revised text".*

The originally introduced text is not reproduced here, since it is the same as the text of H. R. 1203 beginning at page 155 and the explanations and comments relate to the revised text. There is reproduced below, in one column, the revised text in italics followed as to each provision by notes, explanations, and suggestions appearing in the Committee Print of June 1945. First, however, there appear the two explanatory paragraphs in the Print. Editorial inserts, made necessary by the more convenient one-column form used below, are bracketed.

EXPLANATIONS

[Beneath] each paragraph of the revised text as presented [below in italics] is a statement of the purport, derivation, or relation of the provision. References are made to the final report of the Attorney General's Committee on Administrative Procedure and to other authorities. The committee has also had the benefit of the report of the President's Committee on Administrative Management, the monographs issued by the Attorney General's Committee respecting each important Federal agency, the several volumes of hearings by a subcommittee of this committee in 1941, and the current hearings before the House Judiciary Committee.

SUGGESTIONS

[Under this heading, as it appears below in connection with each proposed statutory provision, are] summaries of the objections and suggestions submitted by governmental agencies and others to June 29, after the tentatively proposed revision * * * was published and distributed. Many of the comments received from administrative agencies raise problems of language present in any legislation, which can be clarified in the report accompanying the bill. Agency responses of a very general or nonspecific nature, which are not included in the following summaries, may be grouped as follows:

1. Accord with the purpose of the bill and its specific provisions with stated exceptions.

2. Oppose any such measure either because of fear of hidden difficulties; because of asserted impossibility of drawing one measure to regulate all agencies; or because it is felt there is little need for legislation.

3. Request to be exempted *in toto* from any measure which may be reported.

4. No comment, either generally or specifically.

The typical general response from private interests or organizations is that the bill "does not go far enough", in either its original or revised form. Subsequent references * * * are to the revised text as presented [below in italics.]

[TITLE]

[SEC. 1.] *This Act may be cited as the "Administrative Procedure Act."*

DEFINITIONS

Sec. 2. As used in this Act—

SUGGESTIONS

It has been suggested that "foreign-affairs functions" should be defined and added to section 2 in order to exclude from the operation of the measure all passport and visa functions as well as all duties of consular and diplomatic officers abroad. However, so far as these are not foreign affairs functions "requiring secrecy in the public interest," there would seem to be no reason why they should not be subject to the simple public information requirements of section 3. Whether or not they are in all aspects strictly "foreign-affairs functions," the rule making provisions of section 4 do not apply to organizational or procedural rules nor to other rules where the simple procedures required are found impracticable. Since these functions are not required by statute to be made upon administrative hearing, sections 5, 7, and 8 relating to adjudications, hearings, and decisions are inapplicable.

(a) *Agency.*—"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia but, except as to the requirements of section 3, does not include agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them and war functions exempted by section 13.

EXPLANATION

The term "agency" is defined substantially as in the Federal Reports Act of 1942 (Public, No. 831, 77th Cong., 2d sess., Dec. 24, 1942), the Federal Register Act (sec. 4, 49 Stat. 500, 44 U. S. C. 304), and the Federal Register Regulations (1 C. F. R. 2.1 (b), as revised by 6 F. R.

4397). It should be noted that the definition of agencies does not mean that all acts of such agencies are subject to the procedural requirements. The definition of agency is merely a preliminary device for inclusion and exclusion. If an agency is subject to the proposal under this section, nevertheless it is subject thereto only to the extent that acts, rules, or orders are defined and not further excluded in the following sections and subsections.

SUGGESTIONS

The following agency comments have been received:

(1) It is suggested that all functions of the War and Navy Departments as well as of the Army and Navy should be exempted. However, since the bill relates to functions rather than agencies, it would seem better to define functions. All departments may, and often do, exercise civil and regulatory powers which should be subject to an administrative procedure statute. So far as war powers should be exempted, that should be done in section 13 where appropriate comment is made.

(2) Question has been raised as to the definition of "agency", but it would seem that the matter may be sufficiently explained in the committee report. It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus "divisions" of the Interstate Commerce Commission and the so-called Schwellenbach Officer of the Department of Agriculture would be "agencies" within this definition. Any other form of definition would raise serious difficulties in several Federal agencies. If deemed necessary, appropriate language may be added to the definition.

(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 participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action.

EXPLANATION

The words "person" and "party" are defined as in many statutes and regulations. The definition stated is self-explanatory.

(c) Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making" means agency process for the formulation, amendment, or repeal of a rule and includes rate making or wage or price fixing.

EXPLANATION

The definition of rule making and rule follows essentially the definitions of the Federal Register Act (secs. 5 (a) and 11 (a), 49 Stat. 500, 44 U. S. C. 305 (a) and 311 (a)), in which the essential language is "general applicability and legal effect." The reason for the sharp distinction between rule making and adjudication (see the next subsection) is that they are the two main types of administrative justice (see the *Final Report*, Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess., 1941, pp. 1-2, 5, and chs. IV, V, and VI, hereinafter referred to as "*Final Report*, Attorney General's Committee" with page references). The procedure in rule making differs from adjudication in essential respects.

SUGGESTIONS

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

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

EXPLANATION

"Adjudication" has not been defined generally in statutes, except by implication or reference to particular subjects and orders. However, since there are only two basic types of administrative justice—rule making and adjudication—the words "other than rule making" serve to make the essential distinction.

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

EXPLANATION

"License" and "licensing" is defined in order to make definite and inclusive the functional provisions and exceptions contained in various subsequent sections.

(f) *Sanction and Relief.*—“Sanction” includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of 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; or (6) requirement of a license or other compulsory or restrictive act. “Relief” includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy; (2) recognition of any claim, right, or exception; or (3) taking of other action beneficial to any person.

EXPLANATION

“Sanction” and “relief” are defined in order to simplify the language of parts of sections 9 and 10.

(g) *Agency Proceeding and Action.*—“Agency proceeding” means any agency process as defined in subsections (c), (d), and (e) of this section. For the purposes of section 10, “agency action” includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof.

EXPLANATION

“Agency proceeding” and “agency action” are defined in order to simplify the language of some of the remaining provisions.

PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any military, naval, foreign affairs, or other function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of an agency—

EXPLANATION

The Attorney General’s Committee unanimously agreed that “an important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure,” in which connection the Committee also pointed out that the *Federal Register* and *Code of Federal Regulations* statutes “did not provide affirmatively for the making of needed types of rules or for the issuance of other forms of information. * * * A primary legislative need, therefore, is a definite recognition, first, of the various kinds or forms of information which ought to be available and, second, of the authority and duty of agencies to issue such information” (*Final Report*, pp. 25–26, and see also pp. 123–124). The introductory exception is self-explanatory.

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, (2) the established places and methods whereby the public may secure information or make submittals or requests, (3) statements of the general course and method by which its rule making and adjudicating functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and general instructions as to the scope and contents of all papers, reports, or examinations, and (4) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.

EXPLANATION

This subsection states the kinds of rules agencies shall state or publish. The Final Report of the Attorney General's Committee at pages 26-28 lists them as the types of rules which "agencies should be authorized and directed to make and issue." The Committee also emphasized that the several types of information should be separately stated and their publication kept current. Section 3 (a), however, does not require the making of any substantive or interpretative rules or statements of policy.

SUGGESTIONS

The following agency comment has been made:

(1) It is said that a requirement that agencies describe in rules the "course and method" by which its rule making and adjudicating functions are carried out would be contrary to the public interest. If that is said because of the difficulty of stating details, the answer is that the provision requires only a statement of the "general" course and method. If it is meant literally, the answer is given by the Attorney General's Committee comment quoted [above].

(2) It is said that this section requires agencies to include the "substantive criteria" whereby cases are decided, but the language obviously makes no such requirement and indeed the last numbered category expressly states that substantive material need be published only where affirmatively framed by the agency for the guidance of the public. As a matter of fact, perhaps the words "for the guidance of the public" should be omitted because the public should have the benefit of any substantive rules or directions the agency may frame.

(3) It is suggested that procedural information should be required to be published or, in the alternative, merely made available to public inspection; but the answer would seem to be that the Federal Register is the established organ whereby information is conveyed to the public. It was established for that purpose and the Attorney General's Committee recommends that it be used for that purpose in connection with administrative procedure. Not to do so will in most cases leave parties without any practical recourse to the information.

(b) Rulings and Orders.—Every agency shall publish or make available to public inspection all its generally applicable rulings or

questions of law and 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.

EXPLANATION

This section requires that rulings and orders either be published or otherwise made available to public inspection. Since rulings and orders made in the course of adjudication of particular cases are one of the principal sources of administrative law, it is obviously necessary that they be published or made available to public inspection. The essential nature and value of this type of material were emphasized by the Attorney General's Committee at pages 26-28 of its Final Report.

(c) Public Records.—Matters of official record shall, to the extent consistent with the public interest, be available to persons properly and directly concerned except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

EXPLANATION

This subsection merely provides that appropriate matters of official record shall be made available to properly interested persons.

SUGGESTIONS

It has been suggested that the phrase "personal data" be clarified, which if necessary, may be done in the committee report.

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management, Government personnel, or public property or contracts—

EXPLANATION

The introductory exceptions to the procedural requirements of rule making are self-explanatory.

SUGGESTIONS

The following comments have been made:

(1) The phrase "military functions" should be clarified, particularly for the purpose of including within it all proceedings relating to court martial. As heretofore indicated, the subject would seem more appropriate for section 13.

(2) Objection is made to the entire section on the ground that it should not be applied to minimum wage determinations of the Department of Labor in connection with public contracts. The last sentence of the following subsection (a), however, amply provides for proper exemptions.

(3) It is suggested that the second part of the introductory clause of the section should include public "loans, grants, benefits". If the exemption provision of the last sentence of the following subsection (a) is not deemed sufficient to care for any question in this respect, those words may be added after the word "property" in the introductory clause.

(a) Notice.—General notice of proposed substantive rule making shall be published in the Federal Register and shall include (1) a statement of the time, place, and nature of public rule making proceedings, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause, affirmatively finds (and incorporates the finding in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

EXPLANATION

The Attorney General's Committee found that public rule making procedures "are likely to be diffused and of little real value either to the participating parties or to the agency, unless their subject matter is indicated in advance. * * * In principle, therefore, each agency should be obliged to announce with the greatest possible definiteness the matters to be discussed in rule making proceedings" (*Final Report*, Attorney General's Committee, p. 108). Subsection (a) requires notice only in the making of substantive rules and then only where not impracticable or unnecessary or contrary to public interest, and lists the types of information to be contained in such notices. The limitation of the notice requirement is significant, because upon it depends the requirement of procedures contained in subsection (b) which follows. The reason for the exclusion of rules of organization, procedure, interpretation, and policy is threefold: First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

SUGGESTIONS

The following comment has been made :

(1) It is suggested that "substantive" should be defined and clarified. The meaning of the phrase "substantive rule" is well defined in court decisions and upon principle. Further clarification may be supplied in the committee report. Furthermore, the second sentence enumerates what is not made mandatory in the first.

(2) The subsection has been criticized on the ground that the two sentences, read together, raise a "confusing implication that 'rules of agency organization, procedure, or practice' constitute substantive rules" because the phrase "substantive rule making" is used as the subject of the first sentence and the others are then included in the kinds of rules exempted by the second. Strictly speaking, it should be unnecessary to provide in the second sentence that procedural or organizational rules are exempted; but the exemption was specified out of an abundance of caution lest it be thought by those unversed in administrative law definitions that they might be included in the notice requirement.

(3) Objection is made that the final clause of the subsection is too broad an avenue through which agencies may "escape" the requirement of notice and procedure, but the answer would seem to be that the language as written requires agencies to act in good faith and dispense with the requirements only for good cause.

(b) Procedures.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by law to be made upon the record after opportunity for or upon an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

EXPLANATION

This subsection, which provides for public rule making procedures, applies only to the type of rules for which notice is required by subsection (a) above—that is, substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of sections 7 and 8 necessarily apply. Thus, the provision does not extend present requirements except to require agencies, in the issuance of substantive rules, to permit at least the submission of written views or suggestions. This minimum requirement is based upon the premise stated as follows by the Attorney General's Committee (*Final Report*, pp. 101-103): "An administrative agency * * * is not ordinarily a

representative body. * * * Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. * * * Its knowledge is rarely complete, and it must always learn the * * * viewpoints of those whom its regulations will affect. * * * [Public] participation * * * in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings." It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by some other statute required that rules be issued upon hearing.

SUGGESTIONS

Private parties complain that this subsection provides inadequate procedure, particularly in the matter of findings and conclusions. However, the requirement that agencies consider "all relevant matter presented" and issue "a concise general statement of their basis and purpose" would seem to achieve all that more elaborate procedure could do effectively. The statement of the "basis and purpose" of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the real object or objects sought. It is deemed better to have some public procedure in most cases than to have rigorous procedure in a few cases.

(c) Effective Dates.—The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) shall precede for not less than thirty days the effective date thereof except as otherwise provided by the agency upon good cause found.

EXPLANATION

The Attorney General's Committee found that: "Some procedure should be provided to correct error or oversight in regulations before, rather than after, they become effective. This can be done by deferring their effectiveness until a specified period after their announcement. A provision of this sort will, moreover, insure notice of the regulations to interested parties. * * * A number of statutes now in force provide for the deferred effectiveness of regulations promulgated under them." *Final Report, Attorney General's Committee, pages 114-115.*

SUGGESTIONS

The following comments have been made:

(1) It is suggested that the words "effective rule" should be clarified. This may be done by committee report. They mean a rule which is binding as distinguished from "tentative" or "proposed" rules which agencies often publish and are encouraged to publish. The first use of the word "effective" in the sentence might be omitted if any real confusion results; but with or without it the meaning of the provision is clear on its face.

(2) Objection is made to the application of the provision to minimum wage determinations in connection with public contracts, but subsection (a) contains adequate exemption for good cause which is operative in any proper case.

(3) It is suggested that the provision should not apply to interpretative rules or statements of policy. If the exemption clause is not deemed ample to care for these types of rules, it may be well to add "or interpretative rules and statements of policy" at the end of the parenthetical expression in the subsection.

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

EXPLANATION

Subsection (d) requires agencies to receive and consider requests of private parties for the making, modification, or rescission of rules. The Attorney General's Committee proposed that such a provision be included in legislation (*Final Report*, pp. 195, 230).

SUGGESTIONS

One agency objects to the statutory statement of a right of petition on the ground that it would "force" a "tremendous" number of hearings. The alternative implied is that no one should have a right of petition, leaving action or inaction to the initiative of the agency concerned. Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen. If a petitioner states and supports a valid ground for hearing or relief, manifestly he should be entitled to hearing or relief. Not every petition need result in a hearing, just as not every complaint in court need result in trial.

ADJUDICATION

Sec. 5. 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, (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—

EXPLANATION

This section defines generally the procedure for the administrative adjudication of particular cases. The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing, and the first of the further exceptions eliminates matters subject to a

subsequent trial of the law and the facts *de novo* in any court. Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing. The exception of matters subject to a subsequent trial of the law and the facts *de novo* in any court exempts such matters as the tax functions of the Bureau of Internal Revenue (which are triable *de novo* in The Tax Court), the administration of the customs laws (triable *de novo* in the customs courts), the work of the Patent Office (since judicial proceedings may be brought to try out the right to a patent), and subjects which might lead to claims determinable subsequently in the Court of Claims. This exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement. It also exempts contract and property matters triable in the courts. There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have a right to ultimate full judicial process. The other exemptions are self-explanatory.

SUGGESTIONS

The following comments have been received:

(1) It is suggested that "military functions" be further defined or clarified. This may be done by committee report. So far as the objection relates to the possible inclusion of courts martial proceedings, see the comment to section 13.

(2) It is proposed that proceedings for claims to money damages be exempted from the section, but such proceedings are not ordinarily required by statute to be made after agency hearing. Hence, by operation of the introductory provision, they are exempt from the section. It is similarly suggested that pension and benefit proceedings be expressly exempted, but for the same reason these are not subject to section 5.

(3) One agency requests that its reparation proceedings—though subject to trial *de novo* in the courts—be made subject to section 5 but not to subsection (c) relating to the separation of functions. On principle and for the reason stated in the previous paragraph, this type of proceeding is exempted. If the suggestion is deemed a good one, after the word "except" the following parenthetical expression might be inserted "(unless an agency shall by published rule elect to be governed by this subsection with or without subsection (c))", thereby permitting proceedings under any of the exempt categories to be brought under the measure.

(4) It is urged that the second numbered exception should not apply to examiners appointed pursuant to this Act, so that, if their

sole protection remains the civil service system, they may be removed only after a hearing pursuant to the proposed statute. For this purpose it is suggested that the following words be added at the end of the second exception: "other than examiners appointed pursuant to section 11".

(5) Question has been raised whether the sixth exception in the introductory clause of section 5, relating to certification procedure in labor representation cases, should be included and thus remove such cases from the operation of sections 5, 7, and 8. Those who desire the exemption state that such things as 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. Those who oppose the exemption say that, on principle, the function should be treated as other adjudications and that, so far as the issues are simple, the intermediate report, findings, and decisions may also be simple.

(a) Notice.—Persons entitled to notice of an agency hearing shall be informed 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 in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

EXPLANATION

Since this section, and thereby sections 7 and 8 relating to hearings and decisions, applies only where statutes require a hearing, notice of hearing is an obvious and indispensable requisite. The only purpose of subsection (a) is to require adequate notice, because "a * * * prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject matter and issues involved. Notice * * * must fairly indicate what the respondent is to meet. * * * Room remains for considerable improvement in the notice practices of many agencies" (*Final Report*, Attorney General's Committee, p. 63). The second sentence requiring a statement of controverted issues is essential because of the general lack of requirement for responsive pleadings in administrative proceedings; without such provision moving parties do not know what issues are controverted.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time and the nature of the proceeding permits and (2), to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

EXPLANATION

Subsection (b) provides that, even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process (*Final Report*, Attorney General's Committee, p. 35). The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 except where such officers become unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any issue of fact unless upon notice and opportunity for all parties to participate. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for licenses nor prevent the agency from supervising or authorizing the issuance of process, complaints, or similar papers or from appearing thereon as a party.

NOTE

* * * Section 5 (c) is confined to adjudication (other than licensing) and does not apply to rule making.

EXPLANATION

The first sentence of subsection (c) is designed to assure, in so-called "accusatory" proceedings, that those who hear the case shall participate in its decision. The remainder of the subsection, in such cases, is designed to achieve an "internal" segregation of deciding and prosecuting functions. The minority of the Attorney General's Committee took the position that there should be a complete separation of functions—that is, that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions, or by a court (*Final Report*, pp. 203–209). The majority, however, took the position that, while "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-

American tradition demands of officials who decide questions" and the "commingling of functions of investigation or advocacy with the function of deciding are * * * plainly undesirable," the situation could and should be remedied "by appropriate internal division of labor. * * * The problem is simply one of isolating those who engage in the activity. * * * Independent hearing [officers] insulated from all phases of a case other than hearing and deciding will * * * go far toward solving this problem at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them" (*Final Report*, pp. 55-57). This majority view is adopted here.

SUGGESTIONS

It is suggested that this subsection be made inapplicable to rule making proceedings and reparation cases. But the answer is that the entire section applies only to "adjudications", as shown by the introductory provision, thereby eliminating rule making proceedings under the definitions stated in subsections 2 (c) and (d). The first numbered exception in the introductory provision of section 5, of proceedings subject to trials *de novo* in the courts, exempts reparation proceedings from the entire section.

(d) *Declaratory Orders.*—*The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.*

EXPLANATION

Courts have long recognized the validity of declaratory judgment procedures; but the administrative process has been slow to adopt such procedures. The Attorney General's Committee strongly recommended that the declaratory ruling be made a part of the administrative process and subject to judicial review (*Final Report*, pp. 6, 30-33).

SUGGESTIONS

Private parties object to leaving the issuance of declaratory orders to agency discretion. However, the phrase "sound discretion" means a reviewable discretion and will prevent agencies from either giving improvident declaratory orders or arbitrarily withholding such orders in proper cases.

ANCILLARY MATTERS

Sec. 6. Except as otherwise provided in this Act—

EXPLANATION

The provisions of section 6 are designed to recognize or provide the basic rule for the several types of matters which may be subsidiary to

rule making, adjudication, or other administrative powers and proceedings. They are largely self-explanatory and of obvious application.

(a) *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied and advised by counsel or, if permitted by the agency, by other qualified representative. In other cases, every interested person shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding or, where time and the nature of the case permit, before any agency or its responsible officers or employees for the prompt presentation, adjustment, or determination of any issue, request, or controversy. In either case, due regard shall be had for the convenience and necessity of the parties or their representatives.

EXPLANATION

This subsection recognizes the right of parties to appear before administrative agencies and be accorded facilities for the negotiation or settlement of any matter within the jurisdiction of the agency. It is thus designed to inform both the uninitiated administrator and the unfamiliar party of the right of appearance, thereby precluding either administrators or parties from the view that interviews and negotiations must be handled through favored representatives or as a discretionary dispensation. The first sentence is a recognition that, in the administrative process, the benefit of counsel shall be accorded as of right just as recognized by the Bill of Rights in connection with the judicial process, and as proposed by the Attorney General's Committee (*Final Report*, pp. 193, 219). It is to be noted that nonlawyers if permitted by the agency to practice before it, are not excluded from representing interested parties in administrative matters; for example, class "B" practitioners recognized by the Interstate Commerce Commission.

SUGGESTIONS

The following suggestions have been made:

(1) Clarify "interested person." This may be done by committee report. The phrase is one of recognized meaning, and the Attorney General's Committee on Administrative Procedure has pointed out that attempts at more refined statutory definition are probably futile (*Final Report*, p. 84).

(2) Define "agency proceeding." This has been done in subsection 2 (g).

(3) In the first sentence after "accompanied" insert a comma and the word "represented," so that counsel may present as well as advise. There seems to be no reason why this change may not be made. That is the meaning of the sentence. In most cases, even where the party must be personally present as in judicial proceedings of a criminal nature, the representation by counsel may be helpful both to the agency concerned and the party.

(b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be enforceable in any manner or for any purpose except as authorized by law. 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.

EXPLANATION

Many statutes conferring administrative powers contain authorization to conduct investigations, but the same statutes rarely include language indicating that such investigations must be confined to the jurisdiction and purposes of the agency to which the authority is delegated. Subsection (b) states the established limitations. Although scattered precedents hold that such investigative powers are necessarily so confined, since otherwise delegations would be unrestrained and therefore unconstitutional, the basic rule should be included in any administrative procedure statute.

(c) *Subpenas.*—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, necessity, or reasonable scope of the evidence sought. 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 and, in any proceeding for enforcement, issue an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so.

EXPLANATION

Statutory provisions conferring administrative subpoena powers are usually incomplete. They confer powers, but say nothing of the conditions of issuance or the rights of private parties. Subsection (c) is designed to: (1) Assure that private parties as well as agencies shall have a right to such subpoenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purposes. (2) Limit the showing required of private parties so that they may not be required to disclose their entire case for the benefit of agency prosecutors. (3) Recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The "haphazard" and often unfair methods of issuance of administrative subpoenas were recognized in the *Final Report* of the Attorney General's Committee (pp. 124-125, 414-415).

SUGGESTIONS

The following suggestions have been made:

(1) In the first sentence use the phrase "and reasonable" rather than "or reasonable" to indicate that the agency may require a showing

of "relevance, necessity *and* reasonable scope". If the change were made, agencies would, strictly speaking, be compelled to require all the elements or none; as written, agencies may require all or some.

(2) Provide for witness fees. Such provision, like authority to issue subpoenas hereinafter mentioned, probably should be made in separate legislation relating to particular agencies or powers rather than by a general statute.

(3) Private parties urge that after the word "be" in the second sentence there be added, "within the jurisdiction of the agency and otherwise", so that no administrative subpoena may be enforced beyond the lawful jurisdiction of the agency. It is felt that "in accordance with law" as now stated [in the revised text set forth above] means that. If adopted, the suggestion should be understood as not authorizing a complete pretrial in the courts of factual issues committed to exclusively administrative determination; courts should, instead, do no more than satisfy themselves that, legally upon the general factual situation shown, the agency has jurisdiction of the specific subject matter involved.

(d) Denials.—Prompt notice shall be given of the denial in whole or 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, such notice shall be accompanied by a simple statement of grounds.

EXPLANATION

Subsection (d) calls for prompt notice of denial of applications, and is designed to require notice not only of action but of the grounds in appropriate cases.

Hearings

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

EXPLANATION

As stated in the comment to section 5, the provisions of section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute.

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more subordinate hearing officers designated from 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 other officers specially designated by statute. The functions of all presiding officers and of officers participating in decisions in conformity with sec-

tion 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, disqualification, or willful conduct contrary to law of any such officer, the agency or another such officer shall after hearing determine the matter as a part of the record and decision in the case.

EXPLANATION

This subsection contains merely formal provisions with reference to hearing officers. The problem of their selection is presented in section 11 and the comment thereon.

SUGGESTIONS

The following comments have been received:

(1) It is feared that the provision for disqualification of presiding officers for "willful conduct contrary to law" may be used to try, in interlocutory fashion, the rulings of such officers during the course of the hearing. No such result is intended or reasonable. The type of conduct contrary to law warranting disqualification is that specified in section 5 (c) regarding the separation of functions. It should be possible to care adequately for the point by committee report.

(2) It is also feared that disqualification proceedings may require the main hearing to be held in abeyance. However, such proceedings will take place rarely if at all, and then usually before the main case gets under way. There is nothing in the provision which prevents both proceedings taking place simultaneously.

(b) Hearing Powers.—Officers presiding at hearings shall have power, in accordance with the published rules and established policies of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

EXPLANATION

The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (*Final Report*, pp. 43-53 particularly at pp. 45-46 and 50).

SUGGESTIONS

It has been suggested that this bill should grant the subpoena power to all hearing officers, whether or not the agency has been granted such power. It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of

such powers is of such a nature and so important as to be better left to Congress in connection with specific legislation rather than dealt with by a general statute. If, however, the suggestion is deemed meritorious, the phrase "authorized by law" should be eliminated from the second numbered power in the subsection and witness fees should be provided as mentioned in the comment to subsection 6 (c).

(c) *Evidence.*—*Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any evidence may be received, but no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence. Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence. In rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form subject to opportunity for such cross-examination and rebuttal.*

EXPLANATION

No attempt is made to require the application of the so-called "common law" or "jury trial" rules of evidence in administrative hearings. "The absence of a jury and the technical subject matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the 'common law rules' of evidence for jury trials" (*Final Report, Attorney General's Committee*, p. 70). As a matter of fact, those rules are no longer applicable in judicial trials, at least in trials in equity or before a court sitting without a jury. On the other hand, where private parties have the burden of proof, or seek to adduce evidence or establish defenses, agencies often require precisely that conformity with technical and outmoded rules of proof. Some recognizable rule, therefore, should be adopted for both private parties and government agencies. That some rule is necessary is evident from the fact that courts require administrative action to be supported by "substantial evidence". As a result, "although administrative agencies may be freed from the observance of strict common law rules of evidence for jury trials, it is erroneous to suppose that agencies do not * * * observe some 'rules of evidence'", regulations of some agencies "embody extensive rules governing the modes of proving * * * crucial issues," and the Attorney General's Committee "found no general pattern of departure from the basic principles of evidence among administrative agencies" (*Final Report*, p. 70). Accordingly, subsection (c) adopts the "reliable, probative, and relevant" standard stated by the Attorney General's Committee (*Final Report*, p. 71). The courts have used the same standard. *Edison Co. v. Labor Board*, 305 U. S. 197, 226, 229, 230; *Labor Board v. Remington Rand*, 94 F. 2d 862, 873 (C. C. A. 2, 1938); *Martel Mills Corp. v. Labor Board*, 114 F. 2d 624, 629 (C. C. A. 4, 1940); *Labor Board v. Service Wood Heel Co.*, 124 F. 2d 470, 473 (C. C. A. 1, 1941); *Ellers v. Railroad Retirement Board*, 132 F. 2d 637 (C. C. A. 2, 1943). The provision for rights of cross examination and rebuttal is in keeping with the recognition of those rights by the Attorney General's Committee (*Final Report*, pp. 69-70). Submission

of written evidence was also recommended by the Attorney General's Committee (*Final Report*, pp. 67-70). The provision relating to burden of proof is the standard rule.

SUGGESTIONS

The following objections and suggestions have been made:

(1) The application of the "rules of evidence" should be provided. But, assuming that this does not mean the strict jury trial rules, the difficulty is that there is no definite body of rules of evidence in Federal courts applicable to nonjury cases. There is also serious question whether an attempt to adapt rules in private litigation to administrative procedure would aid either private parties or government. [See the explanation above.]

(2) It is said that the right of cross examination and rebuttal should not apply in all cases, but the answer would seem to be that only "reasonable" cross examination and rebuttal is provided—thus leaving such examination and rebuttal to be adapted to the needs of the case or type of case.

(3) It is said that "relevant, reliable, and probative evidence" varies the present and tested rule in administrative law, but this is erroneous. [See the explanation above.]

(4) It is suggested by one agency that the third sentence should be revised to affirmatively state a right to submit oral evidence by making it read, "Every party shall have the right to present oral or documentary evidence and reasonable opportunity for cross examination and to submit rebuttal evidence." Since the next sentence provides for the submission of written evidence in appropriate cases, there would be no objection to the change.

(5) Several suggestions have been made respecting the provision for submission of written evidence. The first is that the provision should apply to adjudications as well as to rule making and determining applications for licenses. However, adjudications (or "accusatory" proceedings) are traditionally the type of proceeding in which seeing and hearing the witnesses is required and subsection 7 (b) permits even in those cases the taking of depositions "whenever the ends of justice would be served thereby".

(6) The remaining suggestions as to written evidence are that the written-evidence provision should be made applicable to claims and reparation cases. If the suggestion is adopted, the introductory language of the last sentence should read, "In rule making or determining claims for money or benefits or applications for licenses any agency may", and so forth.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, be made available to the parties. Where any agency 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.

EXPLANATION

This subsection provides that administrative hearings shall be reduced to a record, and made available to all parties. The statement of the exclusiveness of the record of the administrative hearing is a necessary recognition that upon it, and no other evidence, the further administrative proceedings must be had, the final administrative decision made, and judicial review be confined. Unless the record is so recognized as exclusive, the purpose and value of the hearing may be rendered nil, for it is only the record that informs the parties of the evidence for or against them. The rule of official notice is that recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an "opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed." (*Final Report*, pp. 71-73.)

DECISIONS

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

EXPLANATION

This section relating to decisions, like section 7 relating to hearings, applies only in cases in which a hearing is required by statute. See also the other exceptions to section 5, which automatically carry over into sections 7 and 8.

(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require (in specific cases or by general rule) the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On review of the initial decisions of such officers 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. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision unless in rule making or determining applications for licenses the agency shall first issue a tentative decision as a basis for post-hearing procedure.

EXPLANATION

The Attorney General's Committee recommended that the officer or officers who presided at the reception of evidence should not merely make recommendations to the agency in which they serve, but should go

further and make an initial decision binding upon the parties in the absence of administrative or judicial review (*Final Report*, pp. 50-53). This subsection, however, leaves it to the agency to choose either in the individual case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make a recommended decision for the further consideration of the agency. Such a provision not only allows the agency a discretion to be adapted to different subjects or cases, but it does not require a sharp break with current practice. In licensing or rule making, however, the agency may issue a tentative decision in lieu of either an initial decision or recommended decision by the officer who presided at the hearings.

SUGGESTIONS

The requirement of a recommended decision by the presiding officer is objected to in wage-hour and in general or regional railroad rate cases. But, because those cases are rule making rather than adjudication, the last sentence permits the agency to issue a tentative decision in lieu of a recommended decision of the presiding officer. To the extent that the issues are simple—which is the ground put forward for eliminating the intermediate report in wage-hour cases—the recommended or tentative decision may also be simple. The objection stated in wage-hour cases does not indicate whether the requirement of a tentative report is also objectionable. The objection in general or regional railroad rate cases is taken to either the requirement of a recommended decision or tentative decision. If either or both of these objections are felt to require recognition in the bill, some or all of the following parenthetical language may be added after the first word of the last sentence: “(except in establishing or adjusting industry-wide minimum wages or in general or regional railroad rate proceedings)”.

(b) Submittals and Decisions.—Prior to each recommended, initial, tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions where the complexity of the issues so requires, (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings and conclusions. All decisions and recommended or tentative decisions shall be a part of the record and include a statement of (1) the necessary findings and conclusions, and the basis therefor, upon the material issues of fact, law, or discretion and (2) the appropriate rule, order, sanction, relief, or denial thereof.

EXPLANATION

This subsection, in its first sentence, merely states the recognized rule respecting proposed findings, exceptions, and argument. The second sentence deals with the form and content of final decisions and determinations. The requirement of written findings and conclusions,

coupled with a statement of reasons, is indispensably necessary so far as administrative agencies undertake to make decisions upon the record of a hearing. The Attorney General's Committee pointed out the desirability of written opinions or statements of reasons (*Final Report*, pp. 29-30). The second sentence also requires administrative agencies to determine not merely whether they have power but whether and why, upon the facts, their discretion should be exercised. Such a requirement is illustrated in the decision of the Supreme Court that when an agency determines only "the dry legal question of its power" it fails to determine "whether in employing that power the policies of the act [involved] would be enforced" (*Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194-197 (1941)).

SUGGESTIONS

One agency recommends that the subsection include provision for service on the parties in adjudication, and publication in the Federal Register in rule making. While such a provision would not seem necessary in view of the existing law and practice, it may be added by inserting after the word "record" in the last sentence, a comma and the words, "served on parties appearing or specifically named and, in the case of rule making, published in the Federal Register."

SANCTIONS AND POWERS

Sec. 9 In the exercise of any power or authority—

(a) *In General.*—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as authorized by statute or lawful contract.

EXPLANATION

This provision, limiting administratively imposed requirements to the authority granted and delegated, is designed to afford statutory recognition for the basic rule of law embodied in judicial decisions. The creation of penalties or benefits is exclusively the province of Congress.

SUGGESTIONS

It is suggested that the subsection be amended to recognize sanctions specified in international agreements. If deemed desirable the subsection might be amended by adding a comma after the word "statute" and having the remainder of the sentence read, "treaty, authorized international agreement, or lawful contract."

(b) *License.*—In any case in which a license is required by law and application is made therefor, the agency shall, with due regard to the

rights or privileges of all the interested parties or adversely affected persons, with reasonable dispatch set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and make its decision. Except in cases of clearly demonstrated willfulness or those in which public health, interest, or safety manifestly require 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 such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely 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.

EXPLANATION

This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. The first sentence requires that applications be determined promptly. The second sentence is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency. Similar provisions are now contained in the banking statutes, except that the latter provide in addition that stated periods of time—sometimes more than one period of warning—shall elapse prior to the revocation of the equivalent of licenses (Banking Act of 1933, secs. 20, 30, and 31, 48 Stat. 162, as amended, 12 U. S. C. 377, 77, and 71a; Federal Reserve Act, sec. 13, 38 Stat. 251, as amended, 12 U. S. C. 347; R. S. 5144, as amended, 12 U. S. C. 61). The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154–167 of the General Code; Amended substitute Senate bill No. 36).

SUGGESTIONS

It is suggested that the provision for the withdrawal of licenses in the second sentence should not be applicable to foreign affairs, including such matters as visas or airplane permits granted foreigners. If deemed desirable, foreign affairs might be excluded by adding after the second word of the second sentence the words and figures "(1) matters of foreign affairs or (2) in".

JUDICIAL REVIEW

Sec. 10. Except so far as statutes preclude judicial review or agency action is by law committed to agency discretion—

EXPLANATION

The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold judicial powers. Other fundamental limitations are included in subsections (a) and (c).

SUGGESTIONS

The following suggestions have been received:

(1) It is proposed that the phrase “by law committed to agency discretion” might be clarified to indicate that judicial review is conferred only to correct an “abuse of discretion granted by law”. So far as necessary, the matter may be explained by committee report.

(2) It is urged that military functions—particularly courts martial proceedings—require specific exemption. This is dealt with in the comment to section 13.

(3) It is said that the section would render a rate making agency “impotent”. But, as indicated [in the explanation] with reference to subsection (e) of this section, the rule of review stated is that which is judicially recognized.

(4) It is urged that money claim cases—including tort claims and those for pensions or benefits—be expressly exempted. However, tort claims are determined in the discretion of agencies and hence are not subject to review; and, to the extent if any that they may not be committed to absolute discretion, they should be reviewable somewhere. Contract or quasi-contract claims are reviewable *de novo* in the Court of Claims or district courts and hence, under subsection 10 (b), are not affected by the procedure recognized by this section. Where Congress has desired to place pension or benefit cases beyond court review, it has—as in the case of the Veteran’s Administration—done so by express statute which is specifically preserved by the introductory clause of this section.

(a) Right of Review.—Any person suffering legal wrong because of any agency action shall be entitled to judicial review.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or legal inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

EXPLANATION

The first sentence states the general situation, that methods of review are “of two kinds: (a) those contained in statutes and (b) those

developed by the courts in the absence of legislation. * * * The non-statutory remedies * * * are available * * * where the remedy provided by statute is not an adequate substitute or does not include the particular situation involved" (*Final Report*, Attorney General's Committee, pp. 80-82). Although the declaratory judgment "proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields" (*Final Report*, Attorney General's Committee, p. 81). In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that "Under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of * * * administrative rules, if he can show such an interest and present injury therefrom as to constitute a 'case or controversy'" (H. Doc. No. 986, 76th Cong., 3d sess.). The second sentence states the present rule as to enforcement proceedings.

SUGGESTION

An agency suggests that this subsection provides a new form of review in *de novo* cases. But it is expressly provided that "any special statutory review relevant to the subject matter" shall not be disturbed, and the recognition of the so-called common-law type of review is in accord with the authoritative statement of existing law as set forth [in the explanation above].

(c) Reviewable acts.—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 to 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. Any agency action shall be final for the purposes of this section notwithstanding that no petition for rehearing, reconsideration, reopening, declaratory order, or (unless the agency otherwise requires by rule) petition for review has been presented to or determined by the agency.

EXPLANATION

Subsection (c), defining reviewable acts, is designed also to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule (*Final Report*, Attorney General's Committee, pp. 85-86; *Shields v. Utah Idaho Central Ry.*, 305 U. S. 177 (1938); *Utah Fuel Co. v. Bituminous Coal Commission*, 306 U. S. 56 (1939)).

SUGGESTIONS

The following objections have been made:

(1) One agency objects to the recognition of a right of review in public contract and other cases where Congress has not specifically provided for judicial review. But, as set forth [in the explanation above] with respect to subsection 10 (b) above, the so-called nonstatutory or common-law type of review was recognized by the Attorney

General's Committee as properly obtaining wherever special statutory review is not provided by Congress and legislation does not indicate that judicial review is precluded or withdrawn. The exceptions stated in the introductory clause of section 10 appear to set forth the proper type of issues not subject to judicial review. If a party can show that he is "suffering legal wrong" as provided in subsection (a), he should have some means of judicial redress.

(2) It is objected that the provision for judicial review of "every final agency action for which there is no other adequate remedy in any court" would provide judicial review of certification proceedings in labor representation cases. But it is admitted that the language of the first sentence is a statement of the present general state of the law. See also [the explanation with reference to] subsection (b) of section 10. Whether NLRB representation cases are so reviewable in equity has not yet been decided by the Supreme Court. The question the Court must decide under general law or this subsection is whether subsequent review in enforcement proceedings is "adequate". To except certification proceedings in this bill would prejudge the question.

(3) A final objection is that this section, read in the light of the definition of agency action in subsection (g) of section 2, would enable courts to review the failure of an agency to institute proceedings in labor cases. The point made is that, out of the numerous complaints and requests received, the responsible agency must have discretion to choose which shall be set down for proceedings. The answer, however, is that the introductory clause of section 10 expressly exempts "agency action * * * by law committed to agency discretion".

(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 preserve status or rights, to afford an opportunity for judicial review of any question of law or to prevent irreparable injury, every reviewing court and 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 temporarily grant or extend relief denied or withheld.

EXPLANATION

The first sentence merely confirms administrative authority to grant a stay. The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself. *Cotting v. Kansas City Stockyards*, 183 U. S. 79, 101-102; *Ex parte Young*, 209 U. S. 123, 145, 147, 163; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 662; *Chesapeake & Ohio Railway Co. v. Conley*, 230 U. S. 513, 521; *St. L. I. M. & So. Ry. v. Williams*, 251 U. S. 56, 63; *Oklahoma Operating Company v. Love*, 252 U. S. 331, 337; *Western*

Union Telegraph Co. v. Richmond, 224 U. S. 160, 172; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 395; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 417; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall, after reviewing the whole record or such portions thereof as may be cited by the parties, 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 (1) arbitrary, capricious, 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 resulting in prejudicial error; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8; or (6) unwarranted by the facts in cases where the facts are subject to trial *de novo* by the reviewing court.

EXPLANATION

A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. "The objections to judicial review have been generally not to its availability but to its scope" (*Final Report*, Attorney General's Committee, p. 80). It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized (see *Final Report*, Attorney General's Committee, pp. 87 *et seq.*). The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution (*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 470 (1910); *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 547 (1912)) and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the Fifth Amendment, applicable to the Federal Government (*New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 348 (1917)). The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. The sixth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler v. Strecker*, 307 U. S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established rule, would permit trial *de novo* to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory

administrative hearing. But it does not attempt to state in what other instances evidence may be presented originally to courts of review since the latter subject is one which the courts themselves have not fully settled (see *Final Report*, Attorney General's Committee, p. 87; *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 368, 372 (1936); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 48 (1936); *Morgan v. United States*, 298 U. S. 468, 476 (1936); *Morgan v. United States*, 304 U. S. 1, 14 (1938); *United States v. Idaho*, 298 U. S. 105, 109 (1926)).

SUGGESTIONS

The following suggestions or objections have been received:

(1) The section fails to remedy the great defect in the rule of review because it does not provide for a review of the "preponderance of the evidence", to determine whether the administrative action is "manifestly wrong", or the like. However, "substantial evidence" would seem to be as sound a rule as language will permit. The real difficulty has been that reviewing courts either accept something less than really substantial evidence or devise formulas of administrative discretion which render the absence of proof immaterial. The failure to follow the real meaning of "substantial", like the failure to follow other statutory language, is not likely to be cured by new language. The expansion of the area of administrative discretion must be remedied, if at all, by the more precise statement of the statutory definitions and directions or limitations in legislation conferring administrative powers.

(2) It is suggested, on the other hand, that the subsection unduly extends the scope of review by authorizing courts to specify administrative action to be taken. But the provision means that the court may compel the agency to act where it has "unlawfully withheld" action, rather than to both direct action and state what it shall be in detail. The court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion.

(3) It is said that review and invalidation of agency action "short of statutory right" is something new. But, with the judicial abolition of the "negative order" doctrine, there is certainly nothing new in judicial review of an administrative failure to act in whole or part. Furthermore, if Congress has prescribed a measure of right or relief, on principle the citizen is entitled to the full measure and there should be no arbitrary power in administrative agencies to grant less in specific cases.

(4) It is suggested that the word "unjust" be added after the word "capricious" in the second numbered category. But it may be that all that legitimately should be done is accomplished by the existing wording of that category.

(5) It is strongly urged that the phrase "resulting in prejudicial error" should be omitted from the fourth numbered category and the word "due" inserted before the word "observance", on the ground that the materiality of error should be tested by the usual rules and that the present statement requiring a showing of prejudicial error may be unjust and unworkable where the failure of the agency to afford procedure is so severe that the party has no opportunity to even present his case. All necessary protection would be afforded by the usual phrase "due observance."

EXAMINERS

Sec. 11. Subject to the civil-service and other laws not inconsistent with this Act, there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to change except that the Civil Service Commission shall generally survey and adjust examiners' salaries in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.

NOTE

This provision raises important issues. There are three proposals: (1) The * * * provision set forth [above] giving examiners such independence and security of tenure as the civil-service laws may afford; (2) the more elaborate proposal of the majority and minority of the Attorney General's Committee on Administrative Procedure (see Report, pp. 193 *et seq.* and 196 *et seq.*) for the creation of an Office of Federal Administrative Procedure under the direction of a board of three to approve appointments of examiners, remove examiners, and undertake continuous research in problems of administrative law and procedure; and (3) the following substitute:

‘SEC. 11. OFFICE OF ADMINISTRATIVE JUSTICE.—The Judicial Conference shall appoint a Director of an Office of Administrative Justice who shall, with the advice and consent of the agencies concerned, appoint (and fix and pay the compensation of) competent examiners who may preside at hearings or participate in decisions pursuant to sections 6 and 7. Such examiners shall perform no other duties, may be suspended or removed by the Director, and on assent of the agencies concerned may be transferred or temporarily assigned to other agencies by the Director. Persons substantially all of whose present duties are those required to be performed by examiners appointed pursuant to this section shall receive initial appointments hereunder. All examiners shall have the same security of tenure as is provided by, but otherwise shall not be subject to, the civil-service laws. The Director shall report annually to Congress, may be assisted by such representative advisory committees as he may appoint, shall have such staff and facilities as his duties may require, may by rule regulate the conduct of examiners pursuant to this Act, and shall be paid the same salary and allowances as a United States district judge.’

EXPLANATION

This section which provides for subordinate hearing officers and their functions, differs greatly from the elaborate and lengthy proposals of the Attorney General's Committee for the creation of a new and special office to approve "hearing commissioners" authorized to preside at administrative hearings (*Final Report*, pp. 196-198, 221-223, and 237-239).

SUGGESTIONS

The following suggestions have been received:

(1) The creation of an executive "Office of Administrative Procedure", as recommended by the Attorney General's Committee on Administrative Procedure and set forth in the note [above], is preferred. On the other hand, it is objected that such an office—in addition to involving the creation of another administrative agency—will be political, will interfere with the independent operation of boards and commissions, will constitute a superadministrative agency, will serve to unduly emphasize and channel complaints respecting the administrative process, or will be without real authority.

(2) The "Office of Administrative Justice," which is also suggested in the note and in which the Director would be appointed by the Judicial Conference and would in turn appoint examiners, is disfavored on principle—chiefly on the ground that it will remove the examiners from real responsibility to the agency charged with the administration of law. On the other hand, it is strongly urged that such an office under the supervision of the Judicial Conference will be nonpolitical, simple to provide, and serve as a desirable medium for securing a truly impartial corps of examiners. The legal difficulty with the suggestion, however, is that the Constitution provides for the placing of powers of appointment "in the courts of law" whereas the Judicial Conference is a committee and not a court and hence may not be within the constitutional authorization for appointing powers. There is little likelihood of agreement as to any existing court upon which the appointing power might be conferred.

(3) It is urged that the Civil Service System be utilized, as provided [in the proposed text set forth above], with or without certain modifications. The first of these modifications is that examiners be appointed "by each agency" rather than "for each agency" as the text now reads. The second suggestion is that the language of the second exception in the introductory provision of section 5 be modified to subject to the bill all hearings for removal of examiners, as set forth in the comment to section 5. The third suggestion is that, in place of the second use of the word "hearing" in section 11, there be inserted the words "opportunity for hearing and upon the record thereof". The fourth suggestion is that there be inserted after the word "Commission" the word "alone", in order to make it clear that the Civil Service Commission alone shall regulate examiners' salaries. A fifth suggestion is that appropriate provision be made for the establishment of special facilities within the Civil Service Commission for investigations, reports, regulations, and the selection, compensation, and removal of examiners coupled with a requirement for special and annual reports to Congress on the subject. All of these merit careful consideration.

CONSTRUCTION AND EFFECT

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional require-

ments 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 any agency or person. If any provision 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 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. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

EXPLANATION

This section includes provisions respecting the construction and effect of the measure. The requirement that implied amendments shall be precluded is familiar in Federal legislation. It should be noted, moreover, that the effective date of the proposal is postponed for periods of time sufficient to afford agencies ample opportunity to revise their practices as required; and the proposal is not to have retroactive effect as to proceedings "initiated or completed prior to the effective date" of any requirement.

War Functions

Sec. 13. Except as to the requirements of section 3, there shall be excluded from the operation of this Act war and defense functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, as well as those conferred by the following: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944 [and so forth].

EXPLANATION

War agencies functions are exempted because it would take at least a year for any adequate proposal to be placed in operation (see section 12). There seems to be no reason, however, why war agencies should not be required to publish the materials required by section 3, since the simple publication of the procedure and policies of war agencies, or as to war functions, would undoubtedly aid in the prosecution of the war by informing the public.

SUGGESTIONS

The following suggestions have been made:

(1) It is suggested that, in place of the words "those functions authorized by the following" in the text, there be substituted the

words, "courts martial, military or naval authority exercised in the field in time of war or in occupied territory, and the functions conferred by the following statutes:". This may properly be done to remove any question of the application of the measure to purely military functions.

(2) It is also suggested that there is no real reason for exempting the Contract Settlement and Surplus Property statutes since there is little, if any, application to them in the measure.

(3) It is suggested also that, apart from the military functions specified in the first suggestion above, the exemption of special war functions should be for a limited period so that, if they continue for appreciable periods after the war, they will be subject to the measure so far as its terms otherwise apply.

(4) A fourth and strongly urged suggestion is that there should be no exemption of war functions except those relating to courts martial and the authority of the Army and Navy as set forth in the first suggestion above.

(5) If the exemption of military and war functions is limited, it is suggested that, as a matter of form, the exemptions may be incorporated in subsection 2 (a), and section 13 thus eliminated.