

ADMINISTRATIVE PROCEDURE ACT

REPORT

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

ON

S. 7

**A BILL TO IMPROVE THE ADMINISTRATION
OF JUSTICE BY PRESCRIBING FAIR
ADMINISTRATIVE PROCEDURE**

**MAY 3, 1946.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed**

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Mr. WALTER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 7]

The Committee on the Judiciary, to whom was referred the bill (S. 7) to improve the administration of justice by prescribing fair administrative procedure, having considered the same, report the bill favorably to the House, with an amendment, with the recommendation that, as amended, the bill do pass.

The committee amendment is as follows:

Strike out all of the bill after the enacting clause and insert in lieu thereof the following:

TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

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

(c) **RULE AND RULE MAKING.**—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) **ORDER AND ADJUDICATION.**—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) **LICENSE AND LICENSING.**—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

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

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

PUBLIC INFORMATION

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

(a) **RULES.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) 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, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) **PUBLIC RECORDS.**—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

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 or personnel or to public property, loans, grants, benefits, or contracts—

(a) **NOTICE.**—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law)

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 finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons 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 statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

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

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 other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign-affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. 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; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(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, the nature of the proceeding, and the public interest permit and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(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 required by section 8 except where such officers become unavailable to the agency. Save 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 fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. 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 factually 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 initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(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.

ANCILLARY MATTERS

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

(a) **APPEARANCE.**—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) **INVESTIGATIONS.**—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(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 and 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, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

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

HEARINGS

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

(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **HEARING POWERS.**—Officers presiding at hearings shall have authority, subject to the published rules 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) to take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall 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.

DECISIONS

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

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be 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 appeal from or 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 except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its function imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (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 or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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 and as authorized by law.

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

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **RIGHT OF REVIEW.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(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 inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory 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 law.

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

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

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

EXAMINERS

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable

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

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any 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 such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

II. LEGISLATIVE HISTORY

For more than 10 years this legislation has been under consideration. Certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated, and private interests of every kind have had an opportunity to present their views. In the legislative branch there have been four major proposals for the creation of an administrative court, and at least eight for the regulation of administrative procedure. Two important studies were conducted in the executive branch under the late President Franklin D. Roosevelt—each resulting in reports to Congress with legislative recommendations. Private individuals and organizations have made innumerable studies and recommendations. While various proposals have been made over the years, the continuous line of development leading to the present bill is clear and illuminating.

1937 Report of President's Committee on Administrative Management.—The growth and intensification of administrative regulation of private enterprise and other phases of American life had moved President Roosevelt early in his administration to appoint a committee to study administrative methods, functioning, and organization. Although that committee approached the problem from the standpoint of executive branch management, it was soon deeply involved in the essential public processes of administrative regulation. It issued numerous studies and an extensive report (*Report With Special Studies, 1937*), which President Roosevelt transmitted to Congress with his

endorsement and the statement that it was "a great document of permanent importance" (p. iii). At that time he also took occasion to remark that the practice of creating administrative agencies—

who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution.

To which the committee added (p. 40):

There is a conflict of principle involved in their make-up and functions. * * * They are vested with duties of administration * * * and at the same time they are given important judicial work. * * * The evils resulting from this confusion of principles are insidious and far reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.

The foregoing statement reflects a widespread feeling, which has been greatly extended by the expansion of administrative controls during the subsequent war years.

The problem has been how to deal with the situation, in our complex governmental set-up, without unduly interfering with necessary governmental operations. President Roosevelt's committee recommended a drastic reform by which every agency exercising mixed functions would be divided into an administrative and judicial section. The latter, although it might be "in" a department, was to be wholly independent of the former and of executive control. While subsequent proposals (except for the minority of the later Attorney General's Committee on Administrative Procedure, discussed hereinafter) have not suggested such a complete separation of functions and the present bill does not go so far, the recommendations of the President's Committee on Administrative Management are—as President Roosevelt said in his message to the Congress—of permanent importance.

1938 Senate hearings.—The Senate Judiciary Committee in 1938 held hearings on the proposal for the creation of an administrative court; and it issued as a committee print an elaborate study of administrative powers conferred by statute up to that time (S. 3676, 75th Cong.). However, such a proposition presents serious problems and some deficiencies. It means the creation of a special court or courts, in derogation of the regular courts with which people are familiar and which the Constitution directs the Congress to provide for the redress of all grievances and settlement of disputes. There may also be some limitations upon the functions which could be conferred upon a court. It could not, for example, exercise the rule-making power without undertaking to supplant the administrative arm entirely. Moreover, that proposal fails to reach and control the administrative process at its source. There is need for a simple and standard plan of administrative procedure, together with the statement of legal and enforceable guides for administrative officers and agents in their daily operations. In short, an important object of any legislation in this field is not only to provide judicial redress but to assure administrative fairness in the beginning so that litigation may become unnecessary.

1939-40 Walter-Logan bill.—S. 915, the Walter-Logan administrative procedure bill, was favorably reported to the Senate in 1939 (S. Rept. No. 442, 76th Cong., 1st sess.). Although a different bill is now reported to the House of Representatives, the following passages of that report are well worth quoting (pp. 9-10):

Unfortunately the statutes providing for hearings before the so-called independent agencies of the Federal Government as well as those providing for the conduct of the affairs of the single-headed agencies, do not provide for uniform procedure for * * * hearings or for a uniform method and scope of judicial review. All argument that such uniformity is neither possible or desirable is answered by the fact that uniformity has been found possible and desirable for all classes of both equity and law actions in the courts exercising the whole of the judicial power of the Federal Government. It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power.

The results of the lack of uniform procedure for the exercise of quasi-judicial power by the administrative agencies have been at least threefold: (1) The respective administrative agencies give little heed to, and are little assisted by, the decisions of other administrative agencies or by the decisions of the courts applicable to such agencies; (2) the courts are placed at considerable disadvantage because they must verify the basic statutes of all decisions relating to other administrative agencies which are cited to them, thus slowing up the writing of opinions in particular cases; and (3) individuals and their attorneys are at a disadvantage in the presentation of their administrative appeals, with the result that there is a tendency to emphasize the importance of the judiciary in the administrative process.

In fact, the present situation of indescribable confusion is due to the fact that the Congress has ignored the development of the administrative process prior to 1861; that since such time the Congress has created administrative agencies without regard to any uniformity of the judicial review provisions and without regard to the procedure developed and proven prior to that time; and that the law schools have placed undue emphasis on the pathological aspects of administrative procedure rather than upon the statutes and the administrative processes. Added to all this has been the constantly growing complexity of the Federal Government and the resulting lack of training of most lawyers and businessmen therein.

Furthermore the statutes, commencing with the Interstate Commerce Act, have made no provision whatever for improvement of the administrative process and rarely have these statutes attempted to prescribe, even in a general way, the scope of judicial review. The result has been that the administrative agencies and the courts have been required to work out the procedure from case to case with unnecessary fumbling in the administrative process and with unnecessary criticisms of the courts when they have attempted—not altogether with success—in their decisions to lay down general rules of trial and appellate procedure.

The Judiciary Committee of the House of Representatives reported the similar bill (H. R. 6324) with some amendments during the same year (H. Rept. No. 1149, 76th Cong., 1st sess.).

Referring to President Roosevelt's program of governmental reorganization which followed the report of his Committee on Administrative Management, described above, the Committee on the Judiciary of the House of Representatives said in reporting the bill (p. 2):

Procedures vary as among the several agencies and to some extent even among the principal officers or employees of the same agencies. It is practically impossible for a Member of the Congress, much less an individual citizen, to find his way among these many agencies or to locate the particular officer or employee in any of the agencies with whom any particular problem should be discussed with a view to settlement.

This condition of affairs has been in the making for many years and is not something which has come upon us within the past few years, though it might be candidly admitted that the condition has grown worse within the past few years in the attempts that have been made to meet serious economic and social problems.

Very obviously these administrative agencies cannot be abolished, though without doubt there are many of us who yearn for the comparatively simple life

of yesteryear when these agencies of Government were not needed and did not exist. Practically all of these agencies, in their administration of the various and sundry statutes, must issue rules, make investigations, conduct hearings, and decide controversies, and there is no practicable and feasible method which could be adopted by which there could be segregated these quasi-legislative and quasi-judicial functions from the purely administrative functions without destroying the usefulness of such agencies.

At the same time, the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.

Early in 1940 there was issued an elaborately annotated copy of the bill, explaining its purposes and the derivation of its provisions (S. Doc. No. 145, 76th Cong., 3d sess.).

Meanwhile the President had directed the appointment of a committee to make further studies and recommendations, as described under the next heading of this report. Congress nevertheless passed the Walter-Logan bill. In vetoing it President Roosevelt said (H. Doc. No. 986, 76th Cong., 3d sess., pp. 1, 3-4):

The objective of the bill is professedly the assurance of fairness in administrative proceedings. With that objective there will be universal agreement. The promotion of expeditious, orderly, and sensible procedure in the conduct of public affairs is a purpose which commends itself not only to the Congress and the courts, but to the executive departments and administrative agencies themselves.

* * * * *

I am, of course, not unaware that improvement in the administrative process is as much the duty of those concerned with it as the improvement of court procedure ought to be a duty of the legal profession.

Recognizing this, more than a year ago I directed the Attorney General to select a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive Government and to recommend improvements, including the suggestion of any needed legislation. For over a year such a committee has been taking up in detail each of the several typical administrative agencies and has been holding prolonged sessions, hearings, inquiries, and discussions. Its task has proved unexpectedly complex. The objective of this committee, however, is not to hamper administrative tribunals but to suggest improvements to make the process more workable and more just and to avoid confusions and uncertainties and litigations. I should desire to await their report and recommendations before approving any measure in this complicated field. In this thought I believe most Americans will agree. The report and recommendations will be transmitted to the Congress in a few weeks.

The committee to which the President referred had been at work for more than a year, had made an interim report, and had issued studies of the work of particular agencies.

The present bill must be distinguished from the Walter-Logan bill in several essential respects. Unlike that bill it differentiates the several types of rules. It requires no agency hearings in connection with either regulations or adjudications unless statutes already do so in particular cases. Where statutory hearings are otherwise provided, it fills in some of the essential requirements; and it provides for a special class of semi-independent subordinate hearing officers. It includes several types of incidental procedures. It confers numerous procedural rights. It limits administrative penalties. It contains comprehensive provisions for judicial review for the redress of any legal wrong. And, since it is drawn entirely upon a functional basis, it contains no exemptions of agencies as such. One of the main recommendations of the later Attorney General's Committee on Administrative Procedure—which is hereinafter discussed—was 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" (S. Doc. No. 8, 77th Cong., p. 25). The Walter-Logan bill made no provision in that respect, whereas the first operative section of the present bill spells out the requirements of public information in considerable detail (sec. 3). This is an important provision of the present bill. The Walter-Logan bill changed the present examiner system by providing for employee boards to hear cases in departments and that examiners could hear cases in independent agencies, but that in independent agencies either boards or three members should rehear cases on the petition of the party involved before a decision could be entered (sec. 4 (a), (b), (d)). The present bill, on the other hand, does not change the operation of the examiner system nor does it provide that examiners should supersede the functions of other types of hearing officers provided by statute (sec. 7 (a)).

1941 Final Report of Attorney General's Committee on Administrative Procedure.—In December 1938 the Attorney General in a letter to President Roosevelt had reviewed the progress made in securing simplified and uniform rules of procedure for Federal court procedure, stated that "there is need for procedural reform in the wide and growing field of administrative law," and recommended the creation of an appropriate body to make the necessary studies and recommendations for congressional consideration (S. Doc. No. 8, 77th Cong., 1st sess., p. 251). The President had agreed by letter of February 16, 1939 (p. 252). The committee had made an interim report in January 1940, setting forth mainly the comprehensive scope of its program of studies (p. 254).

The agencies studied were the following (pp. 3-4):

- The Department of Agriculture (Agricultural Marketing Service; Commodity Exchange Administration; Bureau of Animal Industry; Bureau of Entomology and Plant Quarantine; Surplus Marketing Administration; and Sugar Division).
- The Department of Commerce (Civil Aeronautics Administration; Bureau of Marine Inspection and Navigation; and Patent Office).
- The Department of the Interior (Bituminous Coal Division; General Land Office; Grazing Service; Office of Indian Affairs; Bureau of Fisheries; and Bureau of Biological Survey).
- The Department of Justice (Immigration and Naturalization Service).
- The Department of Labor (Division of Public Contracts; Wage and Hour Division; and Children's Bureau).
- The Post Office Department (fraud orders and second-class mailing privileges).
- The Department of State (Passport Division, Visa Division, and the Division of Controls, having to do with the international traffic in arms and with the supervision and administration of neutrality laws).
- The Department of the Treasury (Bureau of Internal Revenue [into which had been absorbed the Federal Alcohol Administration]; Processing Tax Board of Review; Bureau of the Comptroller of the Currency; and the Bureau of Customs).
- The War Department (Office of the Chief of Engineers; the Selective Service Act was enacted after the completion of these studies).
- The Commodity Exchange Commission.
- The Federal Communications Commission.
- The Federal Deposit Insurance Corporation.
- The Federal Home Loan Bank Board.
- The Federal Power Commission.
- The Federal Reserve System.
- The Federal Security Agency (Social Security Board, Public Health Service, and the Food and Drug Administration).
- The Federal Trade Commission.
- The Interstate Commerce Commission.
- The National Labor Relations Board.
- The National Mediation Board.

The National Railroad Adjustment Board.
 The Railroad Retirement Board.
 The Securities and Exchange Commission.
 The United States Board of Tax Appeals.
 The United States Employees' Compensation Commission (including the deputy commissioners).
 The United States Maritime Commission.
 The United States Tariff Commission.
 The Veterans' Administration.

The committee's investigators examined agency records and procedures, it held executive hearings, and then written studies were issued. These usually embraced a first mimeographed study, a revision thereof, and finally the issuance of 27 printed monographs each embodying the results for one or more agencies, which became Senate documents (S. Doc. No. 186, 76th Cong., 3d sess., pts. 1-13; and S. Doc. No. 10, 77th Cong., 1st sess., pts. 1-14). They were widely distributed. The committee also held public hearings. Defects of the procedures of particular agencies are also summarized at length in chapter IX of the committee's final report.

There are 474 pages in the committee's final report, of which only the first 127 are the report proper. The remainder is made up of minority views (pp. 203-250) and appendixes. See *Administrative Procedure in Government Agencies—Report of the Committee on Administrative Procedure, Appointed by the Attorney General at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and To Suggest Improvements Therein* (S. Doc. No. 8, 77th Cong., 1st sess., dated January 22, 1941).

The published documents relating to the present bill, notably the Senate Judiciary Committee print of June 1945 on S. 7 which collates in parallel columns the provisions of the present bill with the pertinent portions of the final report of the Attorney General's Committee on Administrative Procedure, indicate the care with which the recommendations of that committee have been studied in framing the present bill. While it follows generally the views of good administrative practice as expressed by the whole of that committee, it differs in several important respects. It provides that agencies may choose whether their examiners shall make the initial decision or merely recommend a decision, whereas the Attorney General's committee made a decision by examiners mandatory. It provides some general limitations upon administrative powers and sanctions, particularly in the rigorous field of licensing, while the Attorney General's committee did not touch upon the subject. It relies upon independence, salary security, and tenure during good behavior of examiners within the framework of the civil service, whereas the Attorney General's committee favored short-term appointments approved by a special "Office of Administrative Procedure."

As a matter of drafting, the actual language of the present bill has had vastly more consideration and participation by all parties concerned than the bills presented in 1941 by the majority and minority of the Attorney General's Committee on Administrative Procedure. An entire year has been spent alone in redrafting the original S. 7 (H. R. 1203) of the present Congress, as hereinafter more fully explained. Its predecessor, S. 2030 (H. R. 5081), of the previous Congress, had passed through a similar process.

Senate hearings.—The majority and minority bills growing immediately out of the work of the Attorney General's committee were

introduced in Congress along with revised versions of other bills. A distinguished subcommittee of the Senate Committee on the Judiciary (composed of Senator Hatch as chairman and Senators O'Mahoney, Chandler, Austin, and Danaher) then held hearings in April, May, June, and July of 1941, which were published in three parts and an appendix. (See hearings on S. 674, 675, and 918.) By far the greater part of the hearings were devoted to the oral or written statements, or both, of representatives of governmental agencies, among them the following:

- Agriculture Department
- Attorney General
- Bituminous Coal Division
- Bonneville Power Administration
- Bureau of Marine Inspection and Navigation
- Bureau of Reclamation
- Civil Aeronautics Administration
- Civil Aeronautics Board
- Civil Service Commission
- Export Control Administrator
- Federal Communications Commission
- Federal Deposit Insurance Corporation
- Federal Power Commission
- Federal Reserve System
- Federal Security Agency
- Federal Trade Commission
- Fish and Wildlife Service
- Grazing Service
- General Land Office
- Immigration and Naturalization Service
- Interior Department
- Interstate Commerce Commission
- Justice Department
- Labor Department
- National Labor Relations Board
- National Railroad Retirement Board
- Office of Indian Affairs
- Patent Office
- Post Office Department
- Securities and Exchange Commission
- Tariff Commission
- Tennessee Valley Authority
- Treasury Department
- Veterans' Administration
- War Department

In addition, the subcommittee heard or received the written statements of representatives of business, professional, labor, and agricultural organizations as well as members of the Attorney General's Committee on Administrative Procedure. The written statement submitted by the minority members of that committee summarizes most of the testimony and statements (pp. 1374-1401) and also presents a revision of their legislative recommendations (pp. 1402-1418).

It can be said fairly that no point raised by any agency in those very lengthy and detailed hearings has not been given full consideration in the drafting of the present bill, and indeed in almost every instance the present bill avoids the difficulties which Government agencies then feared. For example, in those hearings agencies protested mainly against limitations upon delegations of authority (p. 1378), but the present bill expressly states that "nothing in this Act shall be construed to repeal delegations of authority as provided by

law" (sec. 2 (a)). They feared any provision which might be construed to require them to issue rules or regulations in advance to meet every case (p. 1381), but apart from rules of organization and procedure the present bill requires the publication only of "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" (sec. 3 (a)). Some agencies did not want hearings provided (pp. 1389-1398, 1394), and the present bill provides the details for hearings only where other statutes require a hearing. (See sec. 4 (b) and the introductory clause to sec. 5.) They wished power to make declaratory rulings to be so limited that parties would not have an absolute right to such a ruling in every case (p. 1392), and the present bill expressly confers the authority upon certain agencies to be exercised only in their "sound discretion" (sec. 5 (d)). Various agencies objected to any provision for the separation of functions in rule making (p. 1396), a suggestion which the present bill expressly carries even further because section 5 which contains the segregation provision does not apply to rule making and in subsection (c) makes additional exemptions.

1942-44.—In August 1941 the increasingly threatening international situation moved the Senate Judiciary Committee to postpone further consideration of the legislative proposals. The attack at Pearl Harbor occurred before the year was out. During the war years 1942-43 the subject was necessarily in abeyance; but war legislation, administration, and congressional investigations brought administrative processes more and more into prominence. In June 1944 new bills were introduced by the chairmen of the Senate and House Judiciary Committees (S. 2030 and H. R. 5081, 78th Cong., 2d sess.), and thereafter there was a good deal of discussion and activity in and out of the Government with respect to the form such legislation should take. The Attorney General, utilizing some of the staff of his former Committee on Administrative Procedure, had a voluminous analysis made of the new bill.

1945. The present bill.—With the opening of the present Seventy-ninth Congress, revised and simplified bills were introduced in January 1945 by the chairmen of the two Judiciary Committees as S. 7 and H. R. 1203. Both chairmen called upon administrative agencies to submit their further views and suggestions in writing. Written submittals were also received from private organizations and parties. These were analyzed and, with the aid of representatives of the Attorney General and interested private organizations, in May 1945 there was issued a Senate committee print setting forth in parallel columns the bill as introduced and a tentatively revised text. This was distributed to administrative agencies, and they again submitted comments and suggestions in writing.

Thereupon the Senate Judiciary Committee had its staff make a further analysis and issued in June 1945 a large committee print setting forth in four parallel columns the text of the bill as originally introduced, the tentatively revised text as previously published, a general explanation of provisions with references to the final report of the Attorney General's Committee on Administrative Procedure and other authorities, and a summary of agency and private views received in response to the first committee print.

At this point the full Committee on the Judiciary of the House of Representatives held hearings late in June. The House Committee on the Judiciary had kept in close touch with, and had participated fully in, the development of the bill; and it had also designated a subcommittee on the subject. Attorney General Biddle had previously indicated orally that he was prepared to recommend the enactment of an administrative procedure statute, and now indicated similarly that he was prepared to accept the draft proposed. He was, however, succeeded in office by Attorney General Tom C. Clark, who made some additions to the conference group representing the Attorney General. They entered upon 3 more months of discussions with interested Government agencies and undertook to screen and correlate views and suggestions received orally or in writing. Private parties and organizations also participated. By this time the issues had been narrowed to matters of language and expression. A final form of bill (see the revised Senate committee print dated October 5, 1945) was then submitted to and endorsed by the Attorney General by letters addressed to the committee chairmen of both Houses. (For the full text see S. Rept. No. 752, 79th Cong., 1st sess., pp. 37-38.)

Favorable recommendation of the Attorney General.—In his letter approving and recommending S. 7 as revised the Attorney General stated:

The goal toward which these efforts have been directed is, in my opinion, worth while. Despite difficulties of draftsmanship, I believe that over-all procedural legislation is possible and desirable. The administrative process is now well developed. It has been subject in recent years to the most intensive and informed study—by various congressional committees, by the Attorney General's Committee on Administrative Procedure, by organizations such as the American Bar Association, and by many individual practitioners and legal scholars. We have in general—as we did not have until fairly recently—the materials and facts at hand. I think the time is ripe for some measure of control and prescription by legislation. I cannot agree that there is anything inherent in the subject of administrative procedure, however complex it may be, which defies workable codification.

Since the original introduction of S. 7, I understand that opportunity has been afforded to public and private interests to study its provisions and to suggest amendments. The agencies of the Government primarily concerned have been consulted and their views considered. * * *

The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government. Insofar as possible, the bill recognizes the needs of individual agencies by appropriate exemption of certain of their functions.

After reviewing the committee print, therefore, I have concluded that this Department should recommend its enactment.

A similar statement was delivered to the chairman of the Committee on the Judiciary of the House of Representatives at the same time.

Favorable report of the Senate Judiciary Committee.—On November 19, 1945, the Committee on the Judiciary of the Senate unanimously reported the bill as revised (S. Rept. No. 752, 79th Cong., 1st sess.). Its report states that (p. 1)—

There is a widespread demand for legislation to settle and regulate the field of Federal administrative law and procedure. The subject is not expressly mentioned in the Constitution, and there is no recognizable body of such law, as there is for the courts in the Judicial Code. There are no clearly recognized legal guides for either the public or the administrators. Even the ordinary operations of administrative agencies are often difficult to know. The Committee on the Judiciary is convinced that, at least in essentials, there should be some simple and standard plan of administrative procedure.

That report contains a somewhat more brief résumé of the legislative history (pp. 1-5) than is here set forth, a general statement as to the approach of the Senate committee (pp. 5-6), a comparison of the bill with the earlier Walter-Logan bill (p. 6), a comparison with the 1941 final report of the Attorney General's Committee on Administrative Procedure (pp. 6-7), a general statement as to the structure of the bill with a diagram (pp. 7-9), a detailed analysis of provisions (pp. 9-30), and some concluding general comments (pp. 30-31). Appendix A thereto is the Senate bill as reported. Appendix B is the letter of the Attorney General in full, together with the more detailed statement which accompanied it.

1946 Senate debate and passage.—On March 12, 1946, the bill came on the Senate floor for action. It was explained in detail. It passed on the same day without change and without an adverse vote.

Changes proposed by House Judiciary Committee.—The original S. 7, as heretofore stated, was also introduced in the House of Representatives as H. R. 1203 by Chairman Hatton W. Sumners of the Judiciary Committee. A half dozen other bills on the same subject had also been introduced in the House of Representatives. The revised S. 7 as reported by the Senate Judiciary Committee (and subsequently passed by the Senate) was introduced in the House of Representatives in December 1945 as H. R. 4941 by Chairman Sumners. The designated subcommittee of the House Judiciary Committee had followed all the proceedings and language of the bill. It considered many suggested changes and alternative proposals. As a result of its deliberations, certain corrections and clarifications were written into the text of the bill and introduced as H. R. 5988 by Chairman Francis E. Walter of the subcommittee. These changes are shown in appendix A of this report. They have been submitted for comment to the Attorney General, who has approved them as shown by his letter set forth as appendix B of this report. They are obviously desirable from the standpoint of all parties concerned. Accordingly, the text of H. R. 5988 has been substituted, as a committee amendment, for S. 7 as passed by the Senate.

III. THE SUBSTANCE OF THE BILL

Manifestly the bill does not unduly encroach upon the needs of any legitimate government operation, although it is of course operative according to its terms even if it should cause some administrative inconvenience or changes in procedure. It is brief, but necessarily not oversimplified. Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. The bill is meant to be operative "across the board" in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See sec. 2 (a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.

The bill is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple

framework upon which to base such operations as are subject to the provisions of the bill.

What the bill does in substance may be summarized under four headings: **1.** It provides that agencies must issue as rules certain specified information as to their organization and procedure, and also make available other materials of administrative law (sec. 3). **2.** It states the essentials of the several forms of administrative proceedings (secs. 4, 5, and 6) and the general limitations on administrative powers (sec. 9). **3.** It provides in more detail the requirements for administrative hearings and decisions in cases in which statutes require such hearings (secs. 7 and 8). **4.** It sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (sec. 10).

The public information section is basic, because it requires agencies to take the initiative in informing the public. In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). It provides quite different procedures for the "legislative" and "judicial" functions of administrative agencies. In the "rule making" (that is, "legislative") function it provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations (sec. 4). No hearings are required by the bill unless statutes already do so in a particular case. Similarly, in "adjudications" (that is, the "judicial" function) no agency hearings are required unless statutes already do so, but in the latter case the mode of hearing and decision is prescribed (sec. 5). Where existing statutes require that either general regulations (called "rules" in the bill) or particularized adjudications (called "orders" in the bill) be made after agency hearing or opportunity for such hearing, then section 7 spells out the minimum requirements for such hearings, section 8 states how decisions shall be made thereafter, and section 11 provides for examiners to preside at hearings and make or participate in decisions.

While the administrative power and procedure provisions of sections 4 through 9 are law apart from court review, the provisions for judicial review afford parties a method of enforcing their rights in proper cases (sec. 10). However, it is expressly provided that the judicial-review provisions are not operative where statutes otherwise preclude judicial review or where agency action is by law committed to agency discretion.

The bill is so drafted that its several sections and subordinate provisions are closely knit. The operative provisions of the bill should be read apart from the purely formal provisions and minor functional distinctions. The definitions in section 2 are important, but they do not indicate the scope of the bill since the subsequent provisions make many functional distinctions and exceptions. The public-information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may

obviously be required or only internal agency "housekeeping" arrangements may be involved. Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings and the agency decisions thereafter while section 11 provides for the appointment and tenure of examiners who may participate. Section 6 prescribes the rights of private parties in a number of miscellaneous respects which may be incidental to rule making, adjudication, or the exercise of any other agency authority. Section 9 limits sanctions, and section 10 provides for judicial review.

A diagram of the bill is to be found at pages 28-29 of this report.

IV. EXPLANATION OF PROVISIONS

In the following explanation, under each section heading there appears an italicized synopsis of the provision and a paragraph or more of analysis or comment. The chart on pages 28 and 29 provides a diagrammed synopsis of the bill. The full bill is reproduced as appendix A hereto, which also shows the clarifications it makes in the similar Senate bill.

SECTION 1. TITLE

It is provided that the measure may be cited as the "Administrative Procedure Act."

As a reading of the bill will demonstrate, it is designed to provide for publicity of information, fairness in administrative operation, and adequacy of judicial review. The purpose of the bill is to assure that the administration of government through administrative officers and agencies shall be conducted according to established and published procedures which adequately protect the private interests involved, the making of only reasonable and authorized regulations, the settlement of disputes in accordance with the law and the evidence, the impartial conferring of authorized benefits or privileges, and the effectuation of the declared policies of Congress in full.

SECTION 2. DEFINITIONS

The definitions apply to the remainder of the bill.

The definitions simplify the language of the remaining sections. They are necessarily broad. Save as exceptions are made from the term "agency" in section 2 (a), this section on definitions is not intended to make all the necessary exceptions; those are to be found in the remaining sections of the bill as appropriate.

SECTION 2 (A). "AGENCY"

The word "agency" is defined by excluding legislative, judicial, and territorial authorities and by including any other "authority" whether or not within or subject to review by another agency. The bill is not to be construed to repeal delegations of authority provided by law. Expressly exempted from the term "agency," except for the public-information requirements of section 3, are (1) agencies composed of representatives of

parties or of organizations of parties and (2) defined war authorities including civilian authorities functioning under temporary or named statutes.

Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of authority, it might result in the unintended inclusion of mere "housekeeping" functions or the exclusion of those who have the real power to act.

Although delegations of authority otherwise lawful are expressly not affected as shown by the second sentence of the section, that does not mean that the examiner system or other requirements provided by the bill may be avoided.

Agencies composed in whole or in part of representatives of all the parties or organizations of parties are exempted because they do not lend themselves to the adjudicative procedures set out in the remaining sections of the bill. This excludes from all but the public-information provisions of section 3 such agencies as the National Railroad Adjustment Board and the Railroad Retirement Board. Other boards so composed under the Railway Labor Act or like statutes would also be exempt. In such cases the exclusion from the bill is total, save for section 3.

The exclusion of war functions is self-explanatory. They are rarely required to be exercised upon statutory hearing, with which much of the remainder of the bill is concerned, and they are rapidly liquidating. But they are subject to the public information requirements of section 3. "Present hostilities" means those connected with the war brought on at Pearl Harbor in December 1941.

SECTION 2 (B). "PERSON" AND "PARTY"

"Person" is defined to include specified forms of organizations other than agencies. "Party" is defined to include anyone named, or admitted or seeking and entitled to be admitted, as a party in any agency proceeding except that nothing in the subsection is to be construed to prevent an agency from admitting anyone as a party for limited purposes.

The definition of person includes both individuals and any form of public or private organization other than Federal agencies, because the latter are separately defined in section 2 (a) and so identified throughout the remainder of the bill. The practice of agencies to admit persons as parties in proceedings "for limited purposes" does not of course authorize an agency to ignore or prejudice the rights of the true or full parties to a proceeding.

SECTION 2 (C). "RULE" AND "RULE MAKING"

"Rule" is defined as any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements and includes any prescription for the future of rates, wages, financial structures, etc. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

"Rules" are often called "regulations" or "general regulations." The definition is important because it determines whether section 4 rather than section 5 applies to a regulatory operation. The specification of some of the activities that are rule making is included to illustrate and to embrace them in the definition beyond question. "Rules" formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities. Rule making is exempted from some of the general requirements of sections 7 and 8 relating to hearings and decisions.

SECTION 2 (D). "ORDER" AND "ADJUDICATION"

"Order" means the final disposition of any matter, other than rule making but including licensing and whether or not affirmative, negative, injunctive, or declaratory in form. "Adjudication" means agency process for the formulation of an order.

The term "order" is essentially and necessarily defined to exclude rules. "Licensing" is specifically included to remove any question, since licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance. Licensing as such is later exempted from some of the provisions of sections 5, 7, and 8 relating to hearings and decisions. "Injunctive" action is a common determination of past or existing lawfulness, although the remedy or sanction is in form cast as a command or restriction for the future rather than as a fine, assessment of damages, or other present penalty.

SECTION 2 (E). "LICENSE" AND "LICENSING"

"License" is defined to include any form of required official permission such as certificate, charter, etc. "Licensing" is defined to include agency process respecting the grant, renewal, modification, denial, revocation, etc., of a license.

The definition of licensing supplements section 2 (d). It is included because licenses take many forms and the term is important in some of the remaining sections. Later provisions of the bill distinguish between initial licensing and renewals or other licensing proceedings.

SECTION 2 (F). "SANCTION" AND "RELIEF"

"Sanction" is defined to include any agency prohibition, withholding of relief, penalty, seizure, assessment, requirement, restriction, etc. "Relief" is defined to include any agency grant, recognition, or other beneficial action taken on the application or petition of any person.

These definitions are mainly relevant to section 9 on sanctions and powers and to section 10 on judicial review. They embrace all forms of legitimate administrative authority. They define but do not confer powers. They are necessary in order to identify "sanction" for the protection in later sections of those against whom agencies are authorized to proceed, and "relief" for the benefit of those seeking authorized redress.

SECTION 2 (G). "AGENCY PROCEEDING" AND "AGENCY ACTION"

"Agency proceeding" means any agency process defined in the foregoing subsections (c), (d), or (e). "Agency action" is defined to include an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, and failure to act.

"Agency proceeding" is a term devised to simplify the language of later sections and assure that all forms of administrative procedure or authority are included. The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements of reasons or basis for the action or inaction.

SECTION 3. PUBLIC INFORMATION

From the public-information provisions of section 3 there are exempted matters (1) requiring secrecy in the public interest or (2) relating solely to the internal management of an agency.

The public-information requirements of section 3 are among the most useful provisions of the bill. The general public is entitled to know agency procedures and methods or to have the ready means of knowing with certainty. The section requires agencies to disclose their set-ups and procedures, to publish rules and interpretations intended as guides for the solution of cases, and to proceed in consistent accordance therewith until publicly changed.

The introductory clause of the section states the only general exceptions. The first, which excepts matters requiring secrecy in the public interest, is necessary but may not be construed to defeat the remaining provisions. It would include confidential operations in any agency, such as some of the aspects of the investigating or prosecuting functions of the Secret Service or Federal Bureau of Investigation, but no other functions or operations in those or other agencies. "Public interest" means manifest need in order to achieve the due execution of authorized functions. Closely related is the second exception, of matters relating solely to internal agency management, which may not be construed to defeat the other provisions or to permit withholding of information as to operations which remaining provisions of the section or of the whole bill require to be public or publicly available. Neither exception is operative unless the excepted subject matter is clearly and directly involved. Neither exception supersedes other legal requirements of publicity or free public accessibility.

SECTION 3 (A). RULES TO BE PUBLISHED

Every agency is required to publish in the Federal Register its (1) organization and delegations of final authority as well as places and ways of doing business with the public, (2) methods of rule making and adjudication, including the rules of practice relating thereto, and (3) such substantive rules, policies, or interpretations as it may frame for the guidance of the public but not rules addressed to and served upon named parties as provided by law. No person is in any manner to be required to resort to organization or procedure not so published.

Since the bill leaves wide latitude for each agency to frame its own procedures, this subsection requiring agencies to state their organization and procedures in the form of rules is essential for the information of the public. The publication must be kept up to date. The enumerated classes of informational rules must also be separately stated so that, for example, rules of procedure will be separate from rules of substance, interpretation, or policy. Under (1) only final delegations of authority to dispose of cases or matters must be published; the delegation of other functions would be shown in (2) in stating the general course and method by which each of an agency's functions are channeled and determined. Also, under (2), an agency is required to state all the stages, steps, courses, and alternatives for each of the types of functions it is authorized to perform. The section forbids secrecy of rules binding upon or applicable to the public, or of delegations of authority. Mimeographed releases of many kinds now common should no longer be necessary since, if they contain really informative matter, they must be published as rules, policies, or interpretations. Substantive rules include the statement of standards. As a matter of good practice rules of any kind should not unnecessarily repeat statutes, but may quote and should identify the statutory authority which they invoke or provisions they properly amplify. Where it is not desirable to publish complicated forms at length and in full-spread fashion in the Federal Register, under this provision an agency may publish in the Federal Register a simple statement of the contents of the form and, if blanks are available, state where they may be obtained. The requirement that no one shall "in any manner" be required to resort to unpublished organization or procedure protects the public from being required to pursue remedies that are not published as required by the section.

SECTION 3 (B). OPINIONS, ORDERS, AND RULES TO BE AVAILABLE TO PUBLIC INSPECTION

Agencies are required to publish or, pursuant to rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those held confidential for good cause and not cited as precedents) and all rules.

General rule making results in published material in the Federal Register as set forth in section 3 (a), but in the case of adjudication and some rules of particular applicability there is no standard medium of publication. Some agencies publish sets of some of their decisions, particularized rules, or orders; but otherwise the public is not informed as to how and where they may consult them. Requiring each agency to formulate and publish a rule respecting access to these materials of administrative law will afford the general public notice as to how such information may be consulted or secured. While the subsection does not mention "rulings"—which are neither rules nor orders but are general interpretations, such as the opinions of agency counsel—if authoritative they would be covered by the third category in section 3 (a). All rules must be subject at least to freely accorded public inspection under this section. The parenthetical exception respecting confidential opinions and orders would not supersede or repeal future or existing legal requirements of publication or public accessibility.

SECTION 3 (C). ACCESSIBILITY OF PUBLIC RECORDS

Except as statutes may require otherwise or information may be held confidential for good cause, matters of official record are to be made available to persons properly and directly concerned in accordance with rules to be issued by the agency.

The purpose of this section is to make access to public records generally applicable, uniform, and more readily determinable. The requirement of an agency rule on the availability of official records is inserted for the same purpose as in section 3 (b). The interest of the person seeking access to records may in some cases be determinative. Agencies must classify data, specify generally what may be disclosed and what may not, and provide where applications for information may be made, how they will be determined, and what public agents will do so. In short, a routine and a procedure must be provided as well as a classification. Refusals of information would be subject to the requirements of section 6 (d). The concluding exception would not repeal or supersede present or future legal requirements of publicity or public accessibility existing apart from the bill.

SECTION 4. RULE MAKING

The introductory clause exempts from all of the requirements of section 4 any rule making so far as there are involved (1) military, naval, or foreign-affairs functions or (2) matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

The principal purpose of this section is, where other statutes do not require a hearing, to provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice as provided in sections 4 (a) and (b).

The introductory exceptions to the section do not relieve an agency from any requirements imposed by law apart from this bill. They apply only "to the extent" that the excepted subject matter is clearly and directly involved. The phrase "foreign affairs functions," used here and in some other provisions of the bill, is not to be loosely interpreted to mean any agency operation merely because it is exercised in whole or part beyond the borders of the United States but only those "affairs" which so affect the relations of the United States with other governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences. The exception of matters of management or personnel would operate only so far as not inconsistent with other provisions of the bill relating to those matters. The term "public property" would include property held by the United States in trust or as guardian, as Indian property is often held. The exception of proprietary matters is included because a main consideration in such cases relates to mechanics, interpretations, or policy and it is wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. Changes can then be sought through the petition procedures of section 4 (d), by which such rule making may also be initially invoked. But these exceptions are not to be taken as encouraging agencies not to adopt voluntary public rule-making procedures where useful to the agency or beneficial to the public. They merely confer a discretion upon agencies to decide what, if any, public rule-making procedures shall be utilized in a given situation within their terms.

SECTION 4 (A). NOTICE OF RULE MAKING

General notice of proposed rule making must be published in the Federal Register—unless all persons subject to the rules are named and are personally served or otherwise have actual notice as provided by law—and must include (1) the time, place, and nature of proceedings, (2) reference to the authority under which held, and (3) the terms, substance, or issues involved. However, except where notice and hearing is required by some other statute, the section does not apply to rules other than those of substance or where the agency for good cause finds (and incorporates the finding and reasons therefor in the published rule) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

The provisions respecting the fullness of notice apply whether or not, under the terms of the section, it must be published in the Federal Register. Notice must fairly apprise interested persons of the issues involved, so that they may present relevant data or argument. The required specification of legal authority must be done with particularity. Statements of issues in the general statutory language of legislative delegations of authority to the agency would not be a compliance with the section. Prior to public procedures agencies must conduct such nonpublic studies or investigations as will enable them to formulate issues, or where possible to issue proposed or tentative rules for the purpose of public proceedings. Summaries and reports may also be issued as aids in securing public comment or suggestions.

The section governs the application of the public procedures required by section 4 (b) since those procedures only apply where notice is required by this section. Agencies are given discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; but this does not mean that they should not undertake public procedures in connection with such rule making where useful to them or helpful to the public. The exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published. "Impracticable" means a situation in which the due, timely, and required execution of agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not unreasonably prevent an agency from fulfilling its duty and that, on the other hand, lack of public concern in rule making warrants an agency to dispense with public procedure. Where authority beneficial to the public does not become operative until a rule is issued, the agency may promulgate the necessary rule immediately and rely upon supplemental procedures in the nature of a public reconsideration of the issued rule to satisfy the requirements of this section. Where public rule-making procedures

are dispensed with, the provisions of subsections (c) and (d) of this section would nevertheless apply. Notice otherwise required by law apart from this bill is not repealed or diminished by this section.

SECTION 4 (B). PUBLIC PROCEDURES IN RULE MAKING

After such notice, the agency must afford interested persons an opportunity to participate in the rule making at least to the extent of submitting written data, views, or argument; and, after consideration of such presentations, the agency must incorporate in any rules adopted a concise general statement of their basis and purpose. However, where other statutes require rules to be made after opportunity for hearing, the requirements of sections 7 and 8 (relating to public hearings and decisions thereon) apply in place of the provisions of this subsection.

The first sentence states the minimum requirements of public rule-making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings," and the like. Open proceedings may be aided by the submission of reports or summaries of data by agency representatives. Where open proceedings are held, interested persons unable to be present would be entitled to make written submittals. Considerations of practicality, necessity, and public interest as discussed in connection with section 4 (a) will naturally govern the agency's determination of the extent to which public proceedings may be carried. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures. The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.

These rule-making procedures must be incorporated in the rules published pursuant to section 3 (a), although their applicability may be left to the notice of rule making in a given case and modifications or extensions of procedure may be made in the notice.

SECTION 4 (C). FUTURE EFFECTIVE DATE OF RULES

The required publication or service of any substantive rule must be made not less than 30 days prior to its effective date except (1) as otherwise provided by the agency for good cause found and published or (2) in the case of rules recognizing exemption or relieving restriction, interpretative rules, and statements of policy.

This section does not repeal or diminish other time requirements provided by law apart from this bill. It does not provide procedures alternative to notice and other public proceedings required by the prior sections. Nor does it supersede the provisions of section 4 (d). Where public procedures are omitted as authorized in certain cases, section 4 (c) does not thereby become inoperative. It will afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt. The specification of a 30-day deferred effective date

is not to be taken as a maximum, since there may be cases in which good administration or the convenience and necessity of the persons subject to the rule reasonably require a longer period. While certain named kinds of rules are not necessarily subject to the deferred effective date provided, it does not thereby follow that agencies are required to make such excepted types of rules operative with less notice or no notice but, instead, agencies may fix such future effective date as is advisable. The other exception—upon good cause found and published—is not an “escape clause” which may be exercised at will but requires legitimate grounds supported in law and fact by the required finding. Many rules, such as some agricultural marketing “orders,” may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation. In any event, however, no rule requiring action may be made effective until a legally reasonable time after its issuance as judged in the light of all the circumstances.

SECTION 4 (D). PETITIONS RESPECTING RULES

Every agency is required to accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

This section applies not merely to effective rules existing at any time but to proposed or tentative rules. Where such petitions are made, the agency must fully and promptly consider them, take such action as may be required, and pursuant to section 6 (d) notify the petitioner in case the request is denied. The agency may either grant the petition, undertake public rule-making proceedings as provided by sections 4 (a) and 4 (b), or deny the petition. The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or to engage in other public rule-making proceedings. But the agency must act on the petition in accordance with procedures set up and published in compliance with section 3 (a).

SECTION 5. ADJUDICATIONS

The provisions of section 5 relating to adjudications apply only where the case is required by some other statute to be determined upon an agency hearing except that, even in that case, the following classes of operations are expressly not affected: (1) Cases subject to trial de novo in court, (2) selection or tenure of public officers other than examiners, (3) decisions resting on inspections, tests, or elections, (4) military, naval, and foreign-affairs functions, (5) cases in which an agency is acting for a court, and (6) the certification of employee representatives.

This section is limited to cases in which other statutes require an agency to act upon or after a hearing, but even then the numbered exceptions remove from the operation of the section adjudications otherwise required by statute to be made after hearing or opportunity therefor. The first, where the adjudication is subject to a judicial trial de novo, is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision. The second, respect-

ing the selection and tenure of officers other than examiners, is included because the selection and control of public personnel has been traditionally regarded as a largely discretionary function. The third exempts proceedings resting entirely on inspections, tests, or elections because those methods of determination do not lend themselves to the hearing process. The fourth exempts military, naval, and foreign affairs functions for the same reasons that they are exempted from section 4; in any event, rarely do statutes require such functions to be exercised upon hearing; and the term "foreign affairs" is used in the same sense as in section 4. The fifth, exempting cases in which an agency is acting as the agent for a court, is included because the administrative operation is subject to judicial revision in toto. The sixth, exempting the certification of employee representatives such as the Labor Board operations under section 9 (c) of the National Labor Relations Act, is included because those determinations rest so largely upon an election or the availability of an election. Any of these exceptions apply only "to the extent" that the excepted subject is clearly and directly involved.

SECTION 5 (A). NOTICES OF MAKING ADJUDICATIONS

Persons entitled to notice of an agency hearing are to be duly and timely informed of the (1) time, place, and nature of the hearing, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law asserted. Where private persons are the moving parties, respondents must give prompt notice of issues controverted in law or fact; and in other cases the agency may require responsive pleading. In fixing the times and places for hearings the agency must give due regard to the convenience and necessity of the parties.

A party must be given ample notice of the legal and factual issues with due time to examine, consider, and prepare for them. To make that possible the issues must be specified with reasonable particularity, for which purpose the statement of issues in general statutory language of delegations of authority to the agency would not be sufficient. The second sentence of the subsection applies in those cases where the agency does not control the matter of notice because private persons are the moving parties; and in such cases the respondent parties must give notice of the issues of law or fact which they controvert so that the moving party will be apprised of the issues he must sustain. The purpose of the provision is to simplify the issues for the benefit of both the parties and the deciding authority.

SECTION 5 (B). ADJUDICATION PROCEDURE

The agency is required first to afford parties an opportunity for the settlement or adjustment of issues (where time, the nature of the proceeding, and the public interest permit) followed, to the extent that issues are not so settled, by hearing and decision under sections 7 and 8.

The preliminary settlement-by-consent provision of this section is important. Such adjustments may comprehend the whole or any part of any case. Pursuant to section 3 (a) agencies would be required to state settlement procedures in their rules. The limitation to cases in which "time, the nature of the proceeding, and the public

interest permit" does not mean that formal proceedings, to the exclusion of prior opportunity for informal settlement, may be required at will by an agency. It is intended to exempt only situations in which (1) time is unavoidably lacking, (2) the nature of the proceeding is such that the number of parties makes it unlikely that any adjustment could be reached, and (3) the administrative function requires immediate execution in order to protect the demonstrable requirements of public interest in the due and timely execution of the laws. Where settlements do not dispose of the whole case, sections 7 and 8 as well as section 5 (c) apply.

SECTION 5(C). SEPARATION OF PROSECUTING FUNCTIONS

Officers who preside at the taking of evidence must make the decision or recommended decision in the case. They may not consult with any person or party except openly and upon notice save in the disposition of customary ex parte matters, and they may not be made subject to the supervision of prosecuting officers. The latter may not participate in the decisions except as witness or counsel in public proceedings. However, the subsection is not to apply in determining applications for initial licenses or the validity or application of rates, facilities, or practices of public utilities or carriers; nor does it apply to the top agency or members thereof.

The purpose of the section is to assure that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives. The separation of functions here required must be reflected in the rules of organization and procedure issued pursuant to section 3 (a). "Ex parte matters authorized by law" means passing on requests for adjournments, continuances, filing of papers, and so forth. The exemption of applications for initial licenses frees from the requirements of the section such matters as the granting of certificates of convenience and necessity, upon the theory that in most licensing cases the original application may be much like rule making. The latter, of course, is not subject to any provision of section 5. The exemption of cases involving the validity or application of utility or carriers' rates, facilities, or practices is included for a similar reason—since they may often be consolidated with rule making. There are, however, some instances of either kind of case which tend to be accusatory in form and involve sharply controverted factual issues, to which agencies should not apply the exceptions because they are not to be interpreted as precluding fair procedure where it is required.

The last exemption—of the agency itself or the members of the board who comprise it—is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases. There, too, the exemption is not to be taken as meaning that the top authority must reserve to itself both prosecuting and deciding functions. It is ultimately responsible for all functions committed to it, but it may and should confine itself to determining policy and delegate the actual supervision of investigations and initiation of cases to responsible

subordinate officers. Agencies, such as heads of bureaus or departments, performing mainly executive functions should delegate to examiners or boards of examiners at least the initial decision of cases and should confine their own review to important issues of law or policy.

SECTION 5 (D). DECLARATORY ADJUDICATIONS

Every agency is authorized in its sound discretion to issue declaratory orders with the same effect as other orders.

This section does not mean that any agency empowered to issue orders may issue declaratory orders, because it is limited by the introductory clauses of section 5 so that such orders may be issued only where the agency is empowered by statute to hold hearings and the subject is not otherwise expressly exempted there. Where authorized to do so by this section, agencies are not required to issue declaratory orders merely because request is made therefor. Such applications have no greater effect than they now have under existing comparable legislation. "Sound discretion," moreover, would preclude the issuance of improvident orders. The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts. Such orders, if issued, would not bind those not parties to them or determine subject matter not presented. They would be subject to judicial review as in the case of other orders.

SECTION 6. ANCILLARY MATTERS

The provisions of section 6 relating to incidental or miscellaneous rights, powers, and procedures do not override contrary provisions in other parts of the bill.

The purpose of this introductory exception, which reads "except as otherwise provided in this act," is to limit, for example, the right of appearance provided in section 6 (a) so as not to authorize improper ex parte conferences during formal hearings and pending formal decisions under sections 7 and 8. This section 6 contains provisions respecting various procedural rights which may be incidental to either rule making or adjudication or independent of either.

SECTION 6 (A). APPEARANCE OR REPRESENTATION OF PARTIES

Any person compelled to appear in person before any agency or its representative is entitled to counsel. In other cases, every party may appear in person or by counsel. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers at any time for the presentation or adjustment of any matter. Agencies are to proceed with reasonable dispatch to conclude any matter so presented, with due regard for the convenience and necessity of the parties. Nothing in the subsection is to be taken as recognizing or denying the propriety of nonlawyers representing parties.

The section is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private. The word "party" in the second sentence is to be understood as meaning any person show-

ing the requisite interest in the matter, since the section applies in connection with the exercise of any agency authority whether or not formal proceedings are available. The phrase "responsible officers," as used here and in some other provisions, includes all officers or employees who actually determine matters or exercise substantial advisory functions. The qualifying words in the third sentence—which read "so far as the orderly conduct of public business permits"—preclude numerous petty appearances by or for the same party in the same case; but they do not confer upon agencies a right to preclude interested persons from presenting fully and before any responsible officer or employee their cases or proposals in full. The reference to interlocutory and summary proceedings emphasizes the necessity for an opportunity for full informal appearance where normal and formal hearing and decision requirements are not applicable prior to agency action.

The requirement that agencies proceed "with reasonable dispatch to conclude any matter presented" means that no agency shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in dilatory fashion to the injury of the persons concerned. No agency should permit any person to suffer injurious consequences of unwarranted official delay.

The final sentence provides that the subsection shall not be taken to recognize or deny the rights of nonlawyers to be admitted to practice before any agency. The use of the word "counsel" means lawyers. The right of agencies to pass upon the qualifications of nonlawyers is expressly recognized and preserved in the subsection, but this provision does not authorize an agency to permit nonlawyers to "practice law" where that would be contrary to law apart from this bill. As to lawyers, agencies are ordinarily not warranted in laying burdensome requirements upon those in good standing in the courts and should normally require no more at most than an attorney's own representation that he is such in good standing before the highest court of any State, Territory, or the United States.

SECTION 6(B). ADMINISTRATIVE INVESTIGATIONS

Investigative process is not to be issued or enforced except as authorized by law. Persons compelled to submit data or evidence are entitled to retain or, on payment of costs, to procure copies except that in nonpublic proceedings a witness may for good cause be limited to inspection of the official transcript.

This section is designed to preclude "fishing expeditions" and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpoena is actually issued. It includes demands or requests to inspect or for the submission of reports. An investigation must be substantially and demonstrably necessary to agency operations, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law. Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be conducted so as to interfere in the least degree compatible with adequate law enforcement.

“Nonpublic investigatory proceeding” means those of the grand jury kind in which evidence is taken behind closed doors. The limitation, for good cause, to inspection of the official transcript may be properly invoked by an agency where evidence is taken in a case in which prosecutions may be brought later and it would nullify the execution of the laws to permit copies to be circulated. In those cases the “good cause” should be clear and convincing; then the witness or his counsel may be limited to inspection of the relevant portions of the transcript. Parties should in any case have copies or an opportunity for inspection in order to assure that their evidence is correctly set forth, to refresh their memories in the case of stale proceedings, and to enable them to be advised by counsel. They should also have such copies whenever needed in other judicial or administrative proceedings.

SECTION 6 (C). ADMINISTRATIVE SUBPENAS

Where agencies are by law authorized to issue subpoenas, parties may secure them upon request and upon a statement or showing of general relevance and reasonable scope if the agency rules so require. Where a party contests a subpoena, the court is to inquire into the situation and, so far as the subpoena is found in accordance with law, issue an order requiring the production of the evidence within a reasonable time under penalty of contempt for failure then to comply.

This provision will assure private parties the same access to subpoenas, pursuant to the same just and reasonable routine, as that available to the representatives of agencies. It will also prevent the issuance of improvident subpoenas or action by an agency requiring a detailed, unnecessary, and burdensome showing of what evidence is sought. The section constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction, in connection with any agency function or authority. It does not mean that upon contest courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance; they should instead inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction. The section expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance. In such contests, the court is required to determine all relevant questions of law.

SECTION 6 (D). AGENCY DENIALS OF REQUESTS

Prompt notice is to be given of denials of requests in any agency proceeding, accompanied by a simple statement of procedural or other grounds.

The section affords the parties in any agency proceeding, whether or not formal or upon hearing, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefor. The latter should in any case be sufficient to apprise the party of the basis of the denial and any other or further administrative remedies or recourse he may have. A statement of

DIAGRAM SYNOPSIS OF BILL OMITTED

GENERAL PROVISIONS

SEC. 1. Title.—"Administrative Procedure Act."

SEC. 2. Definitions.—Defines (a) agency, excepting representative and war agencies, (b) person and party, (c) rule and rule making, (d) order and adjudication, (e) license and licensing, (f) sanction and relief, (g) agency proceeding and action.

SEC. 3. Public Information.—Except secret functions and internal management: (a) agencies are required to publish organization, procedure, and other general rules, (b) opinions and orders are to be published or open to inspection, and (c) official records are to be made available to properly interested persons.

SEC. 6. Ancillary Matters.—(a) Parties are entitled to counsel. (b) Investigations are to be confined to authority granted agencies and witnesses are entitled to copies of testimony. (c) Subpenas are to be issued to parties on request and reasonable showing, and are to be judicially enforced if in accordance with law. (d) Written notice and statement of grounds is to be given by agency in denying any request.

SEC. 9. Sanctions and Powers.—In exercise of any power or authority: (a) no sanction is to be imposed or rule or order issued save within jurisdiction delegated and authority granted by law, (b) license applications are to be acted upon promptly, revocation is not to be attempted except upon notice and opportunity for the licensee to comply with lawful requirements, and renewals are not to be deemed denied until finally acted upon.

SEC. 11. Examiners.—Examiners are to be appointed pursuant to Civil Service for proceedings under sections 7 and 8 and may perform no inconsistent duties. They are removable only for good cause determined by Civil Service Commission after hearing, which is subject to judicial review. They are to receive compensation prescribed and adjusted by Civil Service Commission independently of agency recommendations or ratings.

SEC. 12. Construction and Effect.—The Act is not to impair other or additional legal rights. Procedure is to apply equally. The usual saving clause is included. Authority is granted to agencies to comply with the Act. Subsequent repeals are to be express. Effective dates are to be deferred and the Act is not to apply to proceedings previously begun.

NOTE: Sections 7, 8, and 11 apply only where other statutes require an agency hearing; and section 10 applies in a proper case whether or not an agency hearing is required. Sections 4, 5, 6 (b) and (c), and 9 (b) apply only where agencies by other statutes are given authority to make regulations, adjudicate cases, investigate, issue subpenas, or grant licenses as the case may be. The definitions in section 2 are not operative apart from the rest of the bill.

DETAIL AND SECONDARY EXCEPTIONS

QUASI-LEGISLATIVE FUNCTIONS

SEC. 4. Rule Making.—Except war, foreign affairs, management, and proprietary functions: (a) notice of rule making is to be published in certain instances, (b) thereafter interested persons are to be permitted to make at least written submittals for agency consideration, except that if other statutes require an agency hearing then sections 7 and 8 apply, (c) effective date of rules is to be 30 days following publication, and (d) any interested person may petition for issuance, amendment, or repeal of a rule.

QUASI-JUDICIAL FUNCTIONS

SEC. 5. Adjudication.—Where statutes require a hearing: (a) contents of notice are specified, (b) hearings are to be held under sections 7 and 8 to the extent issues cannot first be settled informally, (c) hearing officers are required to operate entirely separate from prosecuting officers and to make or recommend the decision in the case, and (d) agencies are authorized to issue declaratory orders.



SEC. 7. Hearings.—In hearings which sections 4 or 5 require to be conducted under this section: (a) presiding officers are to be the agency or its members, examiners, or others specially provided for in other statutes, all to act impartially and be subject to disqualification, (b) presiding officers are to have authority necessary to conduct the hearing and dispose of motions, (c) irrelevant and repetitious evidence is to be excluded as a matter of policy and no sanction is to be imposed or rule or order issued except upon the whole record and as supported by and in accordance with reliable, probative, and substantial evidence, and (d) record of the hearing is to be exclusive for purposes of decision.



SEC. 8. Decisions.—Where hearing is required under section 7: (a) examiners are to make either initial decision or recommended decision, as the agency may determine, and (b) prior to any recommended or other decision the parties are entitled to submit suggested findings, exceptions, and supporting reasons and all decisions are to include findings on material issues and a statement of the appropriate action.



SEC. 10. Judicial Review.—Except so far as statutes preclude judicial review or agency action is by law committed to agency discretion: (a) any person suffering legal wrong is entitled to judicial review, (b) the form of action is to be that specially provided by any statute or, in the absence or inadequacy thereof, any appropriate common-law action, (c) every action for which there is no other adequate remedy is made subject to such review, (d) agencies or courts may stay agency action or preserve status or rights pending review, and (e) reviewing courts, upon the whole record and with due regard for the rule of prejudicial error, are to determine all questions of law, compel agency action unlawfully withheld, and hold unlawful action found (1) arbitrary, (2) not in accord with the Constitution, (3) in violation of any statute, (4) without observance of procedure required by law, (5) unsupported by substantial evidence on the record in cases subject to sections 7 and 8, or (6) unwarranted by the facts to extent that facts are subject to trial *de novo* by the reviewing court.

the actual grounds need not be made "in affirming a prior denial or where the denial is self-explanatory." However, prior denial would satisfy this requirement only where the grounds previously stated remain the actual grounds and sufficiently notify the party. A self-explanatory denial must meet the same test; that is, the request must be in such form that its mere denial fully informs the party of all he would otherwise be entitled to have stated.

SECTION 7. HEARINGS

Section 7 relating to agency hearings applies only where hearings are otherwise required by statute and by section 4 or 5.

As heretofore stated in connection with sections 4 and 5, the bill requires no hearings unless other statutes contain such a requirement in particular cases of either rule making or adjudication and even then section 5 contains numerous functional exceptions. This section 7, therefore, is merely supplementary to section 4 or 5 in the relevant cases. These formal hearing provisions are not in derogation of the settlement provisions of sections 5 and 6 (a), which require that parties be given every opportunity to simplify or settle cases. Hearings are not to be used as indirect burdens or penalties.

SECTION 7 (A). PRESIDING OFFICERS AT HEARINGS

The hearing must be held either by the agency, a member or members of the board which comprises it, one or more examiners, or other officers specially provided for in or designated pursuant to other statutes. All presiding and deciding officers are to operate impartially. They may at any time withdraw if they deem themselves disqualified and, upon the filing of a proper affidavit of personal bias or disqualification against them, the agency is required to determine the matter as a part of the record and decision in the case.

The section provides two mutually exclusive methods of hearing—by the agency itself (or one or more of its members) or by subordinate officers. Also recognized as hearing officers are those, including State representatives, specially provided for or named in other statutes. But the reference to other statutory officers would not prevent an agency, such as the head of a department or a board, from utilizing examiners as provided by the bill. On the other hand, statutory provisions authorizing the use of employees or attorneys generally to be presiding officers are superseded. The preservation of the "conduct of specified classes of proceedings by or before boards or other officers specially provided by or designated pursuant to statute" is not a loophole for the avoidance of the examiner system; it is intended to preserve only special types of statutory hearing officers who contribute some special qualifications, as distinguished from examiners otherwise provided in the bill, and at the same time assure the parties fair and impartial procedure.

Those who so preside are subject to the remaining provisions of the bill. They must conduct the hearing in a strictly impartial and considerate manner, rather than as representatives of an investigative or prosecuting authority. They may make sure that all necessary evidence is adduced and keep the hearing orderly and efficient. No

examiner may proceed in willful disregard of law. Presiding officers must conduct themselves in accord with the requirements of this bill and with due regard for the rights of all parties as well as the facts, the law, and the need for prompt and orderly dispatch of public business.

The provision for affidavits of bias or personal disqualification requires a decision thereon by the agency in, and as a part of, the case; it thereby becomes subject to administrative and judicial review. That decision might be made upon the affidavit alone, as for example, the protest might be dismissed as insufficient on its face. The agency itself may hear any relevant argument or facts, or it may designate an examiner to do so. The effect which bias or disqualification shown upon the record might have would be determined by the ordinary rules of law and the other provisions of this bill. If it appeared or were discovered late, it would have the effect—where issues of fact or discretion were important and the conduct and demeanor of witnesses relevant in determining them—of rendering the recommended decisions or initial decisions of such officers invalid. This consequence will require agencies and examiners themselves to take care that they do not sit where subject to disqualification.

The term “presiding officers” means those who officially sit and conduct the proceedings for reception of evidence. If more than one so “presides,” there may of course be a chairman who also presides in a slightly different but familiar sense as chairman of the presiding body.

SECTION 7 (E). HEARING POWERS OF PRESIDING OFFICERS

Presiding officers, subject to the rules of procedure adopted by the agency and within its powers, have authority to (1) administer oaths, (2) issue such subpoenas as are authorized by law, (3) receive evidence and rule upon offers of proof, (4) take depositions or cause them to be taken, (5) regulate the hearing, (6) hold conferences for the settlement or simplification of issues, (7) dispose of procedural requests, (8) make decisions or recommended decisions under section 8 of the bill, and (9) exercise other authority as provided by agency rule consistent with the remainder of the bill.

The section does not expand the powers of agencies. It assures that the presiding officer or officers will perform a real function rather than serve merely as notaries or policemen. They would have and independently exercise all the powers listed in the section. The agency itself—which must ultimately either decide the case, consider reviewing it, or hear appeals from the examiner's decision—should not in effect conduct hearings from behind the scenes where it cannot know the detailed happenings in the hearing room and does not hear or see the witnesses or private parties.

SECTION 7 (C). EVIDENCE REQUIREMENTS

Except as statutes otherwise provide, the proponent of a rule or order has the burden of proof. While any evidence may be received, as a matter of policy agencies are required to provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction may be imposed or rule or order be issued except upon consideration of the whole record or such portions as any party may cite and as supported by and

in accordance with reliable, probative, and substantial evidence. Any party may present his case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct reasonable cross-examination. However, in the case of rule making or determining applications for initial licenses, the agency may adopt procedures for the submission of evidence in written form so far as the interest of any party will not be prejudiced thereby.

That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence. Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper. In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated.

The second and primary sentence of the section is framed on the premise that, as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is, “reliable, probative, and substantial evidence.” Thus while the exclusionary “rules of evidence” do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced. The proof must be substantial, as provided in this section and also in section 10 (e) where the term "substantial evidence" is discussed later in this report.

The provision on its face does not confer a right of so-called "unlimited" cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the "full and true disclosure of the facts" stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required "for a full and true disclosure of the facts." In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings. The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case, subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. Among these are technical statements, reports of surveys, analyses, and summaries. The written evidence provision of the last sentence of the section is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party must have it. An adequate opportunity must also be provided for a party to prepare and submit appropriate rebuttal evidence.

Agencies must comply fully and the courts, pursuant to section 10 of the bill, must enforce all of these requirements diligently.

SECTION 7 (D). RECORD OF HEARINGS

The record of evidence taken and papers filed is exclusive for decision and, upon payment of costs, is available to the parties. Where decision rests on official notice of a material fact not appearing in the evidence of record, any party may on timely request show the contrary.

The "official notice" mentioned relates to the administrative practice of taking facts as shown and true though not in the record. This is done by analogy to "judicial notice" familiar in court procedure. Where agencies take such notice they must so state on the

record or in their decisions and then afford the parties an opportunity to show the contrary. But such notice may initially be taken only of generally recognized and ordinarily indisputable facts—usually those of a scientific or public nature.

SECTION 8. AGENCY DECISIONS AFTER HEARING

Section 8 applies to cases in which a hearing is required to be conducted pursuant to section 7.

Like section 7, upon which section 8 depends, this section is supplementary to sections 4 and 5 in cases in which agency action is required to be taken after hearing provided by statute and not otherwise expressly excepted. The decision in formal proceedings is exceedingly important, because most criticisms of the administrative process relate in one way or another to the methods whereby agencies decide cases. There are suspicions and good ground for assuming that those who purport to decide cases actually do not, that the submittals of private parties are not fully considered, that the views of agency personnel are emphasized without opportunity for private parties to meet them, and that matters outside the record are often the real grounds of decision.

SECTION 8 (A). DECISIONS BY SUBORDINATES

Where the agency has not presided at the reception of the evidence, the presiding officer (or any other officer qualified to preside, in cases exempted from section 5 (c)) must make the initial decision unless the agency—by general rule or in a particular case—undertakes to make the initial decision. If the presiding officer makes the initial decision, it becomes the decision of the agency in the absence of an appeal to the agency or review by the agency on its own motion. On such appeal or review, the agency has all the powers it would have had in making the initial decision. If the agency makes the initial decision without having presided at the taking of the evidence, whatever officer took the evidence must first make a recommended decision except that, in rule making or determining applications for initial licenses, (1) the agency may instead issue a tentative decision or any of its responsible officers may recommend a decision or (2) such intermediate procedure may be wholly omitted in any case in which the agency finds on the record that the execution of its functions imperatively and unavoidably so requires.

These provisions are mandatory but permit agencies to either have their examiners make decisions or, as is now usually the case, recommend decisions. In either case the examiner system is necessary because agencies cannot themselves hear all cases. Where they do not do so some device must be used to bridge the gap between the officials who hear and those who decide cases. The provision that on agency review of initial examiners' decisions it has all the powers it would have had in making the initial decision itself does not mean that initial examiners' decisions or recommended decisions are without effect. They become a part of the record and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10 (e)

of the bill. The agency may adopt in whole or part the findings, conclusions, and basis stated by examiners or other presiding officers. Agency rules must prescribe a reasonable time for appeals from initial examiners' decisions. Where the agency determines to review such a case, it should, so far as possible, specify the issues of law, fact, or discretion for review with particularity.

The alternative intermediate procedure which an agency may adopt in rule-making or determining applications for initial licenses is broadly drawn. But even in those cases, if issues of fact are sharply controverted or the case or class of cases tends to become accusatory in nature, sound practice would require the agency to adopt the intermediate recommended decision procedure.

SECTION 8 (B). REQUIREMENTS FOR ALL SUBMITTALS AND DECISIONS

Prior to each recommended or other decision or review the parties must be given an opportunity to submit for the full consideration of deciding officers (1) proposed findings and conclusions or (2) exceptions to recommended decisions or other decisions being appealed or reviewed, and (3) supporting reasons for such findings, conclusions, or exceptions. The record must show the official rulings upon each such finding, conclusion, or exception presented. All recommended or other decisions become a part of the record and must include (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented by the record and (2) the appropriate agency action or denial.

"Supporting reasons" means that briefs on the law and facts must be received and fully considered by every recommending, deciding, or reviewing officer. They must also hear such oral argument as may be required by law, and the bill does not diminish rights to oral argument. Where the issues are serious or the case becomes one adversary in character, the agency should provide for oral argument before all recommending, deciding, or reviewing officers.

The requirement that the agency must state the reasons or basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record and the law as to advise the parties and any reviewing court of their record and legal basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.

Findings and conclusions must include all the relevant issues of law and fact presented by the record. They may be few or many, simple or complex, as the case may be. Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material. It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often appear to determine only whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions.

When made, decisions as defined by this section must be served on parties named, and also furnished to those participating as well as to interested persons who request them or have attempted to participate or intervene. Any person who requests in writing to be notified or given copies should have his request honored.

SECTION 9. AGENCY SANCTIONS AND POWERS

Section 9 relating to powers and sanctions refers to the exercise of any power or authority by an agency.

Unlike sections 7 and 8, this section applies in all relevant cases, whether or not the agency is required by statute to proceed upon hearing or in any special manner. It also applies to any power or authority that an agency may assume to exercise.

SECTION 9 (A). GENERAL LIMITATION ON SANCTIONS AND POWERS

No sanction may be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law.

This section embraces both substantive and procedural requirements of law. It means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted, no additional authority may be assumed. Where these sources are general, no authority beyond the generality granted may be exercised. In short, agencies may not impose sanctions which have not been specifically or generally provided for them to impose. Thus, an agency which is authorized only to issue cease-and-desist orders may not set up a licensing system. An agency authorized to regulate only trade practices may not regulate banking, and so on. Similarly, no agency may undertake directly or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law. Sanctions in the way of penalties or relief must be identified and authorized by law, and where authorized they must in any case properly apply in the factual situation presented.

One troublesome subject in this field is that of publicity, which may in no case be utilized directly or indirectly as a penalty or punishment save as so authorized. Legitimate publicity extends to the issuance of authorized documents, such as notices or decisions; but, apart from actual and final adjudication after all proceedings have been had, no publicity should reflect adversely upon any person, organization, product, or commodity of any kind in any manner otherwise than as required to carry on authorized agency functions and necessary in the administration thereof. It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of parties.

SECTION 9 (B). LICENSES

Agencies are required, with due regard for the rights or privileges of all the interested parties or persons adversely affected, to proceed with reasonable dispatch to conclude and decide proceedings on applications for licenses. They are not to withdraw a license without first giving the licensee notice in writing and an opportunity to demonstrate or achieve compliance with all lawful requirements except in cases of willfulness or

those in which public health, interest, or safety requires otherwise. In businesses of a continuing nature, no license expires until timely applications for new licenses or renewals are determined by the agency.

This section operates in all cases whether or not hearing is required, but it does not provide for a hearing where other statutes do not do so. Nor does it diminish statutory rights to a hearing. It does not confer licensing powers. The requirement of dispatch means that agencies must proceed as rapidly as is feasible and practicable, rather than at their own convenience. Undue delays are subject to correction by mandatory injunction pursuant to section 10. The exceptions to the second sentence, regarding revocations, apply only where the demonstrable facts fully and fairly warrant their application. Willfulness must be manifest. The same is true of "public health, interest, or safety." The standard of "public * * * interest" means a situation where clear and immediate necessity for the due execution of the laws overrides the equities or the injury to the licensee; the term does not confer upon agencies authority at will to ignore the requirement of notice and an opportunity to demonstrate compliance. However, this limitation does not apply to temporary permits or temporary licenses.

SECTION 10. JUDICIAL REVIEW

Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.

This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein.

SECTION 10 (A). RIGHT OF COURT REVIEW

Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.

This section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute. The phrase "legal wrong" means such a wrong as is specified in section 10 (e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect. Almost any governmental action may adversely affect somebody—as where rates or prices are fixed—but a complainant, in order to prevail, must show that the action is contrary to law in either substance or procedure. The law so made relevant is not only constitutional law but any and all applicable law.

SECTION 10 (B). FORMS OF ACTION

The technical form of proceeding for judicial review is any special proceeding provided by statute or, in the absence or inadequacy thereof, any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction. Moreover, agency action is also made subject to judicial review in any civil or criminal proceeding for enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

The first sentence of this section is an express statutory recognition and adoption of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special statutory forms of judicial review are either lacking or insufficient. Declaratory judgment procedure, for example, may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action. By such an action the court must determine the validity or application of a rule or order, render a judicial declaration of rights, and so bind an agency upon the case stated and in the absence of a reversal. The expression "special statutory review" means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by other statutes as the appropriate mode of review in given cases. The provision respecting "prior, adequate, and exclusive * * * review" in the second sentence is operative only where statutes, either expressly or as they are interpreted, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case.

The section does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law-action variety. Under this and the other provisions of section 10 a proper reviewing court has full authority to render decision and grant relief.

SECTION 10 (C). REVIEWABLE AGENCY ACTS

Agency action made reviewable specially by statute or final agency action for which there is no other adequate judicial remedy is subject to judicial review. In addition, preliminary or procedural matters not

directly subject to review are reviewable upon the review of final actions. Except as statutes may expressly require otherwise, agency action is final for the purposes of the section whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action shall meanwhile be inoperative) for an appeal to superior agency authority.

"Final" action includes any effective or operative agency action for which there is no other adequate remedy in any court. Action which is automatically stayable on further proceedings invoked by a party is not final. "Reconsideration" includes reopening, rehearing, etc. The last clause, permitting agencies to require by rule that an appeal be taken to superior agency authority before judicial review may be sought, is designed primarily to implement the provisions of section 8 (a) pursuant to which an agency may permit an examiner to make the initial decision in a case which becomes the agency's decision in the absence of an appeal to or review by the agency. If there is such review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. This section permits an agency also to require by rule that, if any party is not satisfied with the initial decision of a subordinate hearing officer, the party must first appeal to the agency (the decision meanwhile being inoperative) before resorting to the courts. In no case may appeal to "superior agency authority" be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue "exhausting" administrative processes after administrative action has become, and while it remains, effective.

SECTION 10 (D). TEMPORARY RELIEF PENDING FULL REVIEW

Pending judicial review any agency may postpone the effective date of its action. Upon conditions and as may be necessary to prevent irreparable injury, any reviewing court may postpone the effective date of any agency action or preserve the status quo pending conclusion of review proceedings.

This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency action are to be construed to extend rights pending judicial review and the exclusiveness of the administrative remedy is diminished so far as this section operates. While the section would not permit a court to grant an initial license, it provides intermediate judicial relief for every other situation in order to make judicial review effective. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy. Such relief would normally, if not always, be limited to the parties complainant and may be withheld in the absence of a substantial question for review. In determining whether agency action should be postponed, the court should take into account that persons other

than parties may be adversely affected by such postponement and in such cases the party seeking postponement may be required to furnish security to protect such other persons from loss resulting from postponement.

SECTION 10 (E). SCOPE OF COURT REVIEW

Reviewing courts are required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action. They must (A) compel action unlawfully withheld or unreasonably delayed and (B) hold unlawful any action, findings, or conclusions found to be (1) arbitrary or an abuse of discretion, (2) contrary to the Constitution, (3) contrary to statutes or statutory right, (4) without observance of procedure required by law, (5) unsupported by substantial evidence in any case reviewed upon the record of an agency hearing provided by statute, or (6) unwarranted by the facts so far as the latter are subject to trial de novo. In making these determinations the court is to consider the whole record or such parts as any party may cite, and due account must be taken of the rule of prejudicial error.

This section provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law. Under it courts are required to determine the application or threatened application or questions respecting the validity or terms of any agency action notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement. It expressly recognizes the right of properly interested parties to compel agencies to act where they improvidently refuse to act. "Finding" and "conclusion" also mean failure to find or conclude as the law and the record may require. "Accordance with law" requires, among other things, a judicial determination of the authority or propriety of interpretative rules and statements of policy. "Short of statutory right" means that agencies are not authorized to give partial relief where a party demonstrates his right to the whole. Authorized relief must be granted by an agency to the full extent that entitlement is shown.

"Without observance of procedure required by law" means not only the procedures required and procedural rights conferred by this bill but any other procedures or procedural rights the law may require. Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis. It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. For example, in several provisions the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found and the purpose of the entire section and bill. Cause found must be real and demonstrable. If the agency is proceeding upon a statutory hearing and record, the cause will appear there; otherwise it must be

such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill. As has been said, these findings must in the first instance be made by the agency concerned but, in the final analysis, their propriety in law and on the facts must be sustainable upon inquiry by a reviewing court.

"Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7 (c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party.

The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented. For example, statutes providing for "reparation orders," in which agencies determine damages and award money judgments, usually state that the money orders issued are merely *prima facie* evidence in the courts and the parties subject to them are permitted to introduce evidence in the court in which the enforcement action is pending. In other cases, the test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review. Thus, adjudications such as tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in The Tax Court or the United States district courts. Where administrative agencies deny parties money to which they are entitled by statute or rule, the claimants may sue as for any other claim and in so doing try out the facts in the Court of Claims or United States district courts as the case may be. Where a court enforces or applies an administrative rule, the party to whom it is applied may for example offer evidence and show the facts upon which he bases a contention that he is not subject to the terms of the rule. Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid for some relevant reason of law, he may show the facts upon which he predicates such invalidity. In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo*.

by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.

The requirement of review upon “the whole record” means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case. The requirement that account shall be taken “of the rule of prejudicial error” means that a procedural omission which has been cured prior to the finality of the action involved by affording the party the procedure to which he was originally entitled is not a reversible error.

SECTION 11. EXAMINERS

Subject to the civil-service and other laws not inconsistent with this bill, agencies are required to appoint such examiners as may be necessary for proceedings under sections 7 and 8, who are to be assigned to cases in rotation so far as practicable and to perform no inconsistent duties. They are removable only for good cause determined by the Civil Service Commission after opportunity for hearing and upon the record thereof. They are to receive compensation prescribed by the Commission independently of agency recommendations or ratings. One agency may, with the consent of another and upon selection by the Commission, borrow examiners from another. The Commission is given the necessary powers to operate under this section.

That examiners be “qualified and competent” requires the Civil Service Commission to fix appropriate qualifications and the agencies to seek fit persons. In view of the tenure and compensation requirements of the section, designed to make examiners largely independent in matters of tenure and compensation, self-interest and due concern for the proper performance of public functions will inevitably move agencies to secure the highest type of examiners. The section thus changes the present situation, in which examiners are mere employees of an agency. The entire tradition of the Civil Service Commission is directed toward security of tenure, and that system is put to appropriate use in the present case.

Additional powers are conferred upon the Commission. It must afford any examiner an opportunity for a hearing before acceding to an agency request for removal, and even then its action would be subject to judicial review. The hearing and decision would be made under sections 7 and 8 of this bill.

The requirement of assignment of examiners “in rotation” prevents an agency from disfavoring an examiner by rendering him inactive, although examiners may be permitted to specialize and be assigned mainly to cases for which they have so qualified.

In the matter of examiners’ compensation the section adds greatly to the Commission’s powers and function. It must prescribe and adjust examiners’ salaries, independently of agency ratings and recommendations. The stated inapplicability of specified sections of the Classification Act carries into effect that authority. The Commission would exercise its powers by classifying examiners’ positions and, upon customary examination through its agents, shift examiners to superior classifications or higher grades as their experience and

duties may require. Agencies may make, and the Commission may consider, recommendations; and the Commission might consult the agency, as it now does in setting up positions or reclassifying positions, but it would act upon its own responsibility and with the objects of the bill in mind. Examiners' salaries should be high enough to attract superior personnel.

The provision permitting agencies to borrow examiners is intended to permit those who do not need full-time examiners to borrow them as needed as well as to aid those agencies which may become temporarily or occasionally insufficiently staffed.

SECTION 12. CONSTRUCTION AND EFFECT

Nothing in the bill is to diminish constitutional rights or limit or repeal additional requirements of law. Requirements of evidence and procedure are to apply equally to agencies and private persons except as otherwise provided by law. The unconstitutionality of any portion or application of the bill is not to affect other portions or applications. Agencies are granted all authority necessary to comply with the bill. Subsequent legislation is not to modify the bill except as it may do so expressly. The bill would become law three months after its approval except that sections 7 and 8 take effect six months after approval, the requirements of section 11 become effective a year after approval, and no requirement is mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The word "initiated" in the final clause of the section means a proceeding formally begun as by the issuance of a complaint by the agency (irrespective of prior charges or investigations) or of notice of a rule-making hearing. As to new cases, the effective dates provided in section 12 are deferred longer so far as sections 7 and 8 are concerned in order to afford agencies ample time to prepare and make any adjustments required in their procedures. The selection of examiners under section 11 is deferred for a year in order to permit present military service personnel an opportunity to qualify for these positions.

This section, however, merely provides formal matters of construction and effect. Except as it expands or defers the prior sections of the bill, it supplies mainly the time of taking effect of the several provisions of the bill. Otherwise the earlier provisions are operative according to their terms. Any inconsistent agency action or statute is in effect repealed. No agency action taken or refused would be lawful except as done in full compliance with all applicable provisions of the bill and subject to the judicial review provided. No agreed waiver of its provisions would suffice unless entirely voluntary and without any manner or form of coercion.

Like some other statutes, judicial enforcement in case by case fashion is not the only method of enforcing the bill. For willful failure to comply, funds may be withheld or officers or employees may be subject to disciplinary action or dismissal. However, for most practical purposes it is to the agencies that the Congress and the people must look for fair administration of the laws and compliance with this bill. Judicial review is of utmost importance, but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers

not granted. Yet, in the vast majority of cases the agency concerned usually speaks the first and last word. For that reason the agencies must make the first, primary, and most far-reaching effort to comply with the terms and the spirit of this bill.

This bill is not, of course, the final word. It is a beginning. If it becomes law, changes may be made in the light of further experience; and additions should be made.

APPENDIX A

COMMITTEE AMENDMENT

It is proposed by the Committee amendment to make the following changes in S. 7: Portions of the bill in which no change is proposed are printed in roman, with matter proposed to be omitted shown in black brackets, and new matter is printed in italic:

A BILL To improve the administration of justice by prescribing fair administrative procedure

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

TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

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

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect¹ designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency [.] and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule [and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing].

¹ The change of the language to embrace specifically rules of "particular" as well as "general" applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons. The Senate committee report so interprets the provision, and the other changes are likewise in conformity with the Senate committee report (p. 11). The phrase "future effect" does not preclude agencies from considering and, so far as legally authorized, dealing with past transactions in prescribing rules for the future.

(d) **ORDER AND ADJUDICATION.**—"Order" means the whole or any part of the final disposition (whether affirmative, negative, *injunctive*,² or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) **LICENSE AND LICENSING.**—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

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

(g) **AGENCY PROCEEDING AND ACTION.**—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. [For the purposes of section 10,⁴] "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

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

(a) **RULES.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, *including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests:* [(3)] (2) statements of the general course and method by which its [rule making and adjudicating⁵] functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and [(4)] (3) 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, *but not rules addressed to and served upon named persons in accordance with law.*⁶ No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) *and all rules.*⁷

² This addition is prompted by the fact that some people interpret "future effect" as used in defining rule making, to include injunctive action, whereas the latter is traditionally and clearly adjudication. It is made even more necessary that this matter be clarified because of the amendment of section 2 (e) to embrace clearly particularized rule making as set forth in note 1.

³ The change is necessary to make it clear that "relief" means only action taken upon the application or petition of a party. Agencies frequently, of course, may take action, beneficial or otherwise, on their own motion.

⁴ As the bill now stands the term "agency action" is not used in other sections, but the term ought not be limited to section 10 since it may be found useful in later years in connection with additions and amendments.

⁵ The first insert is necessary to show in which separate set of rules delegations of authority should appear. The Senate committee report states that the effect of any one of the first three classifications requires the publication of subdelegations of authority to subordinate officers (p. 12), and, of course, to other agencies, but certainly such publication should not be required in all three sets of rules. It should be noted that there will be no requirement to list in the rules the names of specific individuals to whom power is delegated unless such a designation is now required by law. The listing of subdelegations of final authority requires only the naming of the specific office or agency to which a delegation of final authority has been made. The phrase "rule making and adjudicating" is eliminated because the introductory clauses of the section make the necessary exemptions.

⁶ The added language is necessary in order not to fill the Federal Register with a great mass of particularized rule making which has always been satisfactorily handled without general publication.

⁷ This change supplements the change explained in note 6. If some rules are not published in the Federal Register, then clearly they should be made available in the same manner as orders.

(c) **PUBLIC RECORDS.**—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

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 or personnel or to public property, loans, grants, benefits, or contracts—

(a) **NOTICE.**—General notice of proposed rule making shall be published in the Federal Register (*unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law*)⁶ 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 finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **PROCEDURES.**—After notice required by this section, the agency shall afford interested persons 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] statute to be made [upon] on the record after opportunity for [or upon]⁷ an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

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

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 other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) **NOTICE.**—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. 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; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) **PROCEDURE.**—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or

⁶ The added language supplements the changes explained in notes 6 and 7. There is no reason to burden the Federal Register with notices addressed to particular parties who have been personally served or otherwise have notice.

⁷ The change is made to conform to the language used in the introductory clause of section 5 respecting adjudications. A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 would apply save as other exceptions are operative.

proposals of adjustment where time, the nature of the proceeding, and the public interest permit and (2), to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

(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 required by section 8 except where such officers become unavailable to the agency. Save 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 fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. 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 factually 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 initial licenses or [the past reasonableness of rates:] to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers;¹⁰ nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(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.

ANCILLARY MATTERS

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

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the [responsible] orderly¹¹ conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (*interlocutory, summary, or otherwise*)¹² or in connection with any agency function [including stop order or other summary actions]. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(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 and 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, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure [to do so] to comply.¹³

¹⁰ The exemption is broadened to include facilities and practices, which are quite as important as rates and often involved in the determination of rate questions. It also seems a wise clarification to use the broader term "validity or application" instead of merely "past reasonableness." It is understood that the reason for this exemption is that these proceedings are often consolidated with rule making so that, unless the exemption is properly made, either rule making will be restricted or the consolidation of proceedings may be impossible.

¹¹ The word "orderly" is substituted because "responsible" is used later in the same sentence in a somewhat different sense.

¹² It seems desirable to specify that interlocutory proceedings are included. The change does not restrict the section. Stop-order proceedings are one form of interlocutory action.

¹³ The additions are made to clarify the intended meaning of the provisions.

(d) **DENIALS.**—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of *procedural or other grounds*.¹⁴

HEARINGS

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

(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **HEARING POWERS.**—Officers presiding at hearings shall have authority, subject to the published rules 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.

(c) **EVIDENCE.**—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any [evidence] oral or documentary evidence¹⁵ may be received, but every agency shall as a matter of policy provide for the exclusion of *irrelevant*,¹⁶ immaterial, [and] or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and¹⁷ as supported by and in accordance with the [relevant] reliable, [and] probative, and substantial evidence.¹⁸ Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) **RECORD.**—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall 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.

DECISIONS

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

(a) **ACTION BY SUBORDINATES.**—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at

¹⁴ The added language is designed to clarify the provision by making it clear that, if the ground for denial is procedural, the agency must say so.

¹⁵ The prior form involved an unnecessary circumlocution of language.

¹⁶ The word "relevant" has been stricken from the latter part of this sentence and the word "irrelevant" has been inserted at this point where it more appropriately belongs, to achieve the same purpose.

¹⁷ That the whole of the relevant record must be considered is the rule laid down in section 10 (e) on judicial review, but some hypercritical mind might contend that the omission to specify such consideration at the agency stage of proceedings was intentional and meant that the agency is not required to consider the whole record.

¹⁸ The insertion of the word "substantial" is made for the same reason as the insertion explained in note 17. Obviously the agency will proceed in accordance with the evidence which it finds reliable, probative, and substantial—there is no reason why the bill should not say so.

hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be 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 appeal from or 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 except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its function imperatively and unavoidably so requires.

(b) **SUBMITTALS AND DECISIONS.**—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (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 or conclusions. *The record shall show the ruling upon each such finding, conclusion, or exception presented.*¹⁹ All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record;²⁰ and (2) the appropriate rule, order, sanction, relief, or denials thereof.

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 and as authorized by law.

(b) **LICENSES.**—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall 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 shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **RIGHT OF REVIEW.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(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 inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal

¹⁹ The sentence is added for the purpose of requiring agencies to note their rulings somewhere on the record in order to preclude later controversy as to what the agency had done.

²⁰ "Reasons or" and "on the record" are inserted for purposes of clarification. "Basis" ought to include "reasons," but use of both words will preclude controversy. "Presented" should mean "on the record," or the protection of both agencies and parties, and the matter should be made specific.

proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(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, procedure, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action *otherwise final* shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be *inoperative*) for an appeal to superior agency authority.²¹

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

(e) **SCOPE OF REVIEW.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion,²² or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by [the parties] any party,²³ and due account shall be taken of the rule of prejudicial error.

EXAMINERS

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other

²¹ The change is made to clarify the provision by making specifically the language of the bill the explanation given in the Senate Committee report (p. 27). It should be noted that section 8 (a) permits agencies to provide by rule for appeals to them from initial decisions of examiners. That provision, as well as this provision of section 10 (c), would authorize an agency to adopt rules requiring a party to take a timely appeal to the agency before resorting to the courts. A party cannot willfully fail to exhaust his administrative remedies and then, after the agency action has become operative, either secure a suspension of the agency action by a belated appeal to the agency, or resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies. This is not to say that after the right to an administrative appeal has lapsed an agency may not, on proper application, either reconsider an adjudication or receive proposals for the modification of a rule, with or without suspending the operation of the agency action involved.

²² The change is designed to make it clear that §. 7 preserves judicial review of abuses of discretion.

²³ This change is to conform the language with the similar provision in sec. 7 (c).

agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any 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 such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

APPENDIX B

LETTER OF ATTORNEY GENERAL

APRIL 3, 1946

HON. FRANCIS E. WALTER,
*Chairman, Subcommittee on Administrative Law,
Committee on the Judiciary,
House of Representatives, Washington, D. C.*

MY DEAR CONGRESSMAN WALTER: I have carefully reviewed the revised version of H. R. 4941, a bill to improve the administration of justice by prescribing fair administrative procedure, as contained in the attached document entitled "Final Draft, April 2, 1946."

The changes indicated in the enclosed draft, as explained by the notes appended thereto, are not objectionable to the Department of Justice. They may, in general, be described as clarifications of the language and intention of H. R. 4941, as introduced by Congressman Sumners on December 10, 1945. As you know, I recommended the enactment of H. R. 4941 in my letter to Congressman Sumners dated October 19, 1945.

With kind personal regards.

Sincerely yours,

TOM C. CLARK, *Attorney General.*

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