The Exemption Provision of the Civil Aeronautics Act: The Problems Inherent in the Exercise of Pure Administrative Power

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I. Introduction

IT IS a singular statutory provision which can mirror many of the ills, complaints and criticisms of the administrative process. Problems of delegation and those of procedural due process rarely find root in the same legislative enactment. Accordingly, the exemption provision of the Civil Aeronautics Act must be classified as a unique section which raises classical problems in the field of administrative law. The three critical elements of the Act's exemption power (speed of administration, broad use of discretion, and continued administrative supervision) correspond very closely to the fundamental concepts which underlie the theory of administrative power. Indeed, the exemption powers exercised by the Civil Aeronautics Board are perhaps the purest form of administrative authority employed by a government agency.

The study of the powers delegated to the Board under the exemption provision and the manner by which the Board has exercised these powers is a study in miniature of the administrative process itself. The Civil Aeronautics Board was created in the mature years of the New Deal to represent the ideal in administrative law—combining the regulatory, the promotional, and the adjudicatory functions of the three branches of government into one body, capable of exercising all or any of these powers whenever it deemed the public interest so required.

Generally, the enabling statute which creates such a body rather carefully delimits the agency's functions according to the traditional separation of powers. Rarely are the three branches of government reflected in one particular section of the Act.

This paper studies the exemption provision from two perspectives: (1) from the question of delegation of power and (2) from the related viewpoint of administrative employment of power. Discussed first is the relation of the exemption provision to the entire statute of which it is an integral part; then the scope of the exemption power is assessed, and finally the unique nature of the provision is compared to other exemption provisions in other regulatory schemes.

The delegation question which is expressed in terms of exactly how much power was granted to the CAB under the exemption provision serves to introduce the primary issue to be discussed by this paper, i.e., Board procedures and practices in administering the exemption authority.

It is a necessary prolog of the discussion of the exemption provision to
define the conventional terms of right and privilege. This is necessary to ascertain which procedural problem is of principal importance. Not surprisingly, the requirement of a hearing will play the critical role in the ensuing analysis, for it is this requirement which counterbalances the original broad delegation of power to the CAB to exempt and to control exemption. The actual practices of the Board and the judicial reaction to these procedures compose the bulk of the discussion. While a hearing need not precede the granting or the denial of an application for an exemption, this report urges that the hearing requirement subsequently must be imposed wherever adjudicative facts are in dispute. The classic conflict between the administrative pressure to regulate effectively and the evidentiary hearing is evident when the Board acts to modify or terminate an exemption. The unique scope and character of the Board’s exemption authority permeates every level of analysis, for the Board’s principal argument against the requirement of a hearing is that the Board has broad power under the exemption provision. Therefore, a carrier is merely exercising a privilege when it operates under or is granted an exemption, thus the carrier is not entitled to an adjudicatory hearing when the privilege is altered or terminated. Conceding that an exemption is a privilege when granted, this paper makes the difficult argument that use of the exemption authority can convert that privilege into a right which cannot be terminated absent an evidentiary hearing on the adjudicative facts in dispute.

II. Section 416 in the Context of the Civil Aeronautics Act of 1938

A. Scope Of The Act

During the five year period preceding the enactment of the Civil Aeronautics Act, the infant air transportation industry in the United States was faced with economic difficulties which seriously threatened its growth and development. It was possible for anyone to enter the business of air transportation and to compete for passenger and cargo traffic. Carriers, anxious to obtain routes or to maintain or extend routes they had developed, after 1934 bid competitively for air mail contracts with little or no regard for the costs involved. Under the conditions then existing, few carriers were able to make a profit and most suffered severe losses. The financial strength of the carriers deteriorated and the credit position of the entire industry was seriously impaired.

In this setting, Congress passed the Civil Aeronautics Act of 1938. The Act’s legislative history clearly indicates that the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development and the elimination of the unrestricted and cutthroat competition which had brought the industry to its precarious condition. The Act was considered the ultimate in administrative legislation, for it conferred upon the Civil Aeronautics Board greater power and wider discretion than ever be-

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1 For a comprehensive analysis of the factors which led to the passage of the Civil Aeronautics Act, see Rhyne, Civil Aeronautics Act, Annotated 1-70 (1939).
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The scope of this power was set forth in Section 2 of the Act, which granted the Board wide latitude to promote and develop a sound transportation system in the national interest.

The Supreme Court has found no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce was a mere outgrowth or overgrowth of surface-bound transport. "Legally, as well as literally, air commerce, whether at home or abroad, has soared into a different realm than any that had gone before." In emphasizing the discretionary authority granted to the CAB, the Court in fact warned of the impropriety of assuming that Congress had intended that judicial precedents and rules of interpretation applicable to the other forms of transportation were to be applied to the regulation of air transportation by the CAB.

Title IV of the Act sets forth the economic powers delegated to the CAB. The heart of that chapter is Section 401, which states that no carrier shall engage in air transportation unless granted a certificate of convenience and necessity authorizing such transportation. Other provisions of Section 401 direct the Board to issue such certificates, upon application and after notice and hearing; if it finds that the air transportation covered by an application is required by the public convenience and necessity and that the applicant is fit, willing and able to perform such transportation properly and to conform to all the provisions of the Act and to the rules and regulations of the Board.

Title IV embodies a specific and detailed system of regulation over the economic activities of the air carriers. The Board is given authority over: the rates to be charged for carriage of persons and property, the consolidation, merger, and acquisition of control of air carriers, the interlocking arrangements between carriers, rates for mail carriage, and some agreements between carriers. In addition, air carriers are required to furnish air transportation authorized in their certificates and to provide safe and adequate service. Where so authorized, the carriers must provide

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Mr. Jones, a former member of the CAB, considers the delegation of power to the Board to be so broad as to surpass Constitutional limits, *id.* at 149.


In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States . . . .

(e) The regulation of air commerce as to best promote its development and safety.

(f) The encouragement and development of civil aeronautics.


necessary and adequate facilities for the transportation of mail whenever required by the Postmaster General.  

The Act thus combines a broad grant of power to the Board to promote and regulate the air transportation system in the national interest with specific and detailed provisions for the regulation of certified carriers. The complex and burdensome duties imposed upon the certified carriers are factors of great importance when the Board's power to exempt carriers from these requirements is considered.

B. Scope Of Section 416

1. Text of 416

While comprehensive regulation was required for the industry as a whole, Congress determined that such regulation might be too stringent and inflexible if applied to all carriers, whatever their size, without qualification or relief. Accordingly, the Board was given authority to classify and exempt, under certain circumstances and conditions, air carriers from the requirements of Title IV. This authority was set forth in Section 416, which provides:

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require . . . .
(b) (1) The Board, from time to time and to the extent necessary (except as provided in paragraph (2) of this subsection) may exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

Subsection (b) (2) precludes the Board generally from granting to scheduled carriers exemptions relating to the wages and hours of pilots. The Board may grant such an exemption to any air carrier not engaged in scheduled air transportation, or to any scheduled air carrier to the extent that the operations of such carriers are conducted during daylight hours, if upon notice and hearing, certain findings are made.

Disagreement and uncertainty have marked the question of the extent of discretionary power conferred upon the Board by Section 416. While the principal emphasis of this paper will be on the procedural problems encountered by the Board's exercise of its exemptive powers, the scope of this power in terms of who may be granted exemptions is of more than tangential importance. Indeed, only after it is established who may be granted exemptions, may it be determined how such exemptions are to be administered. While Board power as exercised under Section 416 is perhaps a more narrow function than the Board's route-making or rate-making operations, nonetheless the conflict over the scope of power delegated to the Board by Section 416 has raised pervasive and far-reaching problems of administrative law.

16 Hearings Before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. 3-4 (1938).
2. Conflicting Theories of Interpretation

One commentator, Senator Joseph O'Mahoney, in a paper prepared for presented to the Senate Small Business Subcommittee, stated that the exemption provision "in effect gave the Board plenary power to issue exemptions for any class of carriers" and "except for wage and hour restrictions, no other restrictions were introduced or ever imposed upon the exemption powers which the Congress apparently wished the Board to exercise freely and boldly in order to usher in the new air age." This view, argued most vigorously by the irregular air carriers, in effect maintains that the Act provided two alternative methods for authorizing air transportation—by certificate, issued after a hearing in conformity with the detailed requirements of the Act, or by exemption, issued without a hearing on such terms as the Board establishes.

Another critic reached the opposite conclusion: "Section 416 (b) is [only] a necessary escape valve to permit the postponement of the certificate requirement and other economic regulations in limited types of circumstances." The Section is merely a "dispensing" or "suspending" power and in no sense is 416 a delegation of powers to authorize affirmative certificate-type privileges. The provision was intended to relieve certain small, limited-operation air carriers from the obligations of the Act which might otherwise threaten their survival. No "plenary" power was ever intended or conferred.

A brief analysis of the decisions of the Court of Appeals reveals a gradual trend away from the position advocated by Senator O'Mahoney and the irregular carriers.

3. Judicial Analysis

The first important case dealing with Section 416 arose in 1956. The Board had permitted non-certified air carriers to transport mail by granting these carriers an exemption for that purpose. The certified air carriers challenged the Board's power to permit mail carriage by exemption, arguing that the only delegation of authority to the Board for selecting mail carriers was through the certification process. The court refused to rule on the contention, made by the noncertified carriers, that 416(b) extends the Board's exemptive power to any air carrier and to any provision of Title IV. Instead, a divided court held that since there is no statutory limitation in 416 with respect to mail exemptions, the Board is free to issue...
such exemptions. Despite the court's reticence, this decision would appear to substantiate Senator O'Mahoney's assertion that the only limit on the scope of the Board's exemptive powers is imposed by 416(b) (2) regarding wages and hours. For if the court will require specific statutory limitations on the Board's exemptive power before precluding the Board from exercising such power, the Board will have a free hand in granting exemptions.

The advantage to a carrier of obtaining a grant of authority via the exemption route is patent. Delay by the CAB is an accepted ingredient of every administrative determination. Because there is no requirement of notice and hearing prior to the granting of an exemption, acquiring operating authority under 416 allows a carrier to cut through the morass of Board procedures and obtain a quick agency decision. Competitors need not be heard and the elaborate requirements of Title IV need not be met.

However, the existence of these requirements in Title IV militates against the broad interpretation of 416 advanced by Senator O'Mahoney and apparently followed by the court in the mail certification case. The spectacle of a regulatory act, contradicting itself, with one area of transportation regulated by one set of requirements and procedures, and another area, overlapping the first, regulated only by the unpredictable discretion of the agency, tied to no standards or procedures, would not seem within the intent of Congress.

This view was explored but not conclusively endorsed by the court in another 1956 decision. The certified carriers, again, had attacked the power of the Board to grant exemptions to irregular air carriers where, they claimed, no undue burden on the irregular carrier had been shown. The court analyzed Section 416 as containing two elements:

In the first place, in broad language, it empowers the Board to exempt any class of carriers from "any provision" of the statute or "any rule, regulation, term, condition, or limitation prescribed thereunder." This is sweeping language. The second basic provision in the paragraph is that in order to exert this broad power of exemption, the Board must find that the enforcement of the statutory provision is or would be an "undue burden" on the class of carriers.

Focusing on the term "undue burden," the court held that the Board had failed to substantiate its findings that the certification process would work an undue burden on the irregular carriers. Had the Board made the required findings as to undue burden, the plan for creating a supplemental class of carriers would be within the statutory exemption power. The

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24 The dissenting opinion, registered by Chief Judge Edgerton, attacked the broad interpretation of 416(b). The opinion found the limits to the Board's exemptive power in 416 itself, in the requiring of specific findings from the Board before exemptions could be allowed.

25 Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L.J. 931 (1960). See also Senate Judiciary Committee Print, Report on Regulatory Agencies To President Elect (the Landis Report), 86th Cong., 2d Sess. (1960). The inordinate delay regarding the disposal of administrative proceedings was considered the principal failing of the administrative process.

26 See Ch. IV A infra p. 275.

27 American Airlines v. CAB, 231 F.2d 483 (D.C. Cir. 1956).


31 Id. at 851. The court recognized that the Board had been operating under the exemption statute for years and that the Board in all probability had not stated any more extensive facts to support its conclusions of undue burden in prior cases than it had in this case. But in the prior cases the affected carriers were truly irregular, while in the present case, the applicants closely
court conceded that the Board had wide authority to exempt, and the opinion did not curtail the power of exemption other than by requiring from the Board more elaborate factual support to justify the exercise of power. The case was remanded to the Board for further findings of fact to support its conclusion.26

One further case requires consideration before the scope of the exemption power can be adequately assessed. In 1957, the CAB had granted an exemption to Seaboard Air Lines allowing it to carry mail pending a full mail certification proceeding. The Board had found that Seaboard's financial distress was acute and that to require a full hearing before allowing the carrier to carry mail would impose an undue burden on the carrier and would not be in the public interest. The court reversed the Board's order.27

Section 416, stated the court, permits the Board to exempt an air carrier from the certificate requirements of Section 401 only if it first finds that enforcement of those requirements would have certain specified results because of the existence of certain specified conditions:

The Board must find that the "operations" of the carrier seeking the exemption are either (1) of "limited extent" or (2) affected by "unusual circumstances." Aside from finding that one of these conditions is present, the Board must also find that the condition causes enforcement of the certificate requirements to work "an undue burden" on the carrier.28

Furthermore, the court noted that the Board had misunderstood the "limited extent" requirement of the statute. The term does not refer to the limited extent of the exemption itself; instead, it refers to the pre-existing condition of the carrier's operations which qualifies the carrier for an exemption.

4. Board of Experience

This decision was a serious blow to future Board action under 416 and buried any lingering possibility that the Board could continue to regulate the irregular carriers under the exemption provision. In the Board's Annual Report for 1959, the agency admitted that the Seaboard decision would result in a substantial curtailment of the Board's exemptive power as it had resembled the certificated route carriers by virtue of being designated supplemental air carriers and by the provision allowing them a form of scheduled operation (individually ticketed operations by each carrier not to exceed ten trips per month in the same direction between any two points).

Consequently, the Board had to meet the standards of the statute and show facts to support its conclusion that the certification process and requirements would cause an "undue burden" on the applicant carriers.

It is submitted that the decision in the instant case left the Court of Appeals vulnerable to a Chenery type administrative reaction (SEC v. Chenery Corp., 332 U.S. 194 (1947)). In that landmark case in administrative law, the SEC first sought to disallow transactions in preferred stock by insiders during reorganization by basing its order on precedents of the Supreme Court. On review, the highest Court found reliance on these precedents to be in error and reversed (318 U.S. 80 (1943)). The SEC thereupon issued the same order and based its ruling on its general experience in reorganization matters and on its informed view of the statutory requirements. The Supreme Court, over a vigorous dissent, then affirmed the second SEC order.

In the American Airlines case, the Board was virtually invited to re-examine the problem, recast its rationale, and reach the same result. In fact, the court noted that if the Board had rested a finding of "undue burden" upon the fact that the interim for which the operating authority is short whereas the remainder of a certification proceeding is long, the court probably would have affirmed the grant of exemption.29 Pan American Airlines v. CAB, 261 F.2d 754 (D.C. Cir. 1958), cert. denied, 359 U.S. 912 (1959).

26 See note 8 supra and accompanying text.

theretofore been exercised. The size of the carrier seeking the exemption, rather than the nature or type of exemption desired, was to be the prevailing standard. While it may be argued that the Board retains wide powers of exemption insofar as "limited" type carriers are concerned (any provision of Title IV may still be waived by the Board), in fact a much needed flexibility in the administration of the nation's air services has been severely curtailed. The important carriers, and the important problems, probably can no longer be controlled under 416 when speed or informality are essential. The Board accurately stated, in reaction to the Seaboard decision, that there are numerous instances in which particular operations for which exemptions are sought may be of limited nature, scope, or duration, because limited in time, or to a particular commodity, or to particular route segments, and clearly in the public interest, although the totality of the existing operations of the carrier applicant may not be of "limited extent."

An example of the need for such an exemption arose in the Pan American-National Agreements case. During the Christmas rush, National Airlines sought to lease, on a short-term basis, additional planes from Pan American to handle the increased New York to Miami traffic. Under Section 408(2) of the Act—which governed carrier leases of aircraft—if the Board had followed its normal procedures (prehearing and hearing, briefs to the examiner, initial decision, briefs and argument to the Board, and final order) delay of more than one year was certain. The Board found that the seasonal rush was an "unusual circumstance" which justified approval of the leases under 416(b), since the delay concomitant with normal procedures would negate any advantage to be gained through the leasing of aircraft.

Relief under 416 would probably now be barred by the recent Court of Appeals' ruling. Neither National nor Pan American are carriers of "limited extent." It was the exemption, rather than the carriers, which was of limited extent and for unusual circumstances. Yet use of the exemptive power is justified here, particularly in light of the Board's finding that the transactions had very little relation to the basic purposes—prohibitions against poolings and unauthorized mergers—of Section 408.

5. Multiple Failures to Amend to Meet Experience

Judge Friendly has suggested that the success of the administrative process is dependent upon the development of more definite standards to govern agency decisions. He found that the failure to develop these standards must be shared by the Congress, the agencies, and by the executive branch. Initial Congressional failure to establish meaningful standards, coupled with agency inability to sharpen the vague contours of the original statute, have been the principal problems. Also noted were further legis-

39 52 Stat. 1001 (1938), 49 U.S.C. § 1378 (1958): "It shall be unlawful, unless approved by order of the authority as provided in this section—(2) For any air carrier . . . to purchase, lease, or contract to operate the properties . . . of any air carrier."
41 Ibid.
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lative failures to supply more definite standards as growing experience had demanded and failure by the executive to spur legislative activity.43

The Board’s experience in administering Section 416 has necessitated a broader interpretation of that provision than can be gleaned from the exact language of the statute.44 Despite the opposition to the Board’s use of the exemption power, the agency did not seek clarification of the standards under which it was operating until the restrictive holding by the court in 1958.45 Two years later, the CAB drafted and submitted to Congress new legislation Senate bill 2127, amending present 416(b) to read:

The Board may issue exemptions to any carrier or class of carriers if it finds that enforcement of this title or such provision, rule, regulation, term, condition, or limitation would be impracticable by reason of the limited extent or duration of, or unusual circumstances affecting, either the existing operations [of the carrier] or the operations, if any, for which the exemption is sought.46

Two principal revisions were contained in the proposed legislation. The requirement of “undue burden” on the carrier before it qualified for an exemption, the issue on which the Board and the court had divided in the second American Airlines case,47 was relaxed, and the standard of “impracticality” was substituted. The Board believed that administrative decisions made under the proposed standard would be less susceptible to judicial reversal because of the wider scope of the term “impracticality.”48

The second, and major, revision sought to clarify the question of what types of carriers were eligible to receive exemptions.49 The exemption power would heretofore be available where either the existing operations of the carrier were of limited extent, or where the nature of the exemption sought was of limited extent or duration.50 The stifling requirement imposed by the court in the Seaboard case,51 which precluded exemptive relief to all carriers not of “limited extent,” was overcome by the proposed legislation. The legislative history of the Civil Aeronautics Act, the affirmative grant of power under Section 2, and twenty years of experience in ministering to the problems of the growing air transportation system; these factors dictated Congressional approval of the Board’s proposed amendment. The Board had found that the limits imposed upon its exemptive power conflicted with its paramount duty to further all types of air transportation in the national interest. Yet no Congressional action was taken on Senate bill 2127. The bill was introduced by Senator Magnuson, read twice then referred to the Committee on Commerce where it died.

The multiple failures denounced by Judge Friendly are evident.52 While the initial standard proved self-defeating and unworkable, more than

43 Id. at 868, 869.
44 See note 17 supra and accompanying text.
46 Supra note 37.
47 See note 28 supra and accompanying text.
48 Supra note 37.
49 See note 33 supra and accompanying text.
50 Situation such as existed in the Pan American-National Agreements case (supra note 38 and accompanying text).
51 Seaboard Airlines had received the exemption and Pan American was the complaining carrier (see note 33 supra and accompanying text).
52 See note 42 supra and accompanying text.
twenty years elapsed before any change was sought by the agency. During that period, exemptions of every conceivable type were authorized to every branch of the industry. In effect, the provision had been re-written to meet the demands of a complex system. Yet, despite the experience of twenty years, no Congressional action was taken. The Board had shown that a broader exemption provision was desirable, but the experience yardstick apparently failed to impress the legislative committee. Congressional failure to relate the exemption provision to the affirmative grant of power under Section 2; agency failure to seek a change in the standards; and Congressional inaction in supplying a more workable standard demanded by experience, make the history of Section 416 strong evidence to support Judge Friendly's explanation of the problems faced by the administrative process.

C. The Unique Character Of Section 416

Before an accurate appraisal of the scope of the Board's exemptive power can be made, the feature which distinguishes Section 416 from exemption provisions in other regulatory statutes requires consideration. It will then be perceived that the controversy over the type of carriers which may be granted exemptions is only a relative one. Even the minimal interpretation of the exemptive power as proffered by the Seaboard case leaves the CAB with far greater discretion than that held by any other agency under its exemption provision.

Essential to an appreciation of the problems of exemption under the Civil Aeronautics Act is an understanding of the fact that the exemptive provision is not self-executing. The authority conferred on the Civil Aeronautics Board to establish such just and reasonable classifications of carriers as the nature of the service performed requires, is permissive and does not compel the Board to establish classifications or to exempt any carrier from the requirements of Title IV. This assertion is self evident from the structure of the Civil Aeronautics Act. Sole power to classify and exempt carriers from the statutory requirements is vested in the Board. No independent right to an exempt status is granted in the Act. The contention that Section 416 constrains the Board to establish classifications and to exempt carriers once certain findings are made ignores the permissive nature of the authority conferred on the Board. The simple answer is that the Board may choose to exempt no one under Section 416.

1. Compared to the Securities Act

This discretionary feature of the exemptive powers under the Act contrasts Section 416 to provisions granting exemptions in other regulatory

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85 Ibid. While the analogy is not perfect, it is submitted that the Board's power to exempt carriers from the requirements of the Civil Aeronautics Act can be compared to the Attorney General's power to suspend the rigors of the deportation provisions. Judge Learned Hand described the Attorney General's power in U.S. ex rel. Kaloudis v. Shaughnessy (180 F.2d 489, 491 (2d Cir. 1950)):

The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which the courts have no review, unless . . . it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant.
acts. The essential characteristic of the exemptive provisions of the Securities Act\textsuperscript{56} is the absence of any dependence upon a finding or approval by the Commission before an exemption can be obtained. Exemption depends upon factual compliance with the conditions of the particular provision under which the exemption is sought; and even in cases where these conditions include the filing of papers with the Commission, as in the case of certain of the exemption regulations adopted by the Commission under Section 3 (b) of the Act,\textsuperscript{57} there is no provision for the taking of any agency action by the Commission to establish the exemption.\textsuperscript{58}

Section 3 (b) expressly provides for several classes of exempt securities by reason of the character of the issuer, the manner of distribution, or by reason of the character of the security regardless of the character of the issuer. Discretionary authority to add any class of securities to the securities already exempted by the statute is limited to public offerings of less than 300,000 dollars.\textsuperscript{59} The Act also specifically exempts certain transactions\textsuperscript{60} from the registration requirements\textsuperscript{61} providing the statutory prerequisites are met. If a provision comparable to Section 416 of the Civil Aeronautics Act were inserted in the Securities Act, the SEC would have the sole power to exempt any transaction, any distribution, and any security (no statutory list delimiting exempt of the Act once the Commission determined that those requirements would place an undue burden on the parties involved and that enforcement of the Act was not in the public interest.

Thus while dissent exists as to the scope of the power granted to the CAB under Section 416, there can be no disagreement that the Board's exemptive powers are infinitely broader and more comprehensive than the exemptive powers conferred on the SEC.

2. Compared to the Motor Carrier Act

The Board's powers of exemption are similarly more extensive than the authority delegated to the Interstate Commerce Commission under the Motor Carrier Act.\textsuperscript{62} Unlike the exemption provisions of the Civil Aeronautics Act (and similar to the sections of the Securities Act) the Motor Carrier Act contains a rigid statutory framework delimiting the classes and types of carriers to be exempted from the requirements of the statute. The Motor Carrier exemption provision is also self executing, i.e., a carrier need only meet the requirements of the statute to be entitled to an exemption. The statute specifically exempts certain types and classes of vehicles from the operation of the Act. Statutory exemptions, for example, are extended to all motor vehicles employed solely to transport children and teachers to school,\textsuperscript{63} to all motor vehicles used to carry ordinary livestock,\textsuperscript{64} and to any casual or occasional transportation of property or passengers in

\textsuperscript{58}Throop and Lane, Some Problems of Exemption Under the Securities Act of 1933, 4 Law & Contemp. Prob. 89, 91 (1937).
\textsuperscript{63}49 Stat. 545, 49 U.S.C. § 303(b) (1).
\textsuperscript{64}49 Stat. 545, 49 U.S.C. § 303(b) (6).
interstate commerce for compensation by a person not engaged in the business of motor transportation.\(^6\)

The Civil Aeronautics Act, on the other hand, provides for broad economic regulation of air transportation without specific statutory exemptions and vests in the Board itself the authority in appropriate circumstances to exempt carriers which would otherwise be subject to economic regulations.\(^6\) The authority to exempt extends to "any provision" of the Act and to "any rule, regulation, term, condition or limitation prescribed thereunder." Compared to the exemption powers delegated by Congress to the ICC\(^7\) and the SEC, or to the OPA,\(^8\) the CAB has extensive power conferred upon it by the "sweeping language"\(^9\) of Section 416.

D. Conclusion: The Scope And Power Of The CAB Under Section 416

In conclusion, therefore, what meaningful estimate can be made with regard to the scope of the exemption power delegated to the Board? Not only is it broader and more comprehensive than the authority conferred on the SEC or the ICC, its very philosophy differs markedly from the exemption power granted to any other administrative agency. These agencies have no important independent power to exempt parties which come under the agency's jurisdiction from the statutory provisions affecting those parties. The determination to exempt was initially made by Congress, and the grounds upon which the exemption is to be based are specifically articulated by statute. In most cases, no discretion exists to exempt a

\(^{6}\) Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430 (9th Cir. 1962). Under present regulations, exemptions are applicable to large irregular air carriers (14 C.F.R. 291); Alaska air carriers (14 C.F.R. 292); military operations air carriers (14 C.F.R. 294); indirect air carriers (14 C.F.R. 296); international air freight forwarders (14 C.F.R. 297); and air taxi operators (14 C.F.R. 298).

\(^{7}\) Comprehensive statutory exemption is also afforded to certain water carriers by Part III of the Interstate Commerce Act (54 Stat. 929 (1940), 49 U.S.C. §§ 901-921 (1950)). There again, no discretionary authority was conferred on the ICC. If the carrier meets the prerequisites of the statute, it is entitled to an exemption from certain provisions of the Act. The same is true concerning the exemptions accorded to freight forwarders by Part IV of the Act (56 Stat. 284 (1942), 49 U.S.C. §§ 1001-1021 (1942)). Certain forwarders are exempted from the Act and the exemptions are self-executing without any agency approval or certification.

\(^{9}\) See note 28 supra and accompanying text.
party not included in the statutory grant, and no discretion exists not to exempt a carrier or party which does meet the statutory definition.

The conflict described earlier regarding the limits to be imposed on the Board's power has thus been placed in its proper perspective. The minimal interpretation of the CAB's exemption authority advanced by the commentators who support the scheduled airlines' position still goes far beyond the discretionary authority granted by Congress to other agencies. "Escape-valve" exemption power which extends to any rule, regulation or statutory provision which might create an undue burden on a carrier remains far broader than the exemption authority held by other agencies. The unique character of Section 416 has created unique procedural problems in the administration of the exemption authority. The exploration and analysis of these problems composes the bulk of this paper.

III. Administering Section 416: Board Procedures and the Hearing Requirement

The antecedent discussion relating to the scope and unique nature of Section 416 has direct relevance to the subsequent chapters of this paper which examine in detail the procedures utilized by the CAB in administering the exemption provision. This section devotes itself exclusively to the clash between the unlimited exercise of Board discretion, and the various checks on agency power imposed by the adjudicatory hearing. This conflict is viewed as the source of great unrest in the administrative process, and the question of the scope of agency authority originally delegated by Congress plays an important role in the analysis.

Stated simply, does the singular character of the exemption provision, whereby broad powers are granted to the CAB to exempt any carrier under its jurisdiction from any provision of the air transportation scheme, have an impact on the procedures which the Board will be required to follow in administering its power? The procedure with which this paper is particularly concerned is the absence or presence of a hearing prior to agency action under Section 416.

A. Lack Of Statutory Guidance On A Hearing Requirement

1. No Reference to Notice and Hearing

The right to an evidentiary hearing is regarded as the most effective check on the arbitrary exercise of administrative discretion. As one court has expressed it, "in our jurisprudence an opportunity to present arguments orally . . . is one of the rudiments of fair play required when property has been taken or destroyed." Unfortunately, on such a critical issue of whether and when an evidentiary hearing is required prior to the exercise of Board power under Section 416, the statutes are silent. Section 416(b)(1) contains no reference to notice or hearing, even though other provisions of the Act, including 416(b)(2), specifically preclude Board action without notice and hearing being afforded the affected parties.

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70 See note 19 supra and accompanying text.
73 See note 17 supra and accompanying text.
2. No Reference to Licensee Status

A second pertinent omission in Section 416 is the definition of the status of the exemption applicant or holder in terms of license protection. Much of the ensuing discussion would be moot if Section 416 gave an exemption holder the status of a licensee, since the Administrative Procedure Act would then interpose its protective features\(^{78}\) regulating the conduct of

\(^{78}\text{60 Stat. 238 (1946), 5 U.S.C. § 1001(d), (e) (1958):}

\(\text{(e)}\) "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.

See also 92 Cong. Rec. 1649 (1946) (remarks of Representative Walker) reprinted in S. Doc. No. 356. The Chairman of the House subcommittee that reported the bill stated during debate that this definition was intended "to embrace every form of operation where a private party is required to take the initiative in securing the official permission of the agency."

Administrative exceptions have been labeled as actually piecemeal solutions to former planning errors. See Thompson, \(\text{op. cit. supra}\) note 68, at 341. In back of the administrative exception device was an abhorrence of a rule governing a very small group, especially a named group, in the regulations. Thompson reports that many rationing attorneys thought classifications into small groups smacked of arbitrariness, although such classifications were acceptable if described as administrative exceptions. See Thompson, \(\text{op. cit. supra}\) note 68 at 342. Also, unpublished administrative exceptions were found to be a useful device for granting the petitioner's request without other persons finding out about it and claiming the same treatment.

Superficially, the exception powers of the administrator would seem to resemble closely the exemption authority delegated to the CAB. Both provisions employ the terms "may provide" or "may exempt" and thereby appeal to grant broad administrative powers to exempt when in the public interest. Furthermore, the OPA section contains no statutory list of those persons entitled to an exception; as in the Civil Aeronautics Act, exceptions are to be determined by the administrative agency and were not prescribed initially by Congress.

A very different standard of judicial review existed, however, from OPA orders denying petitions for exceptions. Unlike such orders of the CAB, which were virtually unreviewable (see Ch. III C infra), the history of the Emergency Court of Appeals is studded with cases in which the petitioning individual or corporation sought judicial reversal of an OPA order denying an application for an exception.

The applicable standard of judicial review over OPA decisions to grant or deny exceptions was established in Hillcrest Terrace Corp. v. Brown (137 F.2d 663 (Emer. Ct. App. 1943)). The complaining landlord sought an exception from the prevailing maximum rent limits on the grounds that his existing rent scale represented the passing on to his tenants of a one year tax exemption granted to newly constructed buildings.

The administrator had denied his application on the belief that the situation could not, in principle, be distinguished from that of any other landlord who, in a free competitive market existing on the maximum rent date, had accepted a rent which later turned out to be unprofitable on account of subsequent cost increases.

On appeal, the court disagreed with the administrator and vacated the order denying an adjustment. The court found that the peculiar facts affecting the petitioner made his situation fall within the general pattern for individual adjustments already provided for in the regulations, even though not fitting exactly in any specific category. The administrator acted arbitrarily in refusing to expand the adjustment provisions to cover the situation. Provisions for adjustment can be made for persons in the complainant's position consistent with the general regulatory scheme.

The court determined that the rents which the complainant was charging on the maximum rental day were not the product of general market conditions of supply and demand on that date. The particular complainant had a tax exemption not available to landlords generally, and his motives in passing on the advantage to his tenants were irrelevant.

While the court recognized that it had no power to order that an adjustment be made, the court stated without doubt the administrator, upon request, would be able to devise an amendment to the adjustment provision to cover the situation presented without laying himself open to an undue administrative burden.

The administrator was able to work out an exception and the Hillcrest doctrine of substituted judicial judgment on adjustment and exception cases became the standard method of judicial review. See Problems in Price Control: Legal Phases Part I, The Emergency Court of Appeals, U.S. Office of Temporary Controls, Historical Report No. 11 (1947).

In Adams, Rowe & Norman, Inc. v. Boules (144 F.2d 337 (Emer. Ct. App. 1944)), the court applied the Hillcrest doctrine to hold a rent regulation invalid insofar as it failed to accord special treatment to houses owned by the complainants, coal mine operators, and rented by them.
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a government agency towards a license-holder. Under the Administrative Procedure Act, notice and hearing necessarily precede any diminution or termination of a license by the controlling agency. The Administrative Procedure Act does require an evidentiary hearing "in every case of adjudication required by statute," but the initial problem as already expressed is that Section 416 makes no reference to adjudication or rule-making procedures.

While inferences can be drawn from the statutory omissions, no concrete guidance can be acquired from Section 416 when a demand for a hearing is made by an interested party. When faced with this problem, the courts will necessarily turn to an analysis of the functions being performed by the Board when it administers the exemption power. The misleading nature of this type of investigation will become evident in the following section.

B. The Unsatisfactory Nature Of The Separation-Of-Powers Labels

Under our system, writes Jaffe, the exercise of government power will not be tolerated unless subject to procedural safeguards. No one quarrels with this sentiment, but each commentator would draw the line balancing procedural due process and administrative efficiency at a different point. The balancing process, whatever its merits in other controversies, plays an important role here because there is general agreement that not every decision by an administrative agency need be accompanied by equal procedural safeguards. Which decisions, and which safeguards, remain the decisive questions.

In the present discussion, on one side of the balance are arrayed the broad delegation of power to the CAB to exempt carriers from the restrictive provisions of the Act when in the public interest; the absence of any standards in the Federal Aviation Act delimiting the procedures to be followed in exemption proceedings; the apparent intent of Congress not to tie the hands of the Board through required procedures; a staggering number of applicants for, or holders of exemption authority; and the to their employees. The basis of the decision was that the rentals were tied to a collective bargaining agreement and were increased after the maximum rent date in accordance with the labor agreement. The court stated:

We are confident that Congress intended not only that the regulations should be generally fair and equitable, but that it should be the duty of the administrator under Section 2 (c) to avoid or eliminate manifest inequities in exceptional classes of cases so far as this might reasonably be done consistent with the main objective of the act and with the effective administration of the stabilization program (emphasis added).

(d) "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.


7 For conflicting interpretations of the meaning of the statutory omissions, see Standard Airlines v. CAB, 177 F.2d 18 (D.C. Cir. 1949); Ch. IV infra p. 275. Contra, Eastern Airlines v. CAB, 185 F.2d 426 (D.C. Cir 1950); Ch. IV A infra p. 275.


79 Compare Hector, Problems of the C.A.B. and the Independent Regulatory Agencies, 69 Yale L.J. 931 (1960), who seeks to withdraw all adjudicatory powers from the administrative agencies, with Elias, Administrative Discretion—No Solution in Sight, 45 Marq. L. Rev. 315 (1961), who considers the problem one of standards and supports the multi-sided nature of the administrative agency.

For a complete analysis of the need for the development of more definite standards to govern agency adjudication, see Friendly, Need for Better Standards in the Administrative Agency, 75 Harv. L. Rev. 863 (1961).
Board's need to maintain strict control over carriers which are otherwise free of the restrictive limits of the Federal Aviation Act.

Against this rather impressive list of public interest considerations and administrative necessities lies the specter of government deprivation of property without due process of law. Specifically, the countervailing danger is the loss of procedural safeguards in a proceeding where private property is so clearly subject to agency control. What might be considered the fulcrum of this shifting balance is the fact that only two forms of proceedings are open to an agency once a determination is made to change the status quo.

1. General Commentary: Rule Making versus Adjudication

Conventionally, rule-making is regarded as the function of laying down general regulations of future applicability. Labeled a legislative function, rule-making or policy-making is formulated normally on the basis of extensive and informal interchanges between the regulatory agency and interested parties with the work delegated from the agency heads to the staff. Formal hearings, so the conventional analysis runs, are not appropriate to rule-making proceedings. Adjudication, on the other hand, involves the formulation of judgments or orders that apply to named persons on the basis of present or past facts. It depends on formalized procedures, the creation of a record with adequate opportunity for presentation and cross examination of testimony, and final judgment on the record alone by the persons responsible for decision.

This paper demonstrates the thesis, advanced by several commentators, that the distinction between rule-making and adjudication is illusory and not helpful in solving the fundamental dilemma facing the agency—either the effective processing of an enormous case load or formal evidentiary hearings for the participants. Under present procedures, the value of rule-making to an agency is patent: (1) economy of time and effort through the governing and determination of many situations at once, (2) firm guidance to affected parties by means of regulations and (3) confidence on the part of agency personnel in handling future situations governed by regulations. An alternative method of announcing general principles, through adjudicatory decision, is generally considered not to carry as much force nor to be as widely publicized as announced regulations.

The dangers of the rule-making process to the holder of an exemption are equally clear. Unlike his brother, the certified carrier, the provisions...
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of the Federal Aviation Act do not guarantee him a hearing if his status or operating authority is modified, suspended or revoked. Furthermore, the protective features of the Administrative Procedure Act available to license holders have not been uniformly accorded to holders of exemption authority. While not every holder of an exemption should be granted licensee protection, there seems to be no justifiable reason to compel the Board to adjudicate a regular carrier out of business but to permit the Board to rule an irregular air carrier into extinction, particularly where the investment by an exempt carrier may be just as great.

The cases explored at length herein, particularly American Air Transport and Great Lakes, will illustrate that the categories of rule-making and adjudication, which can be applied in a limited way to distinguish the end products of administrative regulation, namely rules and orders, often are meaningless if applied to the operating process by which rules and orders are produced. Bernstein summarizes the factors which account for the intermixture of broad policy-formulation and individual decision-making:

The first is the manifest difficulty in many instances of formulating a guiding policy in advance of the consideration of individual cases because the issues involved are highly complex or controversial, or are matters which remain substantially unresolved by existing legislation. The second factor is that many policies cannot be determined or ought not to be decided except in connection with the processing of specific cases of adjudication.

2. Davis: Adjudicatory versus Legislative Facts

Professor Davis recognizes that the most important reason why whole proceedings cannot properly be labeled "judicial" or "legislative" is that in a single proceeding a tribunal commonly acts both judicially and legislatively. He points out that even in a judicial proceeding before a court, the process of creating law or policy which will be applicable in future cases of the same sort is rather clearly legislative, and a trial type of hearing ordinarily is not required for this part of the proceeding.

The test proposed by Davis to aid the tribunal in determining whether a particular issue is legislative or judicial, and thus whether a trial type of hearing would be required, is his celebrated "legislative" and "adjudicative" fact dichotomy. Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts unless the holder fails to comply with an order of the Board commanding obedience to the provisions or order found to have been violated (52 Stat. 988 (1938), 49 U.S.C. § 1371(g) (1958)).

Contra, Great Lakes Airlines v. CAB, 294 F.2d 217 (D.C. Cir. 1961); Ch. IV D infra p. 287.

Temporary exemptions of a specified duration need not confer licensee status upon the holder. It is fundamentally a question of justifiable reliance upon an agency decision. Where considerable investment is encouraged by agency exemption policy, as in the irregular air carrier cases, greater protection to a carrier than the mere opportunity to present written objections to the termination of its authority should be afforded. On the other hand, where an exemption for a thirty day period, or for a particular operation at a particular time, is granted, the holder thereof should not be heard to complain if the Board refused to renew the exemption without granting the carrier a hearing on the question. The Board would have the power to deal with that class or type of exemption holders under rule-making procedures.

Bernstein, supra note 80, at 333. Davis, 1 Administrative Law Treatise § 7.03 (1958 ed.).
that ordinarily ought not to be determined without giving the parties a chance to know and meet any evidence that may be unfavorable to them, that is, without providing an opportunity for trial.

Legislative facts, on the other hand, usually do not concern the immediate parties but are general facts which help the tribunal decide questions of law, policy and discretion. The true principle is that a party who has a sufficient interest or right at stake in a determination of government action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts. This test, while certainly not a conclusive guide for agency action or for criticism of administrative decisions, not only provides a useful framework for analysis, but also often substantiates what otherwise must be termed a "gut" reaction to an agency determination. Generally, what appears to be an unfair administrative decision if rendered without a hearing fails to survive discussion when judged by Davis' proposed distinctions. This will become evident when the Board's exemption cases are discussed.

The distinctive feature of the exemption provision is that it raises the issue of "sufficient interest," which a party must have to gain a hearing on questions of adjudicative facts. The problems of right and privilege will be pondered below, but it is important to note here that the confusion over the question of whether an exemption is a right or a privilege has several facets: first, the issue arises when an exemption is applied for; and second, the issue is posed when the Board seeks to modify or terminate an exemption. The CAB has argued that an exemption remains a privilege both before and after it is granted, and therefore, as will be discussed in the following section, the carrier applicant or holder has not a sufficient interest to demand an adjudicatory hearing at any time. It is submitted that the Board is only half right, in that a party may very well acquire a sufficient interest in its exempt status by its use of the opportunities afforded by an exemption and therefore be entitled to a hearing when the exemption is sought to be terminated or severely modified. On the other hand, an exemption in its latent form, not yet granted to an applicant, closely resembles a privilege, and an evidentiary hearing need not be held on a petition for an exemption. These views will be substantiated by the subsequent analysis of the exemption cases decided by the Board and the courts.

C. Defining The Exemption Status: Right Versus Privilege

The most important principle about requirement of opportunity to be heard is that a party who has a sufficient interest or right at stake in a determination of government action is ordinarily entitled to an opportunity for a trial type hearing on issues of adjudicative facts. The determination of a sufficient interest traditionally has been based on whether the party enjoys a privilege or a right to a particular decision by an agency. It will be recalled that the CAB's exemption powers differed markedly

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94 The term "sufficient interest" will be discussed under C infra.
95 Davis, op. cit. supra note 92, § 7.02.
96 See particularly the Great Lakes decision (294 F.2d 217 (D.C. Cir. 1961)); Ch. IV D infra p. 287.
97 Most recently in the Great Lakes case, supra note 96.
98 Davis, op. cit. supra note 92, § 7.11.
from the provisions governing exemptions in the Securities Act and the Motor Carrier Act. The critical difference was that Section 416 was not self-executing; no independent statutory standard established the exemption, leaving no discretionary authority in the agency. Unlike the other exemption provisions, an applicant for an exemption from the CAB could not successfully seek judicial review of the Board's refusal to grant an exemption on the grounds that it had fulfilled the statutory criteria for an exemption and therefore was entitled to the authority. The Board, not the statute, created exemptions.

This fact is of fundamental importance when the question of privilege or right is considered. Limiting the discussion to the granting of an exemption, it becomes apparent that no carrier applicant has a right to an exemption. The sole authority for the granting of an exemption lies in the discretionary power of the CAB. The reasoning of the Supreme Court in an alien-exclusion case is somewhat analogous: the Court upheld the exclusion of an alien without the granting of a hearing on the grounds that it was dealing with a matter of privilege, and since the petitioner had no vested right of entry into the country, no hearing was required prior to the Attorney General's determination to exclude. Pushing the analogy a bit further, it should be noted that once the privilege has been granted (the alien is admitted), a due process hearing then becomes a requirement before the "privilege" can be revoked. It is submitted that once an exemption is permitted, other factors enter the picture when the government acts to alter or to terminate the grant.

The absence of any requirement for a hearing prior to granting or denying an exemption also follows from the nature of the decision taken by the Board. An exemption can be granted only when it is in the public interest to waive the requirements of the regulatory provisions of the Civil Aeronautics Act. This is not a particular fact relevant to the qualifications of the applicant. It is rather an administrative determination of policy based on the Board's assessment of the needs of the national transportation system at the time when the application is sought. No trial record could serve as grounds for such a decision. The applicant's qualifications can be adequately stated in its petition for the exemption, and the ultimate decision whether the national system requires that the exemption be granted is clearly one that the Board is best equipped to make.

The critical issue is whether the above reasoning also applies where the privilege of an exemption is modified or terminated by the CAB. In a recent case, one court concluded that since the carrier held its exemption only at the "sufferance of the Board," no adjudicatory hearing need precede the termination of a carrier's exemption authority despite the business investment incurred by the carrier during more than fifteen years of

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99 See Ch. II C supra p. 265.
100 Air Transport Associates v. CAB, 199 F.2d 181, 185 (D.C. Cir. 1952), cert. denied, 344 U.S. 922 (1953).
102 Id. at 544.
104 In another context, see In re Carter (177 F.2d 75 (D.C. Cir. 1949), in which the court held that a license (to do business as a bail bondsman) once granted was a "right" which could not be revoked without a hearing required by due process.
The court reached this conclusion despite an earlier decision conferring licensee status upon holders of exemptions and in the face of clear adjudicative determinations by the agency with the carrier having no opportunity to meet and to rebut damaging evidence. Has not the court carried the doctrine of privilege too far by sustaining the CAB's decision to terminate and not requiring an evidentiary hearing on the issues in dispute? It is submitted that the court committed error, but such a conclusion requires the critic to explain how a privilege becomes a right, since it is agreed that no right exists when an exemption is first sought. This problem is faced in the concluding portion of the paper.

D. Conclusion: Hearing Requirement Under 416

Clearly, "the public interest, with which administrative agencies are charged, includes an interest in procedures fair to those whom they affect." The fundamental problem with which this report is concerned is the problem of reconciling, in the field of administrative action, democratic safeguards and standards of fair play with the effective conduct of government. The CAB, in its combined promotional and regulatory functions pursuant to Section 416, is faced with enormous problems due simply to the sheer number of carriers which seek or hold authority under that section. The inadequacy of the strict dichotomy between the rule-making and adjudicatory functions will become evident as the Board's problems are outlined. The lack of statutory guidance in the Civil Aeronautics Act as to the status of an exemption holder, whether he be a "licensee" entitled to the protective features of the Administrative Procedure Act or a bare "permittee" wholly at the control of the Board, is still another question facing the agency and the courts.

Since Section 416 contains no reference to the procedures relevant to Board action under the provision, the interrelationship between the Constitution, the Administrative Procedure Act, and the Civil Aeronautics Act must be explored in an effort to "fill in the gaps" left by Section 416. Where to cast the balance between strict procedural safeguards and effective agency regulation of an industry whose economic health has become a responsibility of government is perhaps the principal problem in administrative law today. This study is organized by proceeding from the relatively facile to the difficult problems, particularly in order to show that easy answers offer no solution to complex issues. Discussed first is Board power to grant and to terminate individual exemptions and court reaction to the procedures employed during exercises of such power. Since the Board will attempt to follow the same procedure when it terminates an exemption as it followed in granting the exemption, intervening Constitutional considerations play a major role in the discussion. This is particularly true since the Civil Aeronautics Act alone will not support a finding that certain procedures must be observed by the Board prior to action under Section 416.

The major portion of this paper concerns a problem which has received little attention in periodicals or commentaries. Because of the broad dis-
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creational power conferred on the Board by Section 416, the conflict between the untrammeled exercise of administrative authority and the imposition of required procedural practices is sharply defined. Pursuant to its exemptive powers, the CAB has been able to employ the rule-making provisions of the Administrative Procedure Act to make adjudicatory decisions which terminate or amend the authority held by a carrier under Section 416. In so doing, the Board has denied to exemption holders rights guaranteed to them under the Administrative Procedure Act. The ultimate refutation of this practice is the goal of this analysis.

IV. Board Practice Under 416

A. Granting An Exemption

1. Eastern Airlines v. CAB

The procedural corollary of the absence of any duty requiring the Board to grant an exemption is the non-applicability of the Administrative Procedure Act provisions requiring an adjudicatory proceeding. In Eastern Airlines v. CAB, Capitol Airlines had been granted an exemption allowing it to engage in transactions otherwise prohibited by the Act. The savings to Capitol were estimated at 11,000 dollars per month. Eastern Airlines, a competitor which opposed the exemption, sought judicial review of the exemption order on the grounds that the Board had refused to hold a hearing prior to issuing the exemption. The Administrative Procedure Act imposes the requirement of notice and full hearing "in every case of adjudication required by statute." Although Section 416(b)(1) does not mention a hearing, Eastern contended that by authorizing the Board to grant exemptions if the Board "find" certain things, Section 416 impliedly requires adjudication.

The court rejected the contention and stated that such a requirement would "frustrate" the action of Congress in granting an exemption power to the Board. There would be no point in permitting the Board to exempt a carrier from the delay and other burdens of a full hearing under Section 401(h) and at the same time require the Board, before granting an exemption, to hold a similar full hearing under Section 416:

The purpose of Congress in permitting the Board to grant exemptions was to avoid "undue burden" on carriers. Both that purpose and the fact that "notice and hearing" which are used in many acts of Congress and in some sections of the Civil Aeronautics Act are omitted from 416(b)(1) indicate that this paragraph does not require a full hearing.

The omission of a requirement of notice and hearing in 416(b)(1), while 401(h) and particularly (b)(2) require notice and hearing, points

109 185 F.2d 426 (D.C. Cir. 1950), vacated as moot, 341 U.S. 901 (1951). The exemption had, by its terms, expired prior to consideration by the Court of Appeals. That court had retained jurisdiction, erroneously, on the grounds that judicial decision of important questions that are likely to recur should not be defeated by short term orders, capable of repetition, yet evading review.

110 Eastern was deemed to have a substantial interest in the exemption order so as to permit judicial recourse under the Civil Aeronautics Act, 52 Stat. 1024 (1938), 49 U.S.C. § 1386(a) (1958).


113 Eastern Airlines v. CAB, 185 F.2d 426, 428 (D.C. Cir. 1950).

114 52 Stat. 1004 (1938), 49 U.S.C. § 1386(b)(2) (1958). This provision requires notice and hearing before the Board can exempt non-scheduled or daylight carriers from the requirements of the Civil Aeronautics Act relating to wages and hours of pilots and co-pilots.
out that "Congress could hardly have made clearer its intention to authorize the Board to grant, without hearing, exemptions from requirements of the Act which do not relate to pilots." 

2. American Airlines v. CAB

Eastern was followed by the court in American Airlines v. CAB. In that case, an intervening certified carrier sought an adjudicatory hearing before the Board granted an exemption to a non-certified carrier to allow it to carry the mails. With respect to the contention the court stated: "That the Board is required to hold an evidentiary hearing in proceedings under Section 416(b), we refer again to the Eastern Airlines case . . . wherein this court has disposed of this claim adversely to this contention." Since the facts of the American case closely paralleled the Eastern controversy, the decision in the later case did not expand upon the earlier holding denying an evidentiary hearing prior to the granting of an exemption. Board attempts to deny evidentiary hearings in proceedings under Section 416 other than the granting of an exemption form the basis for the remainder of this discussion.

3. License Cases Distinguished

These exemption cases must be carefully distinguished from ostensibly similar cases in which the court has required notice and hearing where applications for licenses have been determined. The leading decision in this field stated that denial of permission to practice before the United States Board of Tax Appeals can be effective only after fair investigation, with such notice, hearing, and opportunity to answer for the applicant as would constitute due process. In a more recent case, the Supreme Court held that, whether the practice of law be considered a right or a privilege, an application for admission to the bar is governed by procedural due process. A hearing may nonetheless be denied to an applicant or an interested party regarding the grant of an exemption. This is true because: (1) the Board and the courts have refused to consider an exemption a license for purposes of initial grant or denial, and (2) the decision by the CAB to grant or deny an exemption is predicated upon considerations which are general and legislative. It is settled that a tribunal may properly find such facts without providing an opportunity for a trial type hearing. While the cited cases deal with rule-making determinations by administrative agencies, the principle remains that if the facts upon which the agency grounds its decision do not depend upon the particular qualifications of the affected party, no evidentiary hearing is ordinarily required.

Discussing the second factor, it is immediately evident that the de-

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112 Eastern Airlines v. CAB, 185 F.2d 426, 428 (D.C. Cir. 1950).
113 231 F.2d 483, 487 (D.C. Cir. 1956) (Edgerton, J., dissenting).
114 The intervenor argued with considerable force that the Board had not made the requisite findings of "undue burden" on the non-certified carrier to allow the Board to grant the exemption. The dissenting judge agreed with this contention. Contra, Craig, A New Look at 416(b), 21 J. Air L. & Com. 127 (1954).
115 American Airlines v. CAB, 231 F.2d 483, 488 (D.C. Cir. 1956).
116 In both cases, an intervening carrier sought an adjudicatory hearing prior to the granting of an exemption.
117 Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1921).
118 In both cases, an intervening carrier sought an adjudicatory hearing prior to the granting of an exemption.
termination not to grant an exemption is based primarily on the state of the national transportation scheme. Information pertaining to the public interest is of chief concern for whether or not the applicant is of limited extent, the Board cannot grant an exemption unless it finds that the interests of interstate commerce and the nation's transportation requirements necessitate the granting of the authority.\(^{123}\) Such legislative facts are wholly outside the competence of the applicant carrier to meet or to effectively dispute, and the Supreme Court has recognized that if such information does not pertain to the qualifications of particular applicants no evidentiary hearing is necessary.

While it is laboring the obvious to point out again the unique character of the exemption provision, nonetheless it is necessary to do so in order to distinguish 416 cases which arise from grant or denial situations and license cases. The Civil Aeronautics Act simply does not give any carrier, whatever its qualifications, the right to an exemption; indeed, it is virtually a contradiction in terms to make such a claim. On the other hand, the Goldsmith case describes an applicant for admission as being "entitled" to a license once certain facts are ascertained:

> We think that the petitioner having shown by his application that, being a citizen of the United States and a certified public accountant under the laws of a State, he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer.\(^{124}\)

Similarly, the applicant for admission to the bar has a right to practice if he is free from any disqualifying marks or attachments. But the CAB, on the other hand, has the power to declare that in the future, no further exemptions will be granted, regardless of the merits or the qualifications of the applicants. Therefore, there is a very real distinction between licensing cases and the cases which arise from the grant or denial of exemptions under Section 416.

The Eastern decision is supportable on several grounds. Great difficulty arises, however, when the CAB seeks to extend the holding in that case to other situations beyond the bare granting or denial of an application for an exemption.

### B. Terminating An Individual Exemption

#### 1. Standard Airlines v. CAB

Pursuant to Section 416 and to the expressed intent of Congress,\(^{125}\) in

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\(^{123}\) E.g., American Airlines v. CAB, 231 F.2d 483 (D.C. Cir. 1956). The Board's order granting an exemption to non-certified carriers to enable those carriers to carry mail pending their certification hearing was upheld by the court principally on the ground that the Board had made a specific finding that the exemptions were in the public interest.

\(^{124}\) Chicago & So. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948). In this case, the court evidently assumed that any secret information the President may have relied upon in denying a certificate of convenience and necessity to an overseas carrier was relative to international relations and thus properly found without the requirement of a trial type hearing.

\(^{125}\) Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1925). See 83 Cong. Rec. 6407 (1938). The primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development and the elimination of unrestricted and cutthroat competition. See also Hearings Before House Interstate and Foreign Commerce Committee on H.R. 9736, 75th Cong., 3d Sess. 420-421 (1938).
1938 the Board issued General Regulation 291 that exempted from certain provisions of Title IV carriers which operated on an irregular or non-scheduled basis. In 1947, the Board adopted an amendment to that regulation, which required irregular air carriers utilizing large aircraft to obtain "Letters of Registration." These letters were issued upon application to those large irregular carriers which had previously been operating under Regulation 291.1. The new feature of the letters of registration was that the Board expressly reserved the power to suspend or revoke the letters at any time.

Standard Airlines was an irregular air carrier operating under a letter of registration. Due to consistent violations of its registration authority, the Board suspended Standard's letter of registration without granting Standard an opportunity for a hearing. The court reversed, concluding that the suspension would destroy property, not license property but investment and business property, and "in our jurisprudence an opportunity to present arguments orally . . . is one of the rudiments of fair play required when property has been taken or destroyed." The court briefly dismissed the Board's contention that Standard had sought the letter of registration aware of the possibility of suspension. The government, stated the court, cannot make an otherwise unconstitutional and invalid requirement a condition to a permit.

To support its decision on what it considered the "practicalities" of the situation, the court resorted to a somewhat tortured construction of the Civil Aeronautics Act. It noted that the other provisions of the Act which deal with suspension require notice and hearing. The only specific authority granted to the Board for suspension without a hearing is Section 1005 (a) and this provision is expressly limited to emergencies affecting public safety. The court therefore concluded that if Congress had intended that suspension for an ordinary violation of the Act or regulations, not so critical as safety emergencies, could be without a hearing, it would seem that it would have made appropriate provision in Section 416(b) (1). It did not do so.

On the basis of the legislative history of the Civil Aeronautics Act and the bare language of Section 416(b) (1), the opposite conclusion is perhaps closer to the intent of Congress. Recalling the sweeping grant of authority to regulate the irregular and exempt carriers under Section 416, coupled with Board power under Section 205(a) to make rules and regulations consistent with the provisions of the Act, untrammeled

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Standard Airlines was an irregular air carrier operating under a letter of registration. Due to consistent violations of its registration authority, the Board suspended Standard's letter of registration without granting Standard an opportunity for a hearing. The court reversed, concluding that the suspension would destroy property, not license property but investment and business property, and "in our jurisprudence an opportunity to present arguments orally . . . is one of the rudiments of fair play required when property has been taken or destroyed." The court briefly dismissed the Board's contention that Standard had sought the letter of registration aware of the possibility of suspension. The government, stated the court, cannot make an otherwise unconstitutional and invalid requirement a condition to a permit.

To support its decision on what it considered the "practicalities" of the situation, the court resorted to a somewhat tortured construction of the Civil Aeronautics Act. It noted that the other provisions of the Act which deal with suspension require notice and hearing. The only specific authority granted to the Board for suspension without a hearing is Section 1005 (a) and this provision is expressly limited to emergencies affecting public safety. The court therefore concluded that if Congress had intended that suspension for an ordinary violation of the Act or regulations, not so critical as safety emergencies, could be without a hearing, it would seem that it would have made appropriate provision in Section 416(b) (1). It did not do so.

On the basis of the legislative history of the Civil Aeronautics Act and the bare language of Section 416(b) (1), the opposite conclusion is perhaps closer to the intent of Congress. Recalling the sweeping grant of authority to regulate the irregular and exempt carriers under Section 416, coupled with Board power under Section 205(a) to make rules and regulations consistent with the provisions of the Act, untrammeled

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14 C.F.R. 291.1. No carrier is deemed within the irregular classification unless the services offered and performed by it are of such infrequency as to preclude any implication of a uniform pattern or normal consistency of operation.

14 C.F.R. 292.1.


Standard Airlines, Inc. v. CAB, 177 F.2d 18, 21 (D.C. Cir. 1949).


The court did not have the benefit of the Supreme Court's decision in the Yong Yang Sung case (339 U.S. 3 (1949)). Rather than applying provisions of the Administrative Procedure Act to fill gaps in the Civil Aeronautics Act relating to required procedures, the Court of Appeals was forced to an unrewarding construction of the Civil Aeronautics Act to support its decision.


Standard Airlines, Inc. v. CAB, 177 F.2d 18, 21 (D.C. Cir. 1949).

EXEMPTION PROVISION OF THE C.A.A. 279

Board discretion to regulate appears to have been the aim of Congress. The adjoining paragraph, Section 416(b) (2), requires notice and hearing before the Board can exempt an air carrier from certain labor provisions of the Act. In addition, whenever Congress referred to suspensory or revocation powers, it required notice and hearing, except in Section 416(b) (1). Congress clearly was cognizant of the hearing requirement, and specifically omitted including such a requirement in 416(b) (1). Thus the provisions of the Civil Aeronautics Act alone will not support a requirement that notice and hearing precede Board action in regard to an existing exemption authority.

The court is far more persuasive in its view that fair play requires the opportunity to present oral argument before a serious deprivation of property can be effected. There is an assurance that contentions will be heard and understood upon a verbal statement, a degree of certainty not secured by the mere filing of written material. The decision emphasized that the "controlling practicality," the loss of property without a hearing, governed the outcome. The interpretation of the Act as requiring a hearing is obviously a make-weight argument of little substance.

The utility of the distinction between legislative and adjudicative facts is presented by the Standard case. It is submitted the court reached the correct decision, but did so on the basis of a spontaneous reaction. It then groped for reasons to support its holding. The CAB had openly stated that the grounds for terminating the exemption were past violations of the carrier's letters of registration. Such facts are intrinsically the kind of facts that ordinarily ought not to be determined without giving the affected party the opportunity to challenge the evidence, if for no other reason than that the affected party is in the best position to know about the particular facts under investigation.

The Goldsmith case had stated that due process entitles a party, when rejected on charges of unfitness, to an opportunity, by notice, for hearing and answer. The same reasoning is applicable to the Standard case, for the same issue of determination of adjudicative facts was presented. This then was the basis for the court's decision in Standard, regardless of the statutory interpretation language employed by the bench.

2. Cook Cleland Catalina Airways v. CAB

A later case supports this assertion. In a factual situation similar to the Standard Airlines case, but with one critical difference, the court held that an exemption could be terminated without a hearing. Subsequent to a revised regulation terminating the blanket exemptions to irregular air carriers, Cook had sought to continue its operating authority under an individual exemption. Petitioner's application for a continuation of its exempt status was denied without a hearing. The similarity of the instant

137 While it is true that Section 416(b) (1) does not directly refer to Board powers of suspension or revocation, Congress clearly intended for the Board to have such power under the exemption provision. If the Board did not retain such authority, continued control over exempted carriers would not be possible.


139 Cook Cleland Catalina Airways v. CAB, 195 F.2d 206 (D.C. Cir. 1952).

140 14 C.F.R. 292.1. The new regulations terminated the letters of registration procedure which had been followed since 1947 which had in effect given a blanket exemption to all irregular carriers, since the letters were issued upon application. The new regulation enabled the Board to consider and pass upon applications for exemptions on an individual basis.

141 The court followed the reasoning of the Eastern case (185 F.2d 426), and stated that the
case to the *Standard* decision rests in the fact that in both cases the Board sought to terminate an existing operating authority without a hearing. In *Cook*, however, no existing business and no existing property were involved. Petitioners had never engaged in operations from the date of the issuance of its letter of registration to the denial of its claim for continued exemption. If the Act demanded a hearing prior to the termination of a carrier’s authority under Section 416, as the court in *Standard* had opined, a hearing would have been required in the *Cook* case, since this is exactly what happened in the latter case. Read together, *Cook* and *Standard* reveal that the Civil Aeronautics Act does not, but that due process may, require a hearing prior to the termination of an exemption. 143

Petitioners made a second contention in *Cook* which requires consideration. The carrier sought an adjudicatory hearing on the further ground that its “license” was revoked. This marked the first time that a holder of an exemption sought protection under Section 2(e) of the Administrative Procedure Act defining licensees and Section 2(d) requiring an adjudicatory order prior to final agency disposition, whether affirmative or negative, regarding such a license. 146 In this case, the court denied the carrier’s claim to licensee status, holding that the “license” was merely permission to operate under a blanket exemption, and no hearing is required in respect to such exemptions.

The *Cook* decision is clearly on tenuous grounds. If the Civil Aeronautics Act is to be construed as not, by its terms, requiring a hearing in regard to proceedings under Section 416; and if holders of exemption authority are not to be given licensee protection, subsequent cases may be decided on an ad hoc basis determined on due process grounds by the existing property or business investment. Fortunately, both *Standard* and *Cook* were easy cases to decide: the former carrier clearly had a substantial investment in danger of being destroyed by Board action without an opportunity for a hearing; the latter had nothing to lose but a paper authorization. A considerable shadow area exists, however, between the two extremes. What, for example, would be a sufficient investment in business or property to require an evidentiary hearing prior to alteration or suspension of the carrier’s exemption status? *Cook* Airways had submitted plans for future expansion as a justification for continued existence. Would one contract, obligating the carrier to future performance and stipulating damages for non-performance, be an investment worthy of protection? “Controlling practicalities,” (which simply means “need for Constitutional protection”), the announced ground for decision in the *Standard* case and the inarticulate basis for the holding in *Cook*, is no guide.

On the other hand, evidentiary hearings for each of the one hundred

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143 The court noted, in *Cook* (195 F.2d 206, 207 (D.C. Cir. 1952)): “We do not have here any question which might arise if the applicant had developed a business or acquired property by reason of the original registration or original permissive regulations of the Board [citing to the *Standard* case].”

applicants for individual exemptions following the termination of blanket exemptions would tie up the Board for years. The critical gap between the due process requirements of the Constitution and the sheer administrative necessity of processing and determining scores of applications was never more in evidence than in the turmoil surrounding the irregular air carriers. Because of blatant violations by these carriers, the Board had to revise its method of controlling and regulating their operations. This necessitated altering their exemption authority. *Cook* was only to be the opening skirmish in a decade of controversy.

3. *American Air Transport Revocation Proceedings*

Considering the problems facing the CAB, it is not surprising that the Board interpreted the *Eastern* and *Cook* decisions as giving it full authority to control the destiny of the irregular air carriers unfettered by the procedural technicalities of the Administrative Procedure Act or the Civil Aeronautics Act:

The Administrative Procedure Act and the Civil Aeronautics Act do not of themselves require an adjudicatory hearing prior to the adoption of regulations which grant, terminate, modify or otherwise condition an exemption... [citing to *Cook*]. Nor do we believe the Constitution guarantees any hearing, much less an adjudicatory one, before an administrative agency, prior to legislative action upon consideration of regulatory policy of future applicability. 144

This point marks the end of the beginning. Misconstrued authority in hand, the Board will now seek to manipulate all the irregular air carriers in one proceeding: granting exemptions, modifying exemptions, and terminating exemptions under the rule-making provisions of the Administrative Procedure Act.

C. *Adjudication By Rule Making: Administrative Necessity Versus Due Process*

1. "Important Question" Inconclusively Determined: *American Air Transport v. CAB*

The cases heretofore considered have dealt with Board exemption practice in regard to an individual carrier. Following the revision of the irregular air carrier regulations in 1949, 146 the Board realized that a more expeditious method of handling exemption applications must be devised.

The Board processed the numerous applications for individual exemptions in the first *Large Irregular Air Carrier* case. 147 Ninety-six applications for exemptions were received from holders of letters of registration. The Board, pursuant to the rule-making provisions of the Administrative Procedure Act, 147 published general notice of the proposed changes in the regulations and afforded all interested parties opportunity to participate in the rule-making through submission of written data. The Board examined the applications, all information submitted therewith including voluminous flight and statistical reports, and on the basis of this analysis denied the applications of all the large irregular air carriers which had systematically

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146 14 C.F.R. 292.1.


abused and violated the prohibition against regular route service. Exemptions were granted only to those carriers which had conducted truly irregular service.

In addition to the restrictions on regularity which had been in effect, the Board imposed a further limit on the exempted carriers by permitting only three flights in the same direction between certain major cities during any period of four successive calendar weeks, and only eight flights in the same direction during such period between any other pair of cities. American Air Transport, an "irregular" carrier which had made 613 flights between New York and Miami in 1950, sought to enjoin the enforcement of the Board order limiting the number of flights between major cities. The District Court issued an injunction on the grounds that the regulation was void because adopted without such a hearing as required under the Administrative Procedure Act and the Civil Aeronautics Act. The Board appealed.

It was stipulated that the Board had properly followed the rule-making provisions of the Administrative Procedure Act. The Board had heard oral argument but had not required any of the testimony or oral presentation to be made under oath. Nor had the Board permitted any person to call witnesses, to cross-examine any person, or to offer competent evidence in explanation or in rebuttal. Further, the Board agreed that the new regulations limiting the petitioner's operations would in fact "seriously injure and perhaps in large part destroy their business and property interests." The Board argued that regardless of the regulation's effect on particular carriers, the regulation represents "legislative" or rule-making action rather than adjudication of individual rights. The regulation was nonpunitive in character and predicated upon considerations of policy to be applied in the future to all members of a classification of carriers. Neither the Civil Aeronautics Act, the Administrative Procedure Act, nor the Constitution guarantees an evidentiary hearing to affected persons prior to the taking of "legislative" action by an administrative agency. Since Congress would have been under no duty to grant an evidentiary hearing prior to defining the extent to which air operations would be permitted without compliance with the certificate provisions of the Civil Aeronautics Act, and since Congress had delegated this authority to the CAB under Section 416, the Board has similar freedom.

The appellee relied heavily on the Standard decision, claiming that the Board in effect was confiscating substantial business and property investment without an adjudicatory hearing required by the Civil Aeronautics Act and the Administrative Procedure Act. Furthermore, the carrier claimed "licensee" status under Section 2(e) of the Administrative Procedure Act, noting that its title as an "exemption holder" should not change

\[149\] Large Irregular Air Carrier Case, 11 C.A.B. 609, 618. For the definition of "regular service," see 14 C.F.R. 291.1 (supra note 127).

\[150\] Large Irregular Air Carrier Case, 11 C.A.B. 609, 619 (1950).


\[154\] Id. at 192.

\[155\] Brief for Appellant, pp. 9, 15, CAB v. American Air Transport, 201 F.2d 189 (D.C. Cir. 1952).

\[156\] Standard Airlines, Inc. v. CAB, 177 F.2d 18, 21 (D.C. Cir. 1949).

the application of recognized legal principles requiring notice, hearing, and opportunity to comply prior to the amendment or termination of a license. 157 The court assumed that if the new regulation should legally be regarded as amending existing licenses, adjudicatory hearings for the benefit of existing licensees were necessary. But a majority of the court was unable to agree upon a disposition of the case, although the court was "unanimously of the opinion that the question presented was of far-reaching and fundamental importance in the field of administrative law." 158

One judge voted to affirm the District Court's injunction for the following reasons:

The new Regulation inserts into the appellees' pre-existing licenses a crippling limitation of the number of irregular trips permitted thereunder, the license theretofore having been unrestricted in that respect, which will substantially injure and in large part destroy the existing property and business of the appellees. . . . The insertion of such a restriction into the license originally unrestricted constitutes an amendment of the license which, under the Constitution and the statutes is invalid without an adjudicatory proceeding. 159

One judge voted to reverse the order of the District Court on these grounds:

When licenses are issued under a regulation of a licensing agency, an amendment of the regulation which defines its terms in ways not shown to be arbitrary or capricious, duly adopted by a rule-making procedure and without an adjudicatory proceeding as to any affected license, is not to be regarded as amending licenses and is valid although it will have the effect of destroying substantial parts of the business of licensees. 160

The third judge voted to remand the case to the District Court, and was of the opinion:

(1) that the decisive question is whether the specific prescriptions of the new Regulations are or are not a proper, or reasonable definition of the undefined terms (barring flights which operated with "regularity or with a reasonable degree of regularity") of the original licenses, and (2) that the question is a question of fact which must be determined upon factual criteria devised from studies of actual operations of regular and of irregular carriers similar to the criteria utilized by the three judge court in Brady Transfer and Storage Co. v. U.S. 161 or like purposes under the Motor Carrier Act, and

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157 Id. at 5.
159 Id. at 193.
160 Ibid.
161 80 F. Supp. 110 (D.C. S.D. Iowa 1948), aff'd, 335 U.S. 875 (1948). Since the American Air Transport case was eventually remanded to the District Court on the strength of the opinion of the judge who originally voted for remand, the criteria discussed in Brady Transfer and Storage bears examination. Pursuant to Section 304(b) of the Motor Carrier Act, the Interstate Commerce Commission had established two classes of carriers, regular and irregular, and had prescribed different regulations for each class. One of the issues in the Brady case was whether the ICC, in a rule-making proceeding, had created a reasonable classification between regular and irregular route operators.

The ICC had announced eight criteria for determining the type of operation conducted by a carrier. No one criterion would necessarily be controlling. The criteria were: predetermined plan; character of traffic; solicitation; terminals and call stations; fixed routes; fixed termini; periodicity of service; and schedules or their equivalent (80 F. Supp. 110, 115 n.4).

The court found that these criteria did not constitute any new definition of an irregular route carrier, but merely enumerated the historically established differences in the type of operations long known and recognized by the industry. It concluded, therefore, that the classification was a reasonable one fully authorized by well recognized principles of law (80 F. Supp. 110, 116).
similar to the data which the Board says it used in formulating the Regulation here involved. Since the present record contains no evidence of that sort, this judge would remand the case to the trial court for the receipt of such evidence and a finding of basic facts and an ultimate finding therefrom as to whether the new Regulation does or does not in fact change the terms of the existing licenses.\footnote{162}

Deadlocked, the Court of Appeals requested the instructions of the Supreme Court upon the following question:

Where an operating authority is granted by a regulatory agency and a private company operating thereunder acquires property and business in so doing, is a new regulation of the agency which in fact substantially injures or in a large part destroys such property interests or business—

(1) void as to that licensee unless an adjudicatory hearing is held, because it is on its face an amendment of his license; or

(2) valid if adopted by a rule-making proceeding, provided the new regulation merely defines the terms of the old in ways not shown to be arbitrary or capricious; or

(3) does its validity as to that licensee depend upon a finding of fact that it does or does not in fact vary the terms of the license; or

(4) does its validity depend upon some other condition?\footnote{163}

The Supreme Court dismissed the certificate.\footnote{164} In a per curiam decision, from which Mr. Justice Douglas dissented, the court noted that if it granted the Board’s application for an order requiring the Court of Appeals to send up the record, the entire matter in controversy would be before the court for decision. The unsigned opinion stated that since the Supreme Court does not normally review orders of administrative agencies in the first instance, the high court did not want to take any action which might foreclose the possibility of review in the Court of Appeals. The decision suggested that perhaps the Court of Appeals might wish to hear the case en banc to resolve the deadlock.

The Court of Appeals, the same judges sitting,\footnote{165} unanimously voted to remand the case to the District Court for further proceedings in accordance with the opinion of the judge who originally voted for remand.\footnote{166} No further record of the proceedings was made.\footnote{167}

2. The Case Revisited

The impact of the instant case is not easy to measure. The Board had attempted to destroy the complaining carrier by revising its operating

\footnote{162} CAB v. American Air Transport, 201 F.2d 189, 193-194 (D.C. Cir. 1952).
\footnote{163} Id. at 194.
\footnote{165} Judges Edgerton, Prettyman and Miller sat on the American Air Transport case. The opinions were unsigned, yet it is perhaps interesting to speculate as to which judge authored which opinion, particularly in the light of past decisions by the same judges. Judge Edgerton wrote the Eastern decision, and concurred in Cook. He thus becomes my candidate for the opinion in American Air Transport which sought to reverse the District Court. Judge Prettyman wrote the Standard and the Cook decisions, and the language of the opinion in American Air Transport which would affirm the injunction issued by the District Court closely resembles the tenor of the Standard holding. On these shaky grounds, Judge Prettyman would appear to have written the opinion affirming the District Court. The process of elimination reveals Judge Miller as the author of the “compromise” opinion, which eventually prevailed.
\footnote{166} CAB v. American Air Transport, 201 F.2d 194 (D.C. Cir. 1912).
\footnote{167} The Board subsequently revoked American Air Transport’s operating authority for willful violations of a cease and desist order. American Air Transport, Revocation Proceedings, 16 C.A.B. 294 (1953), aff’d, 206 F.2d 423 (D.C. Cir. 1953).
authority through the rule-making procedure. A later case cited American Air Transport for the proposition that "an interest may merit legal consideration even when the investment is made freely and with knowledge of a possible change in status that would impair its use." Yet certainly American Air Transport expanded upon the rationale of the Standard decision, which was confined to the above mentioned rudimentary due process considerations. The court in the American Air Transport case remanded to determine whether the new regulation did or did not in fact "change the terms of existing licenses." If the new regulation was found to change existing licenses, the court was unanimous in agreeing that an adjudicatory hearing was required. Rule-making procedures would be sufficient only if the new regulation was found to be a reasonable definition of the undefined term "regularity."

On the question of regularity, the reference by the remanding judge to the criteria employed in the Brady Transfer and Storage case is vulnerable to criticism. The Supreme Court previously had warned against analogies or references to other modes of transport when air transport problems arose. The critical feature of the formula employed by the ICC was that the standards in effect codified historical practices in the motor carrier industry. But there were no comparable historical standards in the aviation industry. Irregular air service on any scale was hardly five years in operation when the Board considered the first Large Irregular Air Carrier case. The ICC criteria determining regularity evolved after forty years of interstate motor carriage and have doubtful relevance to singular air transportation problems.

On the other hand, prior to the American Air Transport case, the Board had established precedent on the question of regularity which was apparently ignored by the remanding judge. In 1947 the Board had set up criteria which must be met if the operations were to be considered irregular:

1. Flights between designated points, whether one or more per week, must be staggered as to the days of the week in successive weeks;
2. if more than one flight is to be operated per week in successive weeks, not only must such flights vary as to the days of the week, but there must also be breaks in the continuity of service for a week or approximately that period during which no flights are operated between these same points; and,
3. the flights must be of such infrequency as to preclude any implication of a normal pattern or normal consistency of operations between the same points.

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168 Atchison, T. & S. F. Ry. v. Summerfield, 229 F.2d 777, 779 (D.C. Cir. 1916). The petitioning railroad sought to enjoin the Postmaster General from continuing an experimental plan which authorized air carriers to transport surface mail. By statute, 39 Stat. 428 (1916), 39 U.S.C. § 6203 (1960), the railroads are required to carry such mail as may be offered for transportation by the Postmaster General, and a necessary effect of the experiment was to prevent useful employment of parts of a very considerable investment. The court found the interest of the plaintiff railroad merited legal consideration (citing also Standard Airlines v. CAB, 177 F.2d 18 (D.C. Cir. 1949)).

169 177 F.2d 18 (D.C. Cir. 1949). See also note 130 supra and accompanying text.

170 201 F.2d 189 (D.C. Cir. 1952). See also note 162 supra and accompanying text.

171 See note 161 supra and accompanying text.


173 See note 161 supra.


American Air Transport, it will be recalled, completed 613 flights between New York and Miami in 1950. Under any reasonable definition of regularity, that carrier must be considered a blatant violator of the regulation. Other irregular carriers were operating with varying degrees of regularity and many operations closely approached the new standard. Compliance would cause little hardship to these carriers.

3. Licensee Status Conferred on Carrier

By remanding the case, the Court of Appeals expressed disagreement with the District Court’s injunction invalidating the regulation as it applied to all irregular carriers. There seems to be no reason why the regulation should be invalidated where it simply redefines the authority held by a carrier. Assuming that all the irregular carriers held licenses, those carriers which were already operating on a truly irregular basis suffered de minimus losses, if at all, from the imposition of the new standards. Thus, as to those carriers, even though considered licensees, rule-making procedures were perfectly proper since the Board had merely redefined their authority and no “amendment” of their license had taken place.

Paradoxically, the fact that American Air Transport was so notorious a violator gave that carrier greater protection under the Administrative Procedure Act. For as to American, the new standards could hardly be found to have merely “redefined” its operating status. As the Board conceded, these new regulations would clearly put that carrier out of business, and they were probably intended to accomplish just that end. But since the disparity between the services being performed by American and the new standards was so great, the inarticulate grounds for the Court of Appeals’ decision must be that intervening Administrative Procedure Act requirements regarding licensees bar rule-making as the basis for so altering that carrier’s authority.

Indeed, it is essential that the court assumes the licensee status of the complaining carrier. Otherwise the remand would not be supportable, for if the affected carriers were not licensees, the new regulations would simply be valid exercises of the Board’s rule-making power. The fact that the new rule seriously impaired some carriers’ operating authority would not have any legal ramifications, i.e., no one carrier had been discriminated against nor had there been any attempt to single out violators. In fact, it had been conceded that if rule-making was the proper procedure under the circumstances, then the carrier had received all that it was entitled to in the way of hearing and argument.

But once the court finds that the complaining carrier holds a license, rule-making becomes an improper method of altering the licensee’s authority, except if the new rule merely redefines the licensee’s authority. Clearly, American Air Transport’s operating authority had suffered more than a mere redefinition. It is true that a wilful violator, such as American, although termed a licensee, cannot avail itself of the protective features of Section 9(b) of the Administrative Procedure Act. The

176 See note 150 supra and accompanying text.
177 See Ch. IV E infra p. 292 for an analysis of a valid rule-making proceeding.
178 60 Stat. 242 (1946), 5 U.S.C. § 1008(b) (1958). Section 9(b) provides that before any sanction or any withdrawal, suspension, or revocation affect a license holder, notice of the violation plus an opportunity to comply must be given the holder. However, this protection does
Board is still free to bring a proceeding to terminate American’s operating authority without giving the carrier an opportunity to comply with the new regulation. But, to terminate the authority held by a licensee, an adjudicatory proceeding must be followed. American does not acquire a favored status because of the wilful nature of its violations; but limits are placed on the power of an agency to drastically alter operations licensed under permissive agency regulations. Thus the new regulation limiting flights between major cities can validly be invoked via the rule-making procedures where such limits historically have been followed by the affected carriers.

However, where the otherwise “reasonable” changes in standards materially alter or destroy the license of certain carriers, the Board is forced to proceedings in regard to those carriers which guarantee greater protection from arbitrary administrative action and which conform to the Administrative Procedure Act.

A 1961 decision interpreted American Air Transport as involving an effort by the Board to separate the sheep from the goats: to let the large irregular carriers which had obeyed the spirit and letter of the Board’s regulations remain in business undisturbed, while limiting the operations of those which had violated the authority given them. The court drew the inference, substantiated by the previous analysis, that if the Board proposed to discriminate between carriers in the same group, characterizing some as law-abiders and some as law-breakers, it would be required to afford an evidentiary hearing to those whose operating authority was to be suspended or revoked for cause.

D. Licensee Protection Denied To Exemption Holder

1. Great Lakes Airlines v. CAB

The Board successfully terminated the exemption authority of an irregular air carrier through the rule-making procedure in the most recent and perhaps final case in the long controversy surrounding the irregular carriers. Unconcerned by the implications of the American Air Transport
decision, the court refused to grant the complaining carriers licensee status under Section 2(e) of the Administrative Procedure Act, and allowed the CAB to terminate the exemption authority of Great Lakes Airlines without an adjudicatory hearing. Petitioners in this case were unsuccessful applicants for final authority to perform supplemental air service. The Board found that these carriers had violated provisions of the Federal Aeronautics Act (previously the Civil Aeronautics Act) and the Board's regulations, thus exhibiting a lack of "compliance disposition" which disqualified them for final authority as supplemental carriers. The Board cancelled the "interim" exemption authority under which the carriers had been operating in the general rule-making proceeding held to determine the regulations which govern supplemental carriage.

Petitioners argued that the operating authority they possessed was a "license" which could be cancelled only after a compliance proceeding under Section 9(b) of the Administrative Procedure Act, had been brought against them and they had been given an opportunity to conform their conduct to the Board's regulations.

The court rejected the carrier's contention on two grounds: first, assuming, arguendo, that the carriers did have "licenses," they were temporary and conditional. They were not withdrawn, suspended or revoked within the meaning of Section 9(b); they expired or terminated by their own terms. Second, Section 9(b) does not apply to temporary licenses, so, even if the action of the Board could be construed to be a withdrawal, suspension, or revocation of the carrier's authority within the meaning of 9(b), these petitioners were not aided. It is submitted that the court was incorrect on both grounds and that the carrier's operating authority was invalidly terminated.

It is true, as the court pointed out, that there was no guarantee during the years in which irregular or supplemental service was permitted under

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187 The applications were denied by the CAB in Order No. E-13436, (Jan. 28, 1959).


186 Stat. 242 (1946), 5 U.S.C. § 1008(b) (1958). The second sentence of Section 9(b) states:

\[\text{Except in cases of wilfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.}\]


184 Id. at 223.
the exemption provision that final authorization would be granted. But, query: does this fact give the Board power to terminate the authority of a particular carrier in a rule-making proceeding? Great Lakes Airlines had been operating under successive forms of exemption authority since 1946. The court described this operation as wholly "at the sufferance of the Board." This appears a rather inaccurate description in the light of the Standard decision, which forced the Board to an adjudicatory hearing when it sought to terminate the authority of a carrier which had made a substantial investment on the basis of its exemption status.

Describing the carrier's operating authority as "at the sufferance of the Board" not only appears inaccurate, it would seem to directly conflict with the holding of the court in American Air Transport. All three judges on that court found that the irregular carriers had licensee status, and the bench ultimately agreed that only a reasonable amendment of their operating authority could be accomplished absent an evidentiary hearing. Any further alteration of their status must be accompanied by a hearing pursuant to the requirements of the Administrative Procedure Act respecting the change of a licensee's authority. Yet in the instant case, the court sanctioned not merely the alteration of Great Lakes' operating authority, but permitted the Board to terminate the exemption under which the carrier had operated for sixteen years without giving that carrier an evidentiary hearing on its alleged violations.

In a revealing footnote, the court was relieved to find that it was not "faced with the question whether in a rule-making proceeding the Board could have revoked all prior operating authority for all non-scheduled or supplemental carriers." But clearly, what the court was faced with was the termination, by Board action, of an individual carrier's operating authority under rule-making procedures. This was true whether the Board order was considered a revocation of a license, a denial of an application for a new license, or a refusal to renew present operating authority. "The essence of the matter, both procedurally and substantively, [was] that petitioner's licenses [were] terminated."

Thus the first ground proffered by the court to uphold the Board's action, that the license "expired by its own terms," is without substance. Great Lakes' exemption authority was not a thirty-day permit to fly military charters. Such a permit would "expire by its own terms." On the contrary, the expiration of the petitioner's authority was predicated upon a Board determination that Great Lakes was unfit or unqualified for final authorization. While the Board clearly has the power to reach such a conclusion, it cannot do so without granting the affected carrier an evidentiary hearing.

The second ground upon which the court based its holding is also open to grave criticism. For the proposition that Section 9(b) of the Admin-

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190 Standard Airlines, Inc. v. CAB, 177 F.2d 18 (D.C. Cir. 1949). See also note 130 supra and accompanying text.
191 See note 151 supra and accompanying text.
192 See note 207 infra.
193 Great Lakes Airlines, Inc. v. CAB, 294 F.2d 217, 223 n.13 (D.C. Cir. 1961). The implication being that a rule-making proceeding wiping out all the supplemental carriers might be highly suspect.
194 Great Lakes Airlines, Inc. v. CAB, 294 F.2d 217, 228 (D.C. Cir. 1961) (Fahy, J., dissenting).
195 Standard Airlines, Inc. v. CAB, 177 F.2d 18 (D.C. Cir. 1949); American Air Transport v. CAB, 201 F.2d 194 (D.C. Cir. 1952).
isterial Procedure Act does not refer to temporary licenses, the court relied heavily on extracts from the legislative history of the Act. Both the Senate¹⁹⁶ and the House¹⁹⁷ reports do contain statements to the effect that Section 9(b) was not intended to apply to temporary licenses. Appended to the Senate Report is a letter from the Attorney General to the Chairman of the Senate Judiciary Committee, containing the following commentary on Senate bill 7, the bill that developed into the Administrative Procedure Act: "The second sentence of subsection (b) [of Section 9] is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses."¹⁹⁸ In the first place, to term Great Lakes' fifteen year exemption authority a "temporary permit pending the determination of its application for a license" is stretching the meaning of "pending application." It is far more consonant with the purposes of the Act and with the intent of Congress to consider temporary permits to be only very limited grants of authority permitting an applicant to engage in business or operations while the agency is considering its application for a license. If the agency decides against licensing the applicant, it need not be tied to strict adjudicatory or evidentiary procedures to get back the temporary license. The applicant, on its part, has full knowledge of the precarious nature of its position and conducts its business accordingly.

Great Lakes Airlines did not apply for permanent authority until the Board announced that exemption status for large supplementals was no longer possible and that the carriers must seek certification.¹⁹⁹ At this point, Great Lakes had been operating for twelve years. To construe its authority as a temporary permit subject to being revoked at any time without a hearing is contrary to the reasoning of the Standard and American Air Transport cases and to the intent of Congress in granting procedural protection to license holders.

The above analysis assumes that no judicial gloss had been placed on the relation between temporary permits and Section 9(b) of the Act. This, however, is not the case. The Supreme Court has conferred licensee status (and thus required opportunity for compliance prior to revocation) upon the holder of a 180 day permit granted by the ICC pending determination of the carrier's application for permanent operating authority.²⁰⁰ Thus, the minimum interpretation advanced in the preceding paragraphs has been carried even further by the Supreme Court. The court construed the 180 day permit as a "license" under Section 2(e) of the Act and thus made available to the carrier the protection of the third sentence of Section 9(b).²⁰¹ A temporary permit, stated the court, such

¹⁹⁸ A.P.A. Legis. Hist. 229 (1946). The court also found support for its holding in the Attorney General's Manual on the A.P.A., wherein it is stated: "Such [temporary] permits or licenses may be revoked without 'another chance' regardless of whether the public safety, health, or interest is involved." (at 91).
¹⁹⁹ See note 183 supra and accompanying text.
²⁰⁰ Pan Atl. S.S. Corp. v. Atl. Coast Line R.R., 353 U.S. 436 (1957). Section 311(a) of the Interstate Commerce Act (49 U.S.C. § 911(a)) gives the ICC power to grant "temporary authority" to a common carrier by water or a contract carrier by water to institute service for which "there is an immediate and urgent need." The section provides that the temporary authority "shall be valid for such time as the Commission shall specify, but not for more than 180 days."
²⁰¹ 60 Stat. 242 (1946), § U.S.C. § 1008(b) (1958). The third sentence of Section 9(b) provides that:
as the 180 day authority granted by the ICC, covers an "activity of a continuing nature" and therefore is a "permit" or "certificate" under the Act. The holder is thus entitled to the protection of 9(b). This section was construed as supplementing Section 311(a) of the Interstate Commerce Act and to apply to temporary as well as permanent licenses.

While the *Pan Atlantic* decision construed the third sentence of 9(b), and the *Great Lakes* case is concerned with the second sentence of that provision, the Supreme Court looked to Section 2(e) of the Administrative Procedure Act for a definition of the term "license." Since 2(e) definitions were clearly intended by Congress to assure uniform interpretation of the defined terms throughout the Act, the court's holding in the *Pan Atlantic* case would require that the second sentence of 9(b) also be applicable to temporary permits.

It has been suggested that the "opportunity to comply" provisions of Section 9(b) have no application where the continued operation by the licensee is no longer in the public interest, convenience or necessity. Since the revocation or termination of the license would be based on factors outside the carrier's control, the carrier could not possibly act to remedy the situation even if it were given the opportunity to do so.

Therefore, had the Board determined that the services rendered by Great Lakes were no longer required by the national transportation scheme, no preliminary warning would have had to be given the carrier to enable it to achieve compliance. However, the Board's stated grounds for revocation or termination were past violations. In either case, an evidentiary hearing on the substantive issue is required by the Administrative Procedure Act prior to suspension or revocation of a license, whether that issue be the public necessity for service or violations of the statute.

In the *Great Lakes* case, the Board successfully was able to "weed out" the petitioner from the list of operating carriers without giving the carrier an adjudicatory hearing. The rule-making procedures were thus utilized to adjudicate the merits of an individual carrier and to terminate the operating authority of an alleged violator without giving that violator an adjudicatory hearing required by due process and therefore by the Administrative Procedure Act. The procedures denied to the Board in *Standard and American Air Transport* were upheld in *Great Lakes.*

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In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or 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.

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205 Mr. Justice Burton, with Mr. Justice Harland and Mr. Justice Whittaker, dissented. The dissenters stressed the unconditional maximum time limit incorporated in Section 311(a) of the Interstate Commerce Act and the absence of any license status in the temporary authority held by the petitioner.

206 "Note, 75 Harv. L. Rev. 383, 385 (1961)."

207 Ibid.

208 E.g., where there is no longer sufficient demand for services.

209 Still a third departure from the requirements of the Administrative Procedure Act was condoned by the court in regard to notice of violations. While Great Lakes was notified that previous violations would be considered relative to the carrier's compliance posture, no specific charges of violations were made prior to the hearing. The violations were first specified by the hearing examiners in their decision. On appeal, the Board refused to re-open the record to hear further testimony on the violations found by the hearing examiners. This failure violated Section 9(b) by not granting a license holder a second chance to achieve compliance before the institution of agency proceedings leading to suspension or revocation.

E. Valid Rule-Making By The Board

1. Capitol Airways v. CAB

An example of a valid rule-making proceeding followed by the Board, which nonetheless seriously affected the operating authority of certain carriers, was the Capitol Airways v. CAB case. In this case, the Board, in effect, redrew the rules of the game but left all the competitors in the field.

In 1953, under its exemption power, the CAB had promulgated Part 294 of its economic regulations, which authorized air carriers of all categories to perform certain services for the military without obtaining prior authorization from the Board. As originally issued, 294 contained several restrictions on the operations carriers could provide. These restrictions were lifted by two Exemption orders issued in 1959 and 1960, both of which contained the expiration date of September 30, 1960.

In July, 1960, the Board issued a notice of proposed rule-making with the announced purpose of repealing Part 294—the basic exemption provision. This section was to be replaced by the procedure followed by the Board prior to 1953: granting individual exemptions to particular carriers for particular items of military transportation. The petitioning carrier sought renewal of the temporary exemption as it applied to Capitol and a hearing on its petition. The Board denied both requests and the airline appealed.

The Board had determined that as a matter of regulatory policy, in light of changing conditions, that it was no longer desirable to issue blanket exemptions. An unstated ground for this decision may have been several disasters which had occurred on military charter flights. The determination to revert back to a prior practice was made without prejudice to the disposition of future individual applications and, therefore, did not amount to a decision on the merits of any particular carrier.

The court conceded, as well it must, that the line between rule-making and adjudication was not always easy to draw. In the instant case, some carriers will be able to survive under the new rule, and some will not; but no attempt was made to say that the petitioner, or any other carrier, were violators of the law and thus not qualified for future authority. In contrast to the American Air Transport and Great Lakes cases, the impact of the present decision by the Board was on an entire class, rather than on particular members of the class which were singled out as violators, or labeled for some reason as unfit or unworthy. For this reason, the procedures followed by the Board were correctly affirmed by the court.

The Capitol case illustrates clearly Professor Davis' suggested dichotomy between legislative and adjudicative facts. The facts upon which the Board based its change in practice did not pertain to the parties or their conduct, but related to general questions of policy which were outside the control of the affected parties. Cross-examination and sworn testimony are patentely inappropriate unless particularized issues of fact are disputed.

213 Ibid.
214 Davis, 1 Administrative Law Treatise § 7.02 (1958 ed.).
Therefore the rule-making procedures, allowing the written submission of views, were valid in the instant case because of the broad issue in dispute: whether a blanket exemption was the most effective means of regulating a character of operations which were peculiarly unsuited for regulation under the certification procedures. Had the Board made the further determination that a particular carrier, because of past conduct (an issue which deserves a trial type hearing), would thereafter be ineligible for an exemption, then the rule-making proceeding would be an inappropriate means of regulation. Since the Board in effect made such a determination in the Great Lakes case, the questionable nature of that decision is further illustrated.

V. CONCLUSION: BALANCING PROCESS AND CONFLICTING IDEALS

A conclusion is necessarily predicated on the sum or perhaps the remainder of the judgments made in the course of the paper. Therefore, when it is submitted that the Great Lakes case was wrongly decided, the Eastern, Standard, and Capitol cases were correctly determined, and the American Air Transport case requires further consideration, ordinarily a conclusion could be written based on these judgments. But a conclusion is only as valid as the theory which supports it, and a theory explaining the exemption provision cannot be propounded on the basis of the cases alone.

The cases correctly decided obscure the fact, and the case wrongly decided makes too much of, the Congressional intent to give the Board a much needed flexibility in the administration of air transportation by conferring a broad exemption power on the agency. It is not a coincidence that the three crucial elements of the exemption power—speed of administration, broad use of discretion, and continued supervision of exempt carriers—correspond very closely to the fundamental concepts which underlie the theory of the administrative process. As suggested initially, exercise of discretion under the exemption provision is perhaps the “purest” form of agency power, and while this paper has focused on the procedural problems which have arisen under the section, the important role Section 416 has played in the development of air transportation should not be obscured nor treated summarily.

The case which went the furthest toward granting exempt carriers full procedural protection was American Air Transport, which conferred licensee status on the complaining carrier. This case deserves further analysis in light of the need to balance administrative flexibility against strict procedural requirements; a need implicit from the tone of the preceding paragraph and a need fairly drawn from the wide powers granted the

221 294 F.2d 217 (D.C. Cir. 1961). See also note 184 supra and accompanying text.
216 Ibid.
217 185 F.2d 426 (D.C. Cir. 1950). See also note 109 supra and accompanying text.
218 177 F.2d 18 (D.C. Cir. 1949). See also note 130 supra and accompanying text.
219 209 F.2d 755 (D.C. Cir. 1961). See also note 209 supra and accompanying text.
220 201 F.2d 189 (D.C. Cir. 1952). See also note 151 supra and accompanying text.
222 See Parker, Why Do Administrative Agencies Exist? A Reappraisal, 45 Geo. L.J. 331 (1957). The author examines the diverse and conflicting opinions held of administrative agencies to determine if they conform to the actual operations of the agencies. The effort to discard the myths and halos which surround the administrative process is an admirable one.
223 See Introduction supra p. 255.
Board under 416. Speaking bluntly, should licensee protection be accorded to carriers which hold authority under the exemption provision?

An affirmative answer will solve many problems, for issues of notice and hearing can be resolved by referring to the Administrative Procedure Act provisions regulating government supervision over license holders. Yet to require the full procedural niceties contemplated by the Act would largely vitiate the several advantages that the exemption section was designed to provide: speed of administration and flexibility of control. The granting of an exemption would become subject to added procedural controls; the close supervision necessary over carriers otherwise free from the restrictions of Title IV would be hampered by various procedural technicalities; and of greatest importance, the exemption could not be terminated, whatever the grounds, without an evidentiary hearing being afforded each license holder. This would preclude the termination of blanket exemptions by rule-making proceedings where no adjudicative facts were in dispute. Indeed, if the licensing procedures are to be followed with respect to exemptions, no substantial difference would then exist between the authority exercised by the Board over the certified carriers and the procedures governing the non-certified or exempt carriers or operations.

The opposite view to the license-status proposition is represented by the rationale of the Great Lakes decision. That case appeared to draw its reasoning from the earlier Eastern holding, which had ruled that the unique character of the exemption provision militated against requiring notice and hearing before the granting of an exemption. The Great Lakes case, however, dealt not with granting but with terminating an exemption. The later case, nonetheless, drew heavily on the privilege theory (with its less strict procedural requirements) which had served as the basis for the Eastern holding.

The Great Lakes' privilege argument follows, and it is certainly open to question; because an exemption is deemed a privilege when granted it remains a privilege throughout its employment and upon termination by the agency the affected carrier enjoys no greater procedural rights than he had at the inception of his authority. No other interpretation can be drawn from the Great Lakes decision. The carrier, throughout its sixteen years of service, operated at the "sufferance" of the Board, and was subject to losing its authority without being granted an evidentiary hearing on the facts upon which the agency based its decision to withdraw the exemption. It is maintained that "[neither] the revocation requirements of the Administrative Procedure Act nor of due process were met" in the Great Lakes proceeding.

The granting of an exemption is rather clearly a privilege. No judicial enforcement lies to compel the Board to extend exemption authority to any carrier, whatever the carrier's qualifications or needs. But the
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Standard case\(^{227}\) had held as early as 1947 that an administrative agency cannot make an otherwise invalid proviso a condition to the grant of a permit.\(^{228}\) Once an exemption has been granted, the fact that it could have been denied without a hearing does not mean that the agency has retained the right to terminate the exemption without a hearing. Intervening considerations come into focus, the most notable being the constitutional prohibition against the taking of property without due process being afforded the complaining carrier.

While property is not taken by the denial of an application for an exemption, in most cases property clearly is affected when an exemption is terminated after a decade of use by a carrier. "Nothing in the nature of things requires that courts should refuse legal protection to interests that have been in other contexts denominated privileges."\(^{229}\) Professor Davis further points out that "even if we fully accept the right-privilege dichotomy, government disposition of issues concerning privileges or even gratuities may affect rights, and therefore the courts may properly require procedural fairness."\(^{230}\) The Supreme Court's treatment of the privilege doctrine in Slochower v. Board of High Education\(^{231}\) is a clear demonstration of the court's willingness to subordinate the concept of privilege to the needs of justice and sound policy.

Let there be no confusion here: the privilege concept is useful to decide many cases, but it can serve to confuse an issue by providing only a label to justify a predetermined conclusion. In borderline matters, and most important questions arise in the shadow area, the essential issue is whether the particular investment is worthy of judicial safeguards as represented by greater procedural requirements. In the final analysis, the privilege concept cannot support the Great Lakes decision because it is simply too unfair and burdensome, and hence violative of due process, to encourage a private party to invest money and property over a period of years without a guarantee that he will be entitled to an evidentiary hearing should the government seek to terminate his operating authority.

Somewhere between the Great Lakes decision and the result in American Air Transport, a middle ground must be reached. For while the latter case would cure the defects of the former, it has been noted at numerous points in the discussion that conferring licensee status on all exemption holders would work too great an imposition upon agency procedures and virtually negate the beneficial use of the exemption provision.

\(^{227}\) 177 F.2d 18, 20 (D.C. Cir. 1949).
\(^{228}\) Citing FCC v. Sanders Radio Station (109 U.S. 470 (1940)). That case had held that an existing radio station had a sufficient interest to obtain judicial review of an FCC order granting the application of a new station to commence operations. The FCC had argued that the existing station did not have a right to a hearing to protest the Commission's action, and therefore did not have access to judicial review. The case was evidently cited for the proposition that the FCC could not, as a condition of granting the original license to the existing station, bar that station from seeking judicial review of subsequent Commission decisions which seriously affected the interests of the existing station.
\(^{229}\) Davis, op. cit. supra note 214, at § 7.12.
\(^{230}\) Ibid.
\(^{231}\) 350 U.S. 511 (1952). In Slochower, the Court was faced with its previous decisions that public employment is only a privilege and that "due process of law is not applicable unless one is being deprived of something to which he has a right" (Bailey v. Richardson, 182 F.2d 46, 58 (1950), affirmed by equally divided court, 341 U.S. 918 (1951)). See also Adler v. Board of Education, 342 U.S. 485, 492 (1952). The Court nonetheless reversed, as violative of due process, the discharge of a city college professor who had claimed the privilege against self-incrimination when testifying before a Congressional committee.
A. Suggested Remedies

1. The Administrative Court

The concept of an Administrative Court appears to be of little relevance to the problems arising from the CAB's exercise of the exemption powers. The Hoover Commission, which made a strong recommendation that such a court be established, contemplated only a selective transfer of the agencies' peculiar judicial functions to the Administrative Court. The Commission urged the transfer of the jurisdiction of the Federal Trade Commission to issue cease-and-desist orders under the Clayton and Federal Trade Commission Acts, and also the transfer of the jurisdiction of the National Labor Relations Board to issue orders forbidding unfair labor practices. On the Task Force, twelve of the fourteen members joined in recommending that the NLRB's unfair practice jurisdiction be transferred and all but five recommended that the Court be given jurisdiction over cases involving exclusion, deportation, and incidental powers over aliens. Generally, the functions recommended for transfer as soon as possible were the imposition of money penalties, the remission or compromise of money penalties, the award of reparations or damages, and the issuance of injunctive orders.

Whatever the valid criticism leveled at the theory of an Administrative Court, a perfunctory analysis of the proposed scope of the Court leaves little question that a function as singularly discretionary as the exemptive power was not considered for transfer. While certain trial or judicial procedures are deemed essential where the revocation of a carrier's exemption authority is based on adjudicative facts, forcing the Board to pursue a full court proceeding to revoke, terminate, or modify an exemption capable of being granted or denied with no restraints whatsoever, would destroy the flexibility and speed of administration which are the inherent attributes of the exemption power. It is submitted that the governing philosophy of the Hoover Reports—"The more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process"—is simply too broad a generalization which fails to recognize many of the beneficial characteristics of the administrative process; characteristics which would be destroyed by judicialization, and which include the exemption power discussed herein.

2. Rules of Evidence and Strict Procedures

The same destructive effect upon the exemption power would occur should another suggested form of judicialization be introduced into the administrative process. Reference is made here to the recent American

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233 Task Force 242.
234 Commission Report 86.
235 Task Force 280.
236 Id. at 269.
237 Id. at 242.
239 See note 229 supra and accompanying text.
240 Task Force 138 (Italics in original).
Bar Association proposals to require hearings generally to be conducted in conformity with the Federal Rules of Civil Procedure, and to isolate the Hearing Commissioner from all agency and staff personnel. The exercise of the exemption authority in particular, and of administrative authority in general, is not amenable to strict rules of evidence and the procedural technicalities normally associated with the judicial branch. Matters of national interest and the requirements of an interstate air transportation system do not lend themselves to cross-examination or to the necessity of direct, rather than hearsay, testimony. The isolation of the Hearing Commissioner in an exemption modification case such as Capitol, and the requirements of the rules of evidence can only prolong a process whose chief characteristic had been speed and flexibility.

As Fuchs has pointed out, the essential problem is to set the measure of safeguards against unfairness and abuse in the agencies against the danger of impairment of government effectiveness. Indiscriminate overjudicialization only weights the balance too far to one side, and as typified by its probable effect on the CAB's exemptive powers, could lead to strangulation of a process originally created to avoid the stringent requirements of the judicial concept. In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. If the experiment has failed in terms of political theory, the failure should be met head-on and not obscured by radically altering the original experiment to a point where it will become unrecognizable.

The critical problem in the exercise of the exemption power was discussed at length in the Great Lakes analysis. In the interests of speed and efficiency, the Board sought to combine a broad rule-making function with a particularized decision to terminate a carrier's exemption authority. An Administrative Court solution to such a problem in administrative law is the classic slaughter of an ant by the use of a steamroller. The remedy is simply not appropriate to the problem. While the factors of time and space preclude further references to the administrative process in general, the same inappropriateness of remedy is perhaps characteristic of those proposals which seek to remove or compartmentalize every vestige of the judicial process now existing under administrative control.

Insofar as the Great Lakes issue is concerned, the ABA proposal to redefine rule-making to exclude statements of particular applicability and to refer only to statements of general applicability and future effect implementing, interpreting, or declaring law or policy, would effectively bar a second Great Lakes decision. The Board would be precluded, in a rule-making proceeding, from making a determination on the merits of a par-

242 Section 1006(d) of the proposed Code.
243 Section 1005(c) of the proposed Code.
244 Capitol Airlines v. CAB, 292 F.2d 755 (D.C. Cir. 1961). See also note 209 supra and accompanying text.
245 Fuchs, The Proposed New Code of Administrative Procedure, 19 Ohio St. L.J. 423 (1958). The author points out that in the past few years the trend has been towards increased government effectiveness. He speaks approvingly of this trend, and notes that if it fails to continue a significant impairment of government regulation will occur.
247 See Ch. IV D supra p. 287.
248 Section 1001(c) of the proposed Code.
ticular carrier's authority. In such an instance, administrative convenience would bow to considerations of strict procedures and protection for the individual carrier, but this does not endorse the proposition that an Administrative Court provides the only solution to past agency failures to protect individuals from procedural unfairness.

3. Davis: Limit Hearings to Adjudicative Facts

As suggested earlier, licensing all holders of exemption authority is not an ideal solution, for the procedures envisioned by licensing would rob the Board of its freedom of action under Section 416. But a closer adherence to Professor Davis' adjudicative-legislative fact distinction would provide the essential protection for individuals which basic due process considerations demand. Agency decisions respecting facts peculiar to certain carriers are those decisions which must be preceded by greater procedural formalities than determinations based on general facts or policy. The Board would thus remain free to terminate a carrier's or group of carriers' exemption authority if the interests of national security or if the total air transportation system so require, a power which would be denied to the Board if exempt carriers were deemed license holders (absent adjudicatory hearing for each affected carrier). Yet so long as adjudicative fact determinations are identified, sufficient protection is afforded from unfavorable agency decisions based on the past conduct of a carrier or on similar, personalized facts. A result such as Great Lakes would remain unsupportable, as would the Board's decision in American Air Transport, yet the vast apparatus of the judicial process need not be injected into the administrative sphere.

B. Administrative Discretion: No Solution In Sight

By examining in some detail a singularly administrative function, the elemental advantages and dangers inherent in the administrative process have been brought into sharp relief. While it is true that the powers enjoyed by the CAB under Section 416 are unique in several respects, it is submitted that these powers embody the classic concepts of agency expertise and broad discretion which the administrative process was designed to provide.

No other branch of government is equipped to administer a continuing policy of regulation, promotion and supervision of one of the nation's biggest industries, the air transportation system. The power to exempt carriers from the initial legislative requirements is an integral part of the process of governmental control in the public interest. The inability of the legislature to supply continuing regulation is evident by its delegation of power to an administrative body. To subject the nation's regulatory process to the political vagaries of the executive branch has long since been rejected in theory. The disadvantages, both in terms of policy and procedure, of ceding such authority to the judiciary are patent from the prior analysis. The responsible exercise of administrative discretion remains the only solution in sight.

249 See note 222 supra and accompanying text.