1965

Trends in Federal Administrative Procedure

John L. FitzGerald

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
John L. FitzGerald, Trends in Federal Administrative Procedure, 19 Sw L.J. 239 (1965)
https://scholar.smu.edu/smulr/vol19/iss2/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
TRENDS IN FEDERAL ADMINISTRATIVE PROCEDURE*

by

John L. FitzGerald**

I. INTRODUCTION

A
nd in the development of our liberty insistence upon procedural
regularity has been a large factor.¹

It is the purpose of this Article to survey significant procedural
developments in federal administrative practice and procedure. The
topics to be considered within this broad area are (1) investigational
procedures, (2) the steps of the adjudicative process—the hearing
before the presiding officer, his decision, its review and the agency de-
cision—and (3) substantive rule-making procedure. In the process
we should be able to observe the extent to which these developments
have tended to promote maximum freedom of person and property
compatible with Congressionally directed governmental regulation.

First, however, brief mention should be made of three general legis-
lative efforts in the area of federal administrative procedure, one per-
fected and two in evolution. The Administrative Conference of the
United States, patterned somewhat after the Judicial Conference of
the United States as an instrument to recommend administrative pro-
cedural reform, was created by statute on August 30, 1964.² The
Senate Judiciary Committee, through its Subcommittee on Admin-
istrative Practice and Procedure, is pressing strongly for the right of
every attorney in good standing before the Bar of his state to qualify
without further examination as a practitioner before federal agencies.³

* Portions of this Article appeared in substantially the same form in 1964 Proceedings,
Association of American Law Schools, pt. 1 at 30-36. The consent of the Association to
the reproduction of such portions is gratefully acknowledged.

** B.A., LL.B., University of Washington; LL.M., Harvard University; S.J.D., George-
town University; Professor of Law, Southern Methodist University; Member, Board of Con-
sultants, Subcommittee on Administrative Practice and Procedure, Senate Judiciary Com-
mmittee; Member of Council, Administrative Law Section, American Bar Association; Chair-
man, Ordinance and Administrative Regulations Committee, Local Government Law Sec-
tion American Bar Association; General Counsel, Federal Communications Commission,
1958-61.

¹ Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting), quoted in
Att'y Gen. Comm. on Administrative Procedure, Administrative Procedure in Government


³ To this end, S. 1466, 88th Cong., 1st Sess. (1963), was approved by the Senate De-
cember 6, 1963, but was not acted upon by the House of Representatives; it is being re-
introduced in the 89th Congress, however. For years this right has been recognized in prac-
tice or under the rules of a number of federal agencies.
On a broader scale the Committee is addressing itself with concern to a sweeping revision of the Administrative Procedure Act,\(^4\) reflective of the public interest in efficiency of governmental affairs and the individual interest in procedural due process and in Government policymaking.\(^6\)

II. INVESTIGATION

A. Witnesses' Right To Counsel

Generally, agency rules deal in limited fashion with the right to counsel in investigatory proceedings.\(^7\) Recently, however, the Federal Trade Commission amended its rules\(^8\) to adopt the principles laid down in *Mead Corp.*\(^9\) regarding a witness' right to representation by counsel in investigatory proceedings. The new Securities Exchange Commission rules seem at least equally liberal.\(^10\)

*Mead* apparently is patterned largely from two recent decisions of the federal district courts.\(^11\) In the case, the FTC extended the

---


A comprehensive appraisal of the continuing need for administrative procedural reforms is contained in Fisk, *Legislation and Administrative Law*, 17 Ad. L. Rev. 115 (1961), weighing the provisions of the Administrative Procedure Act, the proposed "Code of Federal Administrative Procedure" popularly referred to as the ABA Code (embodied in S. 2335 in the 88th Congress), and S. 1663 (88th Congress) as revised by committee print dated April 20, 1964 of the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure.

\(^6\) See, e.g., 47 C.F.R. § 1.1 (1965) (FCC governed by *ad hoc* judgment of Commission); cf. 14 C.F.R. § 301.9 (1961) (CAB) (right to counsel expressly given to witnesses in informal nonpublic investigations); See also 29 Fed. Reg. 6460, 6473 (1964), proposing a Federal Maritime Commission rule (46 C.F.R. § 502.290) limiting the right of a compulsory witness in an investigation to be accompanied by counsel.

\(^7\) 16 C.F.R. § 1.36 (Supp. 1965).

\(^8\) 10 Ad. L. Dec. 2d 117 (FTC 1963).

\(^9\) In an SEC investigatory proceeding in which a witness is sworn under Commission order, such proceeding being termed a "formal investigative proceeding," 17 C.F.R. § 203.4, (Supp. 1965), the witness is entitled to counsel who, in turn, may advise the witness and question him "briefly at the conclusion of the examination to clarify any of the answers such person has given. . . ." 17 C.F.R. § 203.7(c)(1)-(2) (Supp. 1965). Moreover, unless otherwise ordered by the Commission, if the record contains implications of wrongdoing by the witness, he shall have a reasonable opportunity for cross examination and production of rebuttal testimony or documentary evidence. The determination of reasonableness is vested in the officer conducting the investigation, and contemplates a balancing of a full opportunity to the person to be heard with considerations of administrative efficiency and avoidance of undue delay. 17 C.F.R. § 203.7(d) (Supp. 1965).

customary rights of a subpoenaed witness to be accompanied by counsel and to be personally advised by counsel by according to counsel the broader representation rights to object to questions asked of the witness he represents and to state his reasons on the record. *Hannah v. Larche* was distinguished as involving a more general investigation, indicating the FTC may restrict its liberalized policy to an investigation leading to possible adjudicative proceedings involving the witness. This indication is not expressed in its revised rule 1.36; however, that rule is one of a series related to investigation of possible violations of law and of FTC cease-and-desist orders.

An investigation of a broad nature did not deter a United States district court in *FCC v. Schreiber* from coming to essentially the same conclusion as the FTC had reached in *Mead*. The trial court's order, however, was modified on appeal, with the effect that counsel representing a "program packager" under a subpoena duces tecum in a general FCC inquiry into sources and practices involved in television programming was precluded from raising objections on the record before the presiding officer. A divided Court of Appeals for the Ninth Circuit concluded that the term "represented" in section 6(a) of the Administrative Procedure Act failed to confer such a right in a non-adjudicative proceeding. The dissenting judge disagreed, supporting his seemingly more logical construction by reference to the legislative history of this subsection, the Attorney General's Manual on the Administrative Procedure Act and Bulletin No. 7 of the Administrative Conference of the United States.

The FCC petitioned for certiorari, raising an issue dealt with under the final heading of this Article. Several months after the Court of Appeals' decision, the FCC amended its procedural rules to permit counsel for a subpoenaed witness in an investigative proceeding to make objections on the record and to state briefly his reasons therefor. The Supreme Court, granting certiorari on the issue to be discussed below, in its decision dealt only in passing with the question of the scope of representation to which a witness is entitled: "Finding this amendment to be 'in accord with respondent's legal posi-
tion on this matter,' respondents did not seek review of the ruling below. Given the change in the Commission's rules, we need not, and do not, express any views as to the legality of the prior rules concerning a witness' right to the assistance of counsel.\footnote{FCC v. Schreiber, 85 S. Ct. 1459, 1466 n. 15 (1965).}

The prior rules (in effect an order of the Commission concerning the manner in which an inquiry proceeding should be conducted), as enforced by the presiding examiner, prohibited a witness' counsel from taking exception to, requesting clarification of, or objecting to any question during the course of interrogation of his client. Counsel could not consult with his client upon his own initiative, but could only do so upon the request of the client and upon approval by the examiner.\footnote{Ibid.}

B. Subpoenas

Generally, certain agencies freely issue subpoenas, although frequently subject to motion to quash; others require a showing of relevancy or materiality before granting a subpoena request.\footnote{Compare 47 C.F.R. § 1.333(b)-(c) (1961) (FCC) and 14 C.F.R. § 102.19(c)-(e) (1961) (CAB), with 29 C.F.R. § 102.31(a)-(b) (1961) (NLRB).} Two recent agency decisions concerning the availability and use of subpoenas are particularly noteworthy.\footnote{Also it should be noted in passing that investigative demands of the Department of Justice, under the recently enacted Anti-Trust Civil Process Act, 76 Stat. 548 (1962), 15 U.S.C. § 1311 (Supp. IV, 1963), broadening the Department's former limited subpoena powers, were recently held to be valid against attack on grounds of unreasonable search and seizure and self-incrimination. Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964).}

In one case the SEC properly denied a subpoena directed to its membership.\footnote{47 San Francisco Mining Exch., SEC Securities Exchange Act Release No. 7247 (Dec. 2, 1964), 15 Ad. L. Dec. 2d 91.} The risk of attaining involuntary judge-witness status under such conditions is obvious and should be avoided in the absence of compelling reasons, such as supported allegations of misconduct. Moreover, freedom of administrative deliberation is imperiled by subsequent judicial investigation into the "mental processes" of the administrator.\footnote{In Union Sav. Bank v. Saxon, 209 F. Supp. 319 (D.D.C. 1962), it was stated that taking the oral deposition of an agency head is not ordinarily allowed; but if the allegation is made that his action in granting a branch-bank certificate was affected by his personal relationship with the president of the bank, an exception is permitted which, however, is restricted to the procedural action taken by the defendant as to the subject matter of the case and not as to the workings of his mind. See also Harvey Aluminum (Inc.) v. NLRB, 335 F.2d 749, 755 (9th Cir. 1964) (direct demands upon the Secretary of Labor and the Attorney General for agency documents do not call into play the “housekeeping regulations” of the departments imposing agency approval requirements upon subordinate employees responding to subpoenas); Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964) (“mental process” rule inapplicable where prima facie case of misconduct is shown).}
In the other proceeding, the FCC Review Board recently granted an appeal from an examiner’s ruling and quashed a subpoena duces tecum issued in behalf of the FCC Broadcast Bureau in a revocation proceeding, on the ground that the subpoena lacked the specificity required by the applicable agency rule. The Board cited with approval a 1955 FCC decision which had adopted the reasoning of Mr. Justice Holmes denouncing issuance of subpoenas for fishing expeditions. Significantly, this Review Board decision applies the same tests to the Commission's prosecuting arm as are applied to private parties. The decision also expresses a more conservative attitude toward Government fishing expeditions, with due allowance for statutory differences affecting agency powers and functions, than may be permissible under Supreme Court opinions subsequent to the Holmes opinion referred to above. It is true, of course, that an agency may voluntarily restrict its exercise of power by procedural rule, and the extreme breadth of the subpoena requested by the Broadcast Bureau seemed heedless of the specificity provision. In a similar vein, the SEC has moved effectively to furnish examiners with express guides to avoid the issuance of oppressive subpoenas.

C. Discovery

Although there is progress toward opening the gates leading to general discovery, it presently is far from being an accepted practice. However, a soft step was taken in this direction with the adoption of Recommendation No. 30 by the Administrative Conference of the United States on December 15, 1962. In so acting, the Conference responded mildly to a forceful and well-documented recommendation—based partly on the not unfavorable experience of those agencies which permitted discovery—of its Committee on Compliance and Enforcement Proceedings. The Conference Report recommended approval of the principle of discovery in agency adjudicatory hearings and the adoption of agency rules permitting discovery to the extent and in a manner appropriate to the proceedings of the particular agency. The Committee, however, had recommended that each agency should pro-
vide for discovery unless restricted by statute from doing so. The Committee was not deterred by the argument that agencies are non-adversary guardians of the public interest; although it considered this and other arguments, the position was taken that fairness to all concerned should be the primary concern of government. In reaching its conclusion in favor of discovery, the Committee further pointed to such factors as (1) the success of pretrial discovery under the Federal Rules of Civil Procedure in expediting proceedings; (2) the predictable decreases in hearing recesses in administrative proceedings and the resulting elimination of the surprise condition with the adoption of discovery rules; (3) the inconsistency between modern acceptance of pre-hearing conferences as an aid to the administrative process and resistance toward its only enforcing arm—the liberal exercise of discovery; (4) the apparently undisturbing experience of the very few administrative agencies which provide for discovery.35

Certain developments in some of the agencies reflect a tendency to allow discovery but excluding information obtained in agency investigations and internal memoranda from the operative rules. The FTC, although progressive in regard to discovery,36 recently exempted from its own discovery rules by ad hoc decision a staff memorandum prepared during unsuccessful consent (nonadjudicative) negotiations preceding the issuance of the complaint.37 The FTC also has established disclosure procedures applicable to special reports forming the basis of an exhibit given counsel, and has stated principles governing the right of inspection of Government files.38 The Civil Aeronautics Board recently amended its pre-hearing rules to allow documentary discovery but excluding government files.39 The National Labor Relations Board40 seems to follow the same policy as the CAB, and the SEC is equally traditional concerning matter gathered in investigations, deeming it confidential.41 In sharp contrast is the FCC which still flatly denies discovery,42 although it currently is re-examining this policy.

The pros and cons of transplanting to administrative proceedings the federal rules of procedure in regard to discovery have been ably

40 See 29 C.F.R. § 102.118 (1965) (NLRB).
discussed elsewhere. The Administrative Conference Committee met the problem well in formulating its recommendation mentioned above. Its confidence in the judgment of hearing examiners, operating within the area of discretion suggested by the Committee, appears reasonable; moreover, undue amendments of the working paper doctrine (particularly in the adjudicatory realm) and risks relative to national security, foreign affairs and trade secret information would properly be avoided under the Conference's proposal.

III. THE ADJUDICATIVE PROCESS

A. The Hearing

1. Pre-hearing Conferences

   Pre-hearing conferences, of course, are no new device in administrative practice, especially since the Presi-


44 See text accompanying notes 34-35 supra.

45 This doctrine immunizes the staff work sheets of an agency from disclosure to the public or to parties or participants in agency proceedings except in extraordinary circumstances. The classic development of the doctrine—assiduously followed by a long line of Attorneys General of the United States—appears in Walkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. B.J. 103, 223, 319 (1964). There is doubt, however, that the basis for the doctrine is that the agencies, rather than the courts, are the arbiters of the "public interest;" this doubt is not too clearly conveyed by the positions of various Attorneys General. On March 30-April 2, 1965, the House Government Operations Committee, Foreign Operations and Government Information Subcommittee under the Chairmanship of Congressman John E. Moss, held hearings upon H.R. 5012 89th Cong., 1st Sess. (which in substance was approved by the Senate in 1964), a bill to amend 72 Stat. 547 (1918), 5 U.S.C. § 22 (1938), narrowing the authority of federal officials and agencies to withhold information and limit the availability of records.

For a painstaking and scholarly review of the "housekeeping" statute, its inapplicability to the NLRB, and the restrictions which should govern such an agency's assertion of (1) the working paper doctrine and (2) the withholding of employees' testimony or agency records, as applied to adjudicatory proceedings, see Judge Hamley's recent opinion in General Eng'r, Inc. v. NLRB, 341 F.2d 367 (9th Cir. 1965).

46 In E. W. Bliss Co. v. United States, 203 F. Supp. 175 (N.D. Ohio 1961), a taxpayer suing the United States moved for the production of certain transmittal letters. The court held that he was not entitled to the letters, because their production did not appear to be essential to the proper presentation of his case. The court stated that normally it would compel production if the Government were a party to the suit, but that it would proceed more slowly in the area of inter-agency advisory opinions. The court quoted with approval the following language from United States v. Proctor & Gamble Co., 25 F.R.D. 485, 489 (D.N.J. 1960): "[T]he Government, operating as it does through a hierarchy of agents, must have the benefit of their full, free advice, and since those advice might well cover angles of a case which would hamper the Government's action if publicized, normally these advice should not be turned over to those with interests hostile to that of the Government." 203 F. Supp. at 176. See also Coro, Inc. v. FTC, 338 F.2d 149 (1st Cir. 1964), holding that a respondent may not attempt by subpoena duces tecum to explore generally FTC "policies and practices" with respect to the Commission's disposition of other cases in order to establish discrimination against the respondent.
dent's Conference on Administrative Procedure in 1953. They increasingly are provided for expressly in amended rules.47

2. Interlocutory Appeals Interlocutory appeals, once a bugaboo in the path of expedited hearings, are being formally abjured more and more except in limited situations.48 Although the FCC does not so express itself formally, it has inserted a footnote to its rules49 as a means of semi-codifying its past adjudicatory pronouncements admonishing parties not to file interlocutory appeals unless the alleged defect in the appealed ruling of the presiding officer is fundamental and affects the conduct of the proceeding. The FTC's procedural expression is that such appeals are to be limited to "extraordinary circumstances," a novel drafting touch relieved somewhat by brief explanation.50

3. Disqualification of Presiding Officer Two patterns generally are followed regarding the disqualification of a presiding officer. The first is illustrated by the SEC procedure. That agency leaves requests for disqualification with the examiner (except, of course, as the case comes before it on the exceptions taken by a party to the hearing examiner's initial decision), who need not either respond to a request that he disqualify himself or otherwise give reasons for not doing so if that is his determination.51 The second pattern is illustrated by the FTC approach. In contrast to the SEC, the FTC determines the matter of an examiner's disqualification as an agency question upon motion duly made.52 The practice of the FCC53 is similar to that of the FTC. An intermediate position is taken by the NLRB, which requires the filing of an affidavit and a ruling on the record if the examiner refuses to disqualify himself.54

4. Admissibility of Evidence Two approaches to the admission of evidence may be observed. The NLRB, for example, provides that "so

47 See, e.g., 47 C.F.R. §§ 1.241, 1.243(h) (1965) (FCC). For an example of a mandatory pre-hearing conference rule, see 16 C.F.R. § 3.8 (Supp. 1961) (FTC) (pre-hearing conference must be held if it appears probable to the hearing examiner that a hearing will extend for more than five days; standards prescribed for the scope of such conference). See also Uniformity in Rules for Agency Adjudication: A Comparison of the CAB, FTC and FCC Rules, 14 Ad. L. Rev. 260, 270-71 (1962). In documentary support of the case for greater uniformity among the agencies in rules of practice and procedure they adopt on common procedural subjects, see Committee on Uniform Rules for Agency Adjudication, 15 Ad. L. Rev. 167 (1963), and ABA Section of Administrative Law, Annual Reports of Divisions and Committees, Vol. 1 (1964).
50 16 C.F.R. § 3.20 (Supp. 1965) (FTC).
51 17 C.F.R. § 201.11 (c) (1964) (SEC).
52 16 C.F.R. § 3.13 (g) (2) (Supp. 1965) (FTC).
54 29 C.F.R. § 102.37 (1965) (NLRB).
far as practicable" the rules of evidence applicable to non-jury trials in the United States district courts under the Federal Rules of Civil Procedure shall control; the ICC and FCC rules are similar. With this probable minority policy may be compared the SEC rules, which restate the pertinent provision of the Administrative Procedure Act. Section 7(c) of the Administrative Procedure Act directs a policy of excluding irrelevant, immaterial, or unduly repetitious evidence, and requires that decisions be supported by reliable, probative and substantial evidence; the section, however, does permit any oral or documentary evidence to be received. It is significant that the NLRB and the FCC, the two agencies involved in the greatest number of administrative appeals during fiscal year 1963, have apparently found their adjudicative hearings expedited by closer adherence to the rules of evidence, thereby maintaining smaller dockets and shorter hearings. It thus would appear that the unfortunate effects of the language in Donnelly Garment Co. v. NLRB have gradually receded as the need for expedited hearings has been stressed by Congress, by the information contained in the 1955 and 1962 Final Reports of the Administrative Conferences called by former Presi-

---

56 47 C.F.R. § 1.351 (1964) (FCC); 49 C.F.R. § 1.75 (1963) (ICC). See also 39 C.F.R. § 204.16(a) (1962) (Post Office Dep't proceedings involving second-class mailing privileges).
57 17 C.F.R. § 201.14(a) (1964) (SEC). Quite similar to the SEC approach is that of the CAB in economic proceedings, 14 C.F.R. § 302.24(b) (1961), of the FTC, 16 C.F.R. § 3.14 (Supp. 1965), and of the FPC, 18 C.F.R. § 1.26(a) (1961).
58 Administrative Procedure Act § 7(c), 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1958), which reads in part as follows: "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."
61 123 F.2d 211 (8th Cir. 1941). In this case the court reversed the Board on grounds of due process because the examiner had excluded material evidence. The court's opinion contains such expressions as the following:

In an earlier case . . . we expressed the opinion that the practice which should be followed by a trial examiner in taking evidence and ruling upon objections to evidence is that which applies to special masters in equity proceedings, and "that the record should contain all evidence offered by any party in interest, except such as is palpably incompetent" . . . If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or re-hearing cannot be avoided. We say this in the hope of preventing a repetition of what occurred in the case now before us, and to obviate any misunderstanding as to what the attitude of this Court is with respect to the taking of evidence in a hearing before a special master or a trial examiner. Id. at 224.

As a result many examiners, fearing reversal if they excluded testimony, documents or data other than that which was palpably inadmissible, exercised an abundance of precaution that contributed to long hearings and voluminous records.
sidents Eisenhower and Kennedy and by the statistics developed over recent years by the Office of Administrative Procedure in the Department of Justice.65

5. Official Notice With respect to official notice, the SEC has adopted a rule66 of considerable breadth, excessively so if arbitrarily applied. The rule permits, in part, the Commission to take official notice in its decisions of any matter in its public official records. Notwithstanding the provision that such notice taken of any material fact will entitle the parties to rebuttal opportunity, the initial breadth of the provision evidently permits official notice of what Professor Davis has called "adjudicatory facts"67 from any other hearing record which may be no part of the expert equipment of the agency and be quite prejudicial to present parties upon whom is cast an undue and improper burden. The Attorney General's Manual on the Administrative Procedure Act, it should be noted, states that official notice "extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge."68 Under the SEC rule, the examiner must list all matters that are officially noticed69 from the Commission's files. In contrast to the SEC, the FTC recently ruled that it may take notice of records in other cases before it involving the same respondent, a not uncommon practice.

6. "Written Case" Method Like the swelling tide of pre-hearing conferences that followed the 1953 President's Conference on Administrative Procedure, so also has the "written case" method recommended by that Conference reached substantial proportions by either rule or process.61 John C. Doerfer, former chairman of the FCC, explained the pioneering efforts of that agency in this direction at

---

67 1 Davis, Administrative Law §§ 7.02, 15.03 (1918).
70 Bakers of Washington, Inc., 15 Ad. L. Dec. 2d 334 (FTC 1964). But see NLRB v. Johnson, 310 F.2d 550 (6th Cir. 1962), holding such practice to be erroneous unless the employer is afforded an opportunity to make a contrary showing (although NLRB upheld on the basis of other independent evidence showing commission of unfair labor practice by respondent-employer).
71 Examples in point are 14 C.F.R. §§ 302.23(a), 302.24(f)-(h) (1965) (CAB); 47 C.F.R. § 1.231(d) (1961) (FCC); 49 C.F.R. § 1.77 (1963) (ICC) (providing for the admissibility of prepared statements not inclusive of argument). This is not to say, however, that verification and cross examination are precluded.
an Institute conducted by the Administrative Law Section of the American Bar Association in late 1958 in this manner:

At the pre-hearing conferences . . . the parties . . . shall be prepared to discuss the advisability of reducing any or all phases of their affirmative direct cases to written form. Where it appears that it will conduce significantly to the disposition of the proceeding for the parties to submit any portion of their cases in writing, it is the policy of the Commission to encourage them to do so. However, the phase or phases of the proceeding to be submitted in writing, the dates for the exchange of the written material, and other procedural limitations upon the effect of adopting the written case procedure (such as, whether material ruled out as incompetent may be restored by competent oral testimony) is to be left to agreements of the parties as approved by the Hearing Examiner. . . .

As is implied above, the written case procedure has rested largely upon a consent basis. The Administrative Conference of the United States, in its Recommendation No. 19 dealing with formal rate hearings, strongly advocated that rate applicants be required “to the extent permitted by law” to submit their cases on a written basis and be limited in cross examination to interrogation which “would make a useful contribution.” Section 7(c) of the Administrative Procedure Act relaxes the hearing requirements with respect to initial licensing and rule-making on the record (such as rate hearings) by permitting the receipt of evidence in written form, but it is subject to the express condition that the interest of any party shall not be prejudiced thereby. The Conference explained that its recommendation (not all of which is reflected above) would afford relief to the problem of delay in rate-making.

It is an obvious fact that much actual “trial” hearing time is saved under the written case method; however, this does not necessarily con-

---

72 Final Report of the Administrative Conference of the United States 15-16 (Dec. 15, 1962). In a current analytical and statistical study by Stuart Nagel and Constantine Curris entitled The Exercise of Procedural Discretion by the Regulatory Agencies, evaluating data collected in the so-called Dawson Committee Survey (Staff of the House Committee on Government Operations, 85th Cong., 1st Sess., Survey and Study of Administrative Organization, Procedure and Practice in the Federal Agencies, Comm. Print 1957), three interesting inferences emerge. 17 Ad. L. Rev. 173, 181-83 (1965). Thus, a table constructed to compare the relation between oral presentation and length of adjudication proceedings revealed that the FTC which had instituted a procedure of not allowing oral testimony had “relatively long examiner proceedings”, whereas “five of the six [regulatory] agencies that allow oral evidence had relatively short trial examiner proceedings”. Id. at 181. It was also found that agency encouragement of prehearing conferences tended to hold down backlogs of proceedings, as did delegation of larger discretion to hearing examiners over proceedings. Id. at 182-83.
serve actual hearing process time because the exchange of exhibits can cause more delay than the actual examination of witnesses. Moreover, no matter how religiously the rules may admonish against conclusionary, argumentative or self-serving matter in the exhibits, it takes more imagination and less experience to expect Utopia in adjudication; the brand of cynic need not be accepted if the presence of unsifted data for argument on the issues is foreseen. Unlike the examiner, the agency on review deals with a paper record which, if unsifted in this respect, will increase the review workload.

7. Submission of Proposed Findings and Conclusions  Agency rules generally provide for the submission of proposed findings and conclusions to the presiding officer when a hearing has been completed. Generally, the agencies have made no provision for the time in which proposed findings and conclusions must be filed. An exception is the SEC. That agency also permits the filing of briefs in support of proposed findings, but declares that a proposed finding not supported by briefs is waived.

Most of the rules contemplate a ruling by the examiner upon the findings and conclusions as a part of the record, at least insofar as they are material to the issues. However, uncertainty is introduced by the FTC provision which exempts matters on which the examiner's decision "otherwise informs the parties of the action taken by him thereon." But this ambiguity is minor compared with the court-like position assumed by the ICC, whose applicable rule permits an examiner to announce an oral decision and to cause the prevailing party to prepare the recommended order or report.

8. Oral Argument  Generally, oral argument is either a matter of right or—much more frequently—within agency discretion. Under the NLRB rules, for example, a party is entitled to oral argument

---

74 17 C.F.R. § 201.16(e) (Supp. 1965) (SEC) (left to hearing officer's discretion, subject to first filing being made within at least sixty days after close of hearing).
76 See, e.g., 47 C.F.R. § 1.267(b) (1965) (FCC).
77 16 C.F.R. § 3.19 (Supp. 1965) (FTC).
before the presiding officer at the close of the case. Under the FCC rules, however, such argument is discretionary. It is probable that hearing examiners allow oral argument whenever it can serve a useful purpose.

A general reason for favoring the NLRB type of rule is its recognition as a matter of policy that closing arguments tend to crystallize the important issues in and other features of the particular case through emphasis and summation after all the evidence is in; on review, an agency benefits greatly from such arguments as preserved in the record. It must be remembered that the closing stage of the hearing before the examiner quite often, if not usually, is the terminus for both physical appearance and argument of the parties and their counsel. Oral argument before the examiner serves the additional functions of (1) tying the case together before the examiner writes his decision and, more important, (2) causing him to review the proposed findings and conclusions in advance of argument and then through questioning to bring additional light to bear on the conflicts usually presented by the evidence.

Frequently, exceptions to initial decisions are little more than paraphrases of the proposed findings and conclusions which are submitted to the examiner but which are not adopted in substance by him in his recommended or initial decision; this is particularly true when recommended or initial decisions are essentially narratives of the examiner's findings and conclusions, rather than sharp analyses and reasoning addressed to the submissions on the issues. It would seem,

79 29 C.F.R. § 102.42 (1965) (NLRB).
80 47 C.F.R. § 1.277(c) (1965) (FCC).
81 The FTC rules make no reference to such argument. See 16 C.F.R. § 1.19 (Supp. 1965). With the SEC the matter is made completely discretionary. 17 C.F.R. § 201.16(g) (Supp. 1965). The FPC permits oral arguments under stated guidelines. 18 C.F.R. § 1.29(b) (1961). By implication the ICC permits argument upon reasonable request. 49 C.F.R. § 1.88 (1963). Although the Administrative Procedure Act provides for the opportunity to file proposed findings and conclusions and supporting reasons therefor, it does not require the agencies to make provision for oral argument. Act § 8(b), 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958). The act also requires rulings upon the proposed findings and conclusions presented. Ibid.
82 In the case of the FCC, the narrative approach that has often been followed in initial decisions may very well trace to a mistaken pronouncement of the Commission itself in Lyman C. Brown Enterprises, 7 Radio Rep. 1272, 1284 (1953): "The Administrative Procedure Act does not require the Examiner to make and show her ruling upon each proposed finding and conclusion, when, as is the practice of the Commission, all exceptions to an Initial Decision are ruled upon individually and specifically."

True, the examiner need not rule upon every proposed finding that he rejects; a residuum of quasi-judicial discretion permits him to reject summarily those that are neither material nor relevant, but he should rule upon the others. The Administrative Procedure Act so requires. Section 8(b), 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958). Certainly the expression of the Commission quoted above finds no support in law; in fact it is directly contrary to the views of the Supreme Court, speaking through Mr. Justice Frankfurter, in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
therefore, that the adjudicative product could be improved considerably (1) by adhering strictly to the Administrative Procedure Act\textsuperscript{83} by specifically ruling upon proposed findings and conclusions (thereby eliminating the indefinite thread of "implicit" rulings common in narrative initial decisions) and (2) by holding oral arguments prior to the initial decision, except in proceedings which present no substantial areas of conflict.

9. Modified Procedure One matter for proper agency concern is that of fruitless hearings, e.g., held upon contentions of parties that lack substance. The line is not easy to draw as to when an agency may refuse to grant a hearing provided by statute on the ground that no useful purpose could be accomplished thereby because a true issue of material fact has not been presented by the individual who seeks an opportunity to present evidence in a formal proceeding. Dismissals of such requests have been upheld on \textit{de minimis} grounds, but in a narrow range.\textsuperscript{84} Oral argument before the agency to determine whether a factual or legal issue should be developed in a hearing has been approved in a restrictive manner.\textsuperscript{5} It is established, of course, that issues of fact need not be heard that in effect challenge the validity of an authorized substantive regulation. But since the agencies act chiefly on a flexible basis, the solace of the authorized rule is often not available because they have not seen fit to promulgate the permissible rules.

Recently some attention has been directed toward a form of "modified procedure" under which the agency, if it determines that no material question of fact has been raised, refuses in part or absolutely to extend the usual due process hearing rights to those claiming them. At once two problems appear: Is a constitutional or statutory right to a full hearing violated, and how much discretion does the agency thereby vest in itself—if reasonably applied today, may it be \textit{quo vadis} tomorrow?

\textsuperscript{84} FCC v. WJB, The Goodwill Station, Inc., 337 U.S. 465 (1949); Superior Oil Co. v. FPC, 322 F.2d 601, 609 (9th Cir. 1963), \textit{cert. denied}, 377 U.S. 922 (1964); Interstate Broadcasting Co. v. FCC, 283 F.2d 5270 (D.C. Cir. 1960); Red River Broadcasting Co. v. FCC, 267 F.2d 653 (D.C. Cir. 1956). A local United States district court rule that permits only the movant for summary judgment to request oral argument on the motion is invalid, as too inflexible to meet the varying requirements of due process presented by differing circumstances. Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964), reversing and remanding the decision of a federal district court that granted summary judgment on the motion of the Government, without oral argument, such judgment denying plaintiff's petition for review, by injunction and declaratory judgment, of an Interior Department decision invalidating plaintiff's mining claims on the ground there had been no valid discovery of minerals.

\textsuperscript{5} Federal Broadcasting Co. v. FCC, 239 F.2d 941 (D.C. Cir. 1956); Harbenita Broadcasting Co. v. FCC, 218 F.2d 28 (D.C. Cir. 1954); \textit{cf.} Elm City Broadcasting Co. v. United States, 235 F.2d 811 (D.C. Cir. 1956).
If used with care, there is reason to believe that the long-term objective of eliminating excessive adjudicative delays may be realized more practically by studying closely the summary judgment of the courts. Much may be said in behalf of the summary judgment procedure. Hearings should not be held needlessly. Pleadings may disclose no issuable proceeding if they rest upon allegations in non-conformance to the law or upon established substantive regulations, or if on their face they raise no substantial question of fact. In the latter category, however, quagmires of doubt assail the agency staff because it recognizes that court reversals of agency orders are based normally on procedural defects and rarely on errors of substance. Yet important progress could be made if (1) more pleadings in support of applications were required to be submitted in affidavit form and (2) the agencies were given discretion to require that the allegations contained in pleadings so filed must be verified by persons having knowledge of the facts and not rest upon the quicksand of information and belief. In this connection one of the 1960 amendments to the Federal Communications Act offers a most practical model, although it is confined to only a single area of FCC activity—the handling of protests (usually by existing licensees) to the granting of radio station applications. Obviously, if both verification and affidavit are required, the pleader will give considerable thought to the substantiality of the facts he may prudently allege. If provisions of this kind do not assist in removing cases on the borderline as to whether substantial questions of fact have been presented requiring a hearing, it is suggested that such cases could be ordered (by provision in procedural rules) to a pre-hearing conference before an examiner, to whom power would be delegated to dismiss upon a finding of insubstantiality. This suggested procedure would be effectuated partially by legislative provision and partially by administrative rule.

Several of the agencies have taken steps in the direction of utilizing modified procedures. The FTC, for example, provides for specificity in the complaint and answer; if specificity is lacking, the effect is one of admission. The SEC provisions are similar. Also significant is that in addition to defining "modified procedure," the ICC provides for verified pleadings and personal knowledge of facts.

---

88 Federal Communications Act of 1934, § 309, 48 Stat. 1081, as amended, 47 U.S.C. § 309(d)-(e) (Supp. IV, 1963). The FCC rules also provide for the simple waiver of hearing by consent of all parties, a procedure that has not been employed to date, so far as can be discovered. 47 C.F.R. § 1.601 (1965) (see subsection (e) thereof prescribing the form of waiver to be used).
87 16 C.F.R. § 3.4-3.5, especially § 3.5(b) (1) (ii) (Supp. 1963) (FTC).
86 17 C.F.R. § 201.7, especially (c) (1964) (SEC).
89 49 C.F.R. § 1.5(k) (1963) (ICC).
Unfortunately, however, at least two agencies appear to have attempted by procedural rules to eliminate hearings under circumstances that would not fall within the concept of the summary judgment adhered to by the courts; this situation is created by the failure of these agencies to provide reasonable administrative standards for the granting vel non of a hearing. The ICC retains discretionary power to determine what oral evidence may be introduced and whether the facts are material enough to warrant a hearing for the sole purpose of cross examination. The opportunity for arbitrary action and process under these rules (especially the latter) suggests the conclusion that the ICC could trespass upon the minimum procedures of the Administrative Procedure Act; moreover, basic concepts of fairness would seem to require provision for more specific standards in its rules for "modified procedure." Similarly, the NLRB provides that in consent election agreement cases, the Board may either decide the exceptions or objections forthwith, or require a hearing if it believes that the exceptions raise substantial or material fact issues; if such proceedings are consolidated with unfair labor practices proceedings, however, the usual hearing provisions apply. These agencies, then, have not attempted to formulate reasonable, objective rules for determining what constitutes a sufficiently substantial factual dispute to justify a hearing; instead, rules leave the ordering of hearings to the unrestricted discretion of the respective agencies, which support such rules by substituting a "modified procedure" short of a hearing in those cases involving factual disputes not considered substantial.

B. The Agency Decision

The rules provide generally for the filing of exceptions and other pleadings (such as supporting briefs) directed to the examiner's initial or recommended decision. Time periods for such filings are pre-

---

95 49 C.F.R. § 1.53(b) (1963) (ICC).
96 49 C.F.R. § 1.53(a) (Supp. 1965) (ICC).
98 See also 49 C.F.R. §§ 1.53(a) (modified procedure), (protests) 1.240(c)(4) (Supp. 1965) (ICC).
100 29 C.F.R. § 102.69(e)(1) (1965) (NLRB).
101 29 C.F.R. § 102.46 (1965) (NLRB).
102 29 C.F.R. § 102.69(e)(1) (1965) (NLRB) (proviso).
103 It is fairly common among the agencies to require specificity in the statement of exceptions, supported by page references to the hearing. See, e.g., 29 C.F.R. § 102.46(b) (1961) (NLRB). See also Izzi Trucking Co., 16 Ad. L. Dec. 2d 420 (NLRB 1964), holding that the right to except to the decision of the trial examiner was waived by failure to except with the specificity required by the rules, and that under NLRB rules, 29 C.F.R. § 102.48(a) (1965) (NLRB), the examiner's decision becomes final if no proper exceptions are taken.
scribed more frequently than in the case of proposed findings and conclusions.¹⁰⁶ The SEC provision seems to be the shortest.¹⁰⁷

A division exists among the agencies on the important question whether oral argument before the adjudicatory agency upon a party’s request should be provided for by rule, since agency statutes generally do not confer this right upon parties to a proceeding. The FTC¹⁰⁸ and the SEC¹⁰⁹ apparently extend this right as a matter of practice. The SEC dispenses with oral argument only if extraordinary circumstances make it “impracticable or inadvisable.”¹¹⁰ The FTC can refuse oral argument if it “otherwise orders.”¹¹¹ Allowance of argument is discretionary with the NLRB¹¹² and the ICC.¹¹³ For no particular understandable reason, the FCC permits oral argument in interlocutory pleading contests if the agency views the “ends of justice” as being “best served thereby,”¹¹⁴ while retaining full discretion over allowing oral argument in the more significant later phase of final decision in the proceeding;¹¹⁵ apparently, the same situation exists when the agency’s review board¹¹⁶ acts pursuant to delegated authority as the appellate tribunal.

The NLRB specifies by rule that its review of a finding of fact by the examiner is tested by whether the finding “is contrary to a preponderance of the evidence.”¹¹⁷ The provision is salutary in drawing direct attention to the importance of the examiner’s fact finding, consequent upon an actual hearing of the evidence.

C. Agency Review

This title is subordinate to the one preceding. However, separate treatment seems warranted because of recent acts of Congress (and procedural provisions that may be expected to follow) which vest discretion in certain agencies to review adjudicatory decisions through subordinates.¹¹⁸

¹⁰⁶ See text immediately preceding and accompanying note 74 supra.
¹⁰⁷ 17 C.F.R. § 201.17(b) and (c) (Supp. 1965) (SEC) (fifteen days for filing exceptions, thirty additional days for filing supporting briefs after Commission orders review). Prior to amendments in 1964, the SEC allowed only ten days for filing exceptions and ten additional days for filing supporting briefs. 17 C.F.R. § 201.17(a)-(b) (1964).
¹⁰⁸ 16 C.F.R. § 3.22(f) (Supp. 1965) (FTC).
¹⁰⁹ 17 C.F.R. § 201.21(a) (Supp. 1965) (SEC).
¹¹⁰ Ibid.
¹¹¹ 16 C.F.R. § 3.22(f) (Supp. 1965) (FTC).
¹¹² 29 C.F.R. § 102.46(i) (1965) (NLRB).
¹¹³ 49 C.F.R. § 1.98 (1965) (ICC).
¹¹⁵ 47 C.F.R. § 1.277(c) (1965) (FCC).
No better initial reference point exists than an article written by the Committee on Agency Adjudication of the Administrative Law Section of the American Bar Association. It comprises an early study, background exposition and analysis of the actual and proposed procedural changes to accommodate heavy regulatory workloads and to encourage time emphasis upon major policy. What is said below supplements, with particular consideration of the FCC experience, the discussion in that article.

1. Delegation of Responsibility

There is general agreement that necessity exists for enabling agency heads to deliberate at greater length on matters of importance and to supplement such deliberation with affirmative regulation. Less unanimity, however, exists as to method of accomplishing this result, and no doubt it is too soon after the 1962 Committee article mentioned above to add to its conclusion that data are inadequate to provide the bases for conclusions.

A preliminary factor often disregarded is the present opportunity for the agencies to delegate their informal administrative (as distinguished from rulemaking and formal adjudicative duties and responsibilities in a broad way, if accompanied by standards for their exercise. With a few agency exceptions, a large quantity of the work of the agencies falls within an informal administrative “processing” classification; thus, ordinarily there are means at hand to confer responsibility for action upon bureau supervisors and other staff personnel. The Hector and Minnow resignation letters, and any expressions of opinions preceding those, tend to fasten upon the formal adjudicative process as the great offender, while showing there has been all too little delegation of administrative authority. So long as the boards and commissions insist upon personal review in myopic detail, important adjudications in pending matters and the

---

112 Comm. on Agency Adjudication, ABA Section on Administrative Law, Progress and Problems in Agency Adjudications, 14 Ad. L. Rev. 239 (1962).
entire rule-making process will lag behind the more ministerial matters that could be delegated in volume. "

The SEC has made a determined and intelligent effort to use its power of administrative delegation. It is true that the nature of its functions may have been of some compulsive force in the initiation of such delegations. Reference to its rules of organization demonstrates the extent of delegation to directors of divisions, regional administrators and the Secretary of the Commission. Indicative are such delegations as (1) the power to determine a hearing is unnecessary on applications for certain orders if they do not appear to the director "to present issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors requires that a hearing be held. . . ", 116 (2) the power to conduct investigations and subpoena witnesses in certain classes of investigations; 117 and (3) the enumeration of certain powers delegated to regional administrators, followed by the guiding caveat: "Notwithstanding anything in the foregoing, in any case in which the Regional Administrator believes it appropriate, he may submit the matter to the Commission." 118

116 As stated by Harold G. Cowgill, former Chief of the FCC Broadcast Bureau, in a panel discussion concerning Administrative Process Problems before the House Special Subcommittee on Legislative Oversight, June 16, 1959:

The role of the staff may be described as the two-fold function of furnishing the Commissioners with information they need in determining policy and deciding individual cases, and, second, of performing the daily tasks involved in carrying out the decisions made by the Commissioners.

Insofar as the staff functions as a source of information to the Commission it operates differently in assisting the Commissioners with their broad policy making function than in the aid it renders to the Commissioners in their adjudicatory capacity. With regard to the policy making and rule making work of the Commissioners the staff serves principally as a source of information. To a large extent this takes the form of technical data and studies—principally engineering, legal and economic. The staff also assembles for the Commissioners analyses of the experience of the Commission in particular fields, as related to the problem in hand, whether it be a question of substantive policy or procedural methods.

The adjudicatory process involves additional requirements. In its broader sense this process involves all the licensing activities of the Commission including actions taken without prior hearing as well as decisions made after hearing on applications for Commission authorizations. Here again, in closely circumscribed areas such as the authorization of minor modifications of radio station licenses and certain types of authorizations for the conduct of common carrier operations, the staff has delegated authority to act in strict accordance with well-defined policy. In all cases involving any doubt as to the clear and direct applicability of established policies or rules the staff refers the matter to the Commissioners even in cases which might be technically regarded as coming within the scope of staff delegations.


2. Independence of the Presiding Officer  A factor of concern in proposed and recently enacted statutes related to adjudicatory delegations is the resulting status of the "independent" examiner. His real independence may have been overstressed; but there can be no question that the public and the bar obtain assurance and confidence from a system of administrative adjudication in which opportunity exists to present evidence to a presiding officer insulated from the exercise of political, philosophical or personal influence within or without the agency, binding administrative rule or precedent excepted. Because public trust is essential to effective government regulation, it is important that delegation of agency appellate authority to employees not affect the examiner's independence and stature. In this regard, it is significant that certain agencies, such as the FTC and the CAB, operating under more broadly drawn delegational statutes (relative to adjudication) than that applying to the FCC, could jeopardize the status of the hearing examiner by placing appeals from his decisions in the hands of employee boards of lesser status, capacity, experience and compensation. Of course, any agency delegations to employees of the power to review examiners' decisions will lessen to an extent the status of the hearing examiner as the sole deciding officer (except for the agency members themselves). However, the FCC statutory delegation language, for reasons explained more fully elsewhere, is more balanced by far in its recognition of the semi-independent examiner status contemplated by the Administrative Procedure Act than the delegation language appearing in the Congressionally approved reorganization plans for the FTC and CAB.

3. Agency Certiorari  In 1961 the FTC embarked upon a certiorari procedure, under which review as of right from an initial decision was abolished and discretion was provided in the FTC to entertain review as it saw fit. In 1963, however, it returned to its original...
procedure whereby review of an initial decision was permitted as a matter of right; in so doing the agency abandoned the complete discretion (which, of course, is the application of certiorari policy) reserved to itself to determine when it would review an examiner's decision.

The CAB has adopted a certiorari policy governed by standards set forth that control the type of case it will review upon exception taken to the examiner's decision; the promulgated rule expressly states that the CAB will apply these standards in its "sound discretion."12

The SEC cannot be classified as an agency which pursues the certiorari policy, because it provides standards for review of initial decisions when requested and assures the petitioner that it "will order review" if his petition complies with the standards.13 Thus, the element of choice, inherent in the certiorari policy, is not present. Of course, as with all agencies, the SEC reserves the right to review on its own initiative.14 The FCC, in addition to providing standards by rule, is required by statute to entertain petitions for review; hence, again the certiorari element appears wanting.15 As might be anticipated from its liberal policy toward oral argument, the NLRB makes no use of the certiorari procedure in unfair labor practice cases,16 as distinguished from representation and certification cases.17

Other agencies, apparently in the majority, have not adopted the certiorari policy, perhaps in some instances due to lack of statutory authority. In contrast, the ICC has provided for the right to apply or petition for review from divisions or appeals boards under certain conditions. In the case of the ICC, for example, the conditions take the form of declaring the decisions of divisions final unless

12 16 C.F.R. § 3.22(a) (Supp. 1965) (FTC).
14 17 C.F.R. § 201.17(d) (Supp. 1965). The standards set forth in the SEC rules are comparable to those of the FCC regarding their sensitivity to the classes of proceedings and character of problems which the agency itself should determine for the greater fulfillment of the design of the statute. For example, the SEC commits itself to review examiner's decisions which order (1) suspension, denial or withdrawal of any registration; (2) suspension or expulsion of a member of a national securities exchange; (3) suspension, denial or revocation of broker-dealer registrations; or (4) suspension of trading on an exchange. 17 C.F.R. § 201.17(d) (1)(i)-(iii) (Supp. 1965). In addition, as has been observed, the SEC provides that it will review depending upon the character of the problem. It, however, precludes itself from summarily affirming the initial decision in such a case. 17 C.F.R. § 201.17(d), last para. (1964). See also 17 C.F.R. §§ 201.17(a)-(c), d(2)(i) (Supp. 1965).
15 17 C.F.R. § 201.27(d) (1964). It should be noted that the SEC amended its rules effective August 1, 1964, to permit hearing officers to make initial decisions rather than recommended decisions. 17 C.F.R. § 200.30-7 (Supp. 1965).
16 See note 12 supra.
17 29 C.F.R. § 102.48 (1965) (NLRB).
18 29 C.F.R. § 102.67(c) (1965) (NLRB). Under this rule, a certiorari policy accompanied by broad standards applies.
they involve matters of general transportation policy, (2) the initial decision was reversed or modified or (3) the division made the initial decision. In practical effect, however, it would seem that the ICC has reduced the review as of right to questions of "general transportation importance" found by the entire Commission on its own motion. Under these circumstances, then, petitions for review as of right appear to be most limited in ICC proceedings.

The ICC's procedural rule of finality was recently held by a federal district court to have been properly applied to pending cases. In another case, the ICC was permitted to rest upon an affirmance of the original decision by one of its divisions, even though on subsequent reconsideration the division had reversed that decision; the district court said that the ICC need not state findings of its own. The latter decision procedurally may be free of criticism, but the court's reasoning that a contrary view would invite prying into the mental processes of the ICC is unsound. The court's reliance upon Baltimore & O. R.R. v. United States for such reasoning seems misplaced, because the opinion in the case was concerned with the Commission's weighing of the evidence and with its findings— not with testimony of an official as to why he voted in a certain manner. Adoption by the ICC of the division's earlier findings as its own indicates that its reasoning is sufficient, and this should be an end to the legal issue, although from a policy standpoint it would seem preferable for the ICC to deal more explicitly with a matter before it as one of "general transportation importance."

It has been noted that recent statutes have pointed the way toward delegation of decisional power in adjudicatory hearings, and that these statutes are not uniform in specifying the matters to be delegated or the standards, if any, imposed to reserve final adjudicatory power in the agency with respect to questions of substantial

130 A position contrary to that of the ICC was taken by the Administrative Conference of the United States in 1962 in adopting its Recommendation No. 9, Administrative Conference of the United States, Report of the Third Plenary Session 1-3 (April 3, 1962). In so acting, it strongly suggested that "review of initial decisions shall not be refused when there is a reasonable showing of the stated grounds for review." Fuchs, The Administrative Conference of the United States, 15 Ad. L. Rev. 6, 11 (1963).
133 298 U.S. 349 (1936).
134 The Court in Baltimore & O. R.R. v. United States stated the following: "Appellants' claim that the order rests exclusively upon the southern lines' financial needs is negatived by the record. Many other facts were shown to have been presented and considered. There is no requirement that the commission specify the weight given to any item of evidence or fact..." 298 U.S. 349, 359 (1936).
135 See note 112 supra.
regulatory importance. Agencies are not noted for pronouncing important policy through rule-making, and much wider use is made of the adjudicatory proceeding for this purpose. It is suggested, therefore, that preferably the parties in such a proceeding should have the statutory right to obtain review of those questions for the solution of which the agency was primarily constituted; failing this, the statute should at least require the agency to promulgate by rule to the greatest extent practicable the standards which identify the kinds or classes of adjudicatory proceedings it will permit to be brought before it by application or petition for review of an otherwise final action by a subordinate panel, division of the agency's membership, an examiner or an employee review board. Certain of these standards applied by the ICC and NLRB have been set out above, those of the ICC being at once the most vague and restrictive.

One further suggestion is in order. If the agencies are to be clothed with authority to divest themselves of major adjudicatory functions, the delegate should be required to grant oral argument upon request of a party. Rarely is this right provided for in relevant rules. Special delegational authorizations—responsive to the plight of the submerged agency unable to perform its multiple regulatory functions—scarcely were designed to free the agency's delegate, operating in a much narrower area, from the granting of oral arguments as an aid to adjudication.

4. The FCC Review Board Technique

The FCC Review Board experiment is a good illustration of Congressional recognition of the examiner's status and of Commission development of standards for the delegation of review of adjudicatory proceedings. Section

---

146 See text accompanying notes 112-26 supra.
147 Compare the broad language of the FTC and CAB Reorganization Plans, supra note 112.
148 Upon denial of administrative review of an examiner's decision by the Appeals Council of the Department of Health, Education and Welfare, that decision became the decision of the Secretary and was judicially reviewable. Wettles v. Celebrezze, 228 F. Supp. 17 (E.D.S.C. 1964).
149 See text accompanying notes 138-44 supra.
150 See text accompanying notes 138-44 supra. See also Arizona v. United States, 220 F. Supp. 337 (D. Ariz. 1963), for a brusque treatment of the contention that ICC division action should not be final merely because the ICC itself said the proceedings were not of general transportation importance.
151 But see the FCC's recently expressed position to the contrary. Hearings on S. 1563 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. 512 (1964). The FCC gave no reason for assuming this position.
152 For a succinct consideration of appropriate methods for limiting a regulatory agency's review, based, however, on appropriate standards to govern the limitations, see Rosenblum & Smalley, Limitations on Agency Review: The Proposed NLRB Rules, 13 Ad. L. Rev. 155 (1961). The reverse side of the coin is presented by the "judicial" and "legislative"
5 (d) of the Federal Communications Act of 1934 was amended in 1961 to authorize the FCC to create a board of its employees to which the Commission's adjudicatory functions, with one exception, could be delegated; the exception is the holding of a hearing, as distinguished from "appellate" review of an examiner's initial decision.

Several quasi-standards are embodied in the amendment. First, any person aggrieved by the action of such a board can apply to the Commission for review and obtain Commission action on such application. Second, the board of employees must consist of at least three members who must be qualified by training, experience and competence to act as reviewing officers. They must perform no duties inconsistent with their reviewing functions, and they must be classified by title or salary commensurate with their "important duties" and in no event below the level of the examiners whose decisions they review. Finally, the board members must work on cases in rotation to the extent practicable, and they must be beyond the supervision of any officer or employee engaged in performing investigative or prosecuting functions for any agency.

In some measure these characteristics, significantly the express legal requirement that the Board be composed of high-salaried employees (GS-17), avoid the lessening of examiner stature. This is supported by the detail of legislative history, which included Commission assurances to the Congress that delegations to the Review Board would be evolutionary in nature rather than activist. Precautions thus were taken that the creation of the Review Board would not constitute a serious risk and a departure from the legislative intent of the Administrative Procedure Act, chronicled in Universal Camera Corp. v. NLRB.

The FCC followed a praiseworthy procedure of soliciting comments (particularly from practitioners) before deciding upon the standards to adopt in (1) freeing itself from direct decision of many cases, and (2) reserving to itself the cases which it considered most appropriate for agency decision. Moreover, it prefaced approaches taken at large by nonregulatory agencies. Their economic and due process impact is strong, but their activities have been regarded as analogous to the proprietary; hence, they are free from the minimum procedural requirements governing rule-making under the Administrative Procedure Act § 4, 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1958), and from such requirements governing adjudications, §§ 5, 7-8, 60 Stat. 240 (1946), 5 U.S.C. §§ 1004, 1006-07 (1958), because organic acts customarily afford no right of hearing. See McCarty, Proposals for Changes in Appeals Procedures at the Department of Interior, 13 Ad. L. Rev. 159 (1961). S. 1336, 89th Cong., 1st Sess. (1965), would reassess and limit realistically that freedom. See note 5 supra and accompanying text.

its amended rules of procedure in this regard by an explanatory statement.\textsuperscript{155}

May, 1964 amendments extended the Review Board's delegated authority to include, \textit{inter alia}, initial television application proceedings.\textsuperscript{146} Both in the earlier (1962) and in the current (1964) rules, the FCC has spelled out in considerable detail the classifications of cases being delegated. For example, in the current rules the Commission expressly reserves for its own decision the important classification of "proceedings involving the renewal or revocation of a station license in the Broadcast Radio Services or the Common Carrier Radio Services."\textsuperscript{157} It has bestowed upon examiners greater authority with respect to interlocutory pleadings. The Commission, however, continues to withhold from examiners the power to allow original action on petitions related to the issues in the proceeding; instead, it has given this authority to the Review Board.\textsuperscript{158}

Obviously, proceedings will arise that well may involve issues more important than the nondelegated renewal and revocation cases. Against this eventuality, the FCC has provided the mechanism of reserving the function of decision to itself upon an \textit{ad hoc} basis at the time of "designation for hearing or otherwise."\textsuperscript{159} Moreover, unaffected by the recent revision is its rule that any person aggrieved by action taken under delegated authority may file an application for review with the Commission.\textsuperscript{160} The application will be dismissed if it fails to make an adequate specification warranting Commission consideration of the action taken in the following respects: (1) conflict with statute, regulation, case precedent or established Commission policy; (2) question of law or policy not previously resolved by the Commission; (3) reliance upon precedent which should be over-turned or revised; (4) erroneous findings on an important or material question of fact; (5) prejudicial procedural error.\textsuperscript{161}

The success of the FCC experiment probably will be an important factor in deciding the future of this more conservative adjudicatory method, as compared with the agency certiorari technique. With the recent new delegations, the Board has jurisdiction over nearly all hearing cases appealed from examiners' initial decisions, the only exceptions being broadcast and common carrier renewal and revocation cases. Thus, fairly full use is being made of the Board. In terms

\textsuperscript{157} 47 C.F.R. § 0.365 (1965).
\textsuperscript{158} 47 C.F.R. § 0.341 (1965).
\textsuperscript{159} 47 C.F.R. § 0.365(a) (1965).
\textsuperscript{160} 47 C.F.R. § 1.115(a) (1965); see text accompanying and following note 153 supra.
\textsuperscript{161} 47 C.F.R. § 1.115(a)-(b) (1965).
of volume, this is likely to keep the Board and its staff busy. Since its inception in August 1962, through December 1964, the Board has issued eighty-seven decisions. Before the TV delegations, the Board issued forty-five decisions, and remanded six cases to the hearing examiners for further hearing. Oral arguments were heard by the Board in all of these cases in which they were requested. A substantial burden has thus been removed from the Commission. What volume is to be expected in television is conjectural, although eventually it is likely to be fairly substantial. Probably somewhere between twelve and fifteen television cases a year is not too far from the mark. As these involve much more effort than the average standard broadcast cases, further substantial benefits should redound to the Commission.

The Board has attempted to exercise its independent authority wisely by following established Commission policy. Nevertheless, in appropriate cases it has not hesitated to interpret or extend these policies to solve new problems upon which specific Commission solutions do not exist. The Board apparently does not consider itself a policy-making group, although of course the lines of distinction sometimes tend to blur. Its tendency to date has been toward conservative exercise of its powers.

The Board has hired young attorneys in the lower grades (GS-7 and GS-9), and its current staff complement, excluding the five Board Members, consists of fourteen attorneys, two engineers and ten secretaries. None of this staff is used by the FCC Office of Opinions and Review in its decision-writing work for the Commission on applications for review.

Only in a few instances has the Commission exercised its powers of review of Board decisions following exceptions taken to examiner’s initial decisions.¹⁶² In the first such instance the Commission decided in the Board’s favor after hearing oral argument.¹⁶³ In another matter at about the same time, however, the Commission granted an application for review and reversed the Board without asking for briefs or hearing oral argument.¹⁶⁴ The effect of granting these applications for review is greater than the number would seem to indicate. At the present time, applications for review are filed in about one-third of all Board decision cases. Depending on how the Commission proceeds in the future, there could be the beginning of a trend or practice which reduces or dilutes the effectiveness of the Review Board’s work.

¹⁶² Of the eighty-seven decisions issued by the Board, applications for review were filed in thirty-two. In all but five cases the application for review was denied, and in only four instances was the Board’s decision reversed, revised or remanded after Commission review.
while shifting back to the Commission much of the burden which it sought to free itself of by establishing the Board. If the Board tends to become only another step in the adjudicatory review process, its reason for existing will be largely removed. Although this point has not been reached, it is too early to say with assurance that it will not be. The Commission which invited the very specific delegation authority involved is doubtless aware of the problem and is attempting to avoid such a development.

Several Board decisions have gone to the courts of appeals after the Commission refused review. At the end of 1964, six of these were awaiting court decision. In the one case thus far decided, the court, in a per curiam opinion, denied the appeal without discussing the Board's role. Thus, it is premature to state how much weight the courts will attach to Review Board decisions.

With five members, the Review Board divides into ten different panels of three to hear oral arguments and decide cases. Differences in panel makeup obviously can present some problems in consistency, and the fact that each decision is signed by a Board member who has overseen its preparation also introduces variables in both substance and form. Thus far, however, the Board has a fairly good record of consistency. But consistency on the part of the Commission must be achieved in its method of handling application for review and of disposing of cases in which review has been granted.

To this point the Review Board has proved itself able to perform the work delegated to it consistently and with reasonable dispatch. It, however, has not yet been established with certainty that the Board is not just another level in the adjudicatory process or that the Review Board technique is superior to the certiorari procedure of agency review of examiner's initial decisions. An obvious fact in striking the balance will be whether the Commission adheres in a substantial manner to a policy of reviewing Board actions in only the cases which truly present questions upon which agency action is justified. Reciprocally probative will be affirmative evidence that the Commission reviews board actions when the petitioners make reasonable showings that they meet the Commission's standard for review.

IV. Rule-making

Thus far this Article has focused upon certain procedural develop-

---

166 In a recent case in which the United States Court of Appeals for the District of Columbia remanded a proceeding to the Commission because it had taken into consideration matter outside the hearing record, the dissenting opinion of Judge Danaher emphasized the expertness of the FCC Review Board. The Commission had reviewed the decision of the Review Board in the proceeding.
ments affecting investigations and adjudications by federal administrative agencies. Attention will now be given to several major problems connected with the procedure for adopting substantive rules. 6

A. Procedure For Rule-Making

With few exceptions, 68 agency rules are required by the Administrative Procedure Act to be published in the Federal Register on a current basis. 69 Generally, an agency authorized to issue rules must (1) notify the public of the rules it proposes to adopt through publication in the Federal Register; (2) afford interested parties an opportunity to submit at least written data, views or arguments with respect thereto; (3) give consideration to all relevant information presented by the parties; and (4) thereafter state concisely the basis and purpose of the rules it adopts. 70 The ordinary exceptions to extending this opportunity are matters involving (1) defense and foreign affairs; (2) internal management and public property, contracts or benefits; (3) interpretative rules, policy statements and rules of organization, procedure or practice; and (4) situations in which the agency for good cause finds it impracticable or contrary to the public interest to follow this prescribed procedure, and no other statute requires it to do so. 71 On the other hand, if a statute requires an agency's rules to be made on the record after opportunity for an

67 A "rule" is defined by the Administrative Procedure Act as follows: "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." Act § 2(c), 60 Stat. 237 (1946), 5 U.S.C., § 1001(c) (1958).


72 Administrative Procedure Act § 4(a), 60 Stat. 238 (1946), 5 U.S.C. § 1003(a) (1958) (also introductory para.).
agency hearing, the more strict adjudicatory procedural provisions of the Administrative Procedure Act in the main apply.\(^{173}\)

It appears that the rules of practice and procedure of the agencies rarely implement the minimum procedures mentioned in the immediately preceding paragraph. The agency rules\(^{174}\) to be followed in a rule-making proceeding usually deal only in summary fashion therewith and leave the subject basically to the Administrative Procedure Act\(^{175}\) and the agency notices of proposed rule-making. The FTC rules,\(^{176}\) however, are somewhat more specific and add to the Administrative Procedure Act\(^{177}\) requirement of a concise general statement of the basis and purpose of the rule a progressive further mandate implicit in the language "and any necessary findings. . . ." The FCC rules of practice\(^{178}\) are much more detailed in relation to rule-making practice than those of the usual agency.

B. Discussion Of Data Submitted

No rule of practice and procedure has been found that requires an agency to discuss, as a part of its adoption or refusal to adopt a proposed substantive rule, the basic and substantial views, data or arguments filed in the rule-making proceeding. At least some of the agencies do so in practice, however. Recently, both the FTC and the FCC discussed in some detail the views advanced by interested persons during the course of rule-making proceedings of some importance.\(^{179}\) A recent set of procedural rules\(^{180}\) of the CAB was attended by the same execution of the spirit, if not the literal requirement, of the Administrative Procedure Act.\(^{181}\) However, concerning another recent rule of importance, the FPC's statement was characterized by

\(^{173}\) Administrative Procedure Act § 7(b), 60 Stat. 241 (1946), 5 U.S.C. § 1006(b) (1958). The primary exception is that appearing in § 5(c) of the act, 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1958), which imposes separation of functions requirements.


\(^{176}\) 16 C.F.R. § 1.67(d) (Supp. 1965) (FTC).


\(^{181}\) Administrative Procedure Act § 4(a), 60 Stat. 238 (1946), 5 U.S.C. § 1003(a) (1958), exempts rules of procedure from the rule-making procedural requirements of that section of the act.
an almost complete disregard of the comments made during the rule-
making proceeding.¹²²

Because the cases in which the issue thus far has been presented have
shown no disposition to void administrative rule-making action for
failure to meet or discuss the views presented in the proceeding by
opponents to the rule,¹²³ it would seem that Congressional relief is
both desirable and necessary. A useful analogue is the approach of
the Revised Model State Administrative Procedure Act, approved by
National Conference of Commissioners on Uniform State Laws in
1961, which reinforces the federal requirement of agency considera-
tion of submitted views of rule-making by a policing mandate as
follows: "Upon adoption of a rule, the agency, if requested to do
so by an interested person either prior to adoption or within 30 days
thereafter, shall issue a concise statement of the principal reasons for
and against its adoption, incorporating therein its reasons for over-
ruling the considerations urged against its adoption."¹²⁴

The mandate gives explicit direction to the agency and enables
persons affected to litigate their appeals with a proper understanding
of the agency position, and allows reviewing courts to apply the test
of reasonableness against a better background of agency reasoning.
Equally important is a further element: An agency creates a more
intelligent, deliberative product if it is required to meet head-on by
a recorded opinion the principal considerations urged upon it in a
rule-making proceeding.¹²⁵

Of course, there is nothing to prevent the agencies from following
the suggested course of action without direction from Congress. Con-
sideration of such a procedure, including possible standards for ex-
cluding minor rules or amendments therefrom, should be a fitting
subject for inquiry by the Administrative Conference of the United
States, as now permanently established.¹²⁶

C. Other Rule-Making Problems

Two additional problems connected with rule-making will be
briefly noted. Although they are of great significance, the attention
they merit would prolong unduly an article of survey scope.

One is the extent to which a procedural rule permitting petitions

¹²² See FitzGerald, Adoption of Federal Power Commission Price-Changing Rules With-
¹²³ Although the cases are not legion, they do not reflect conflicting opinions. Illustra-
tions are Courtaulds (Alabama) Inc. v. Dixon, 294 F.2d 899 (D.C. Cir. 1961), and
Bigelow-Sanford Carpet Co. v. FTC, 294 F.2d 718 (D.C. Cir. 1961).
¹²⁴ Revised Model State Administrative Procedure Act § 3(a) (2). (Emphasis added.)
¹²⁵ See Att'y Gen. Comm. on Administrative Procedure, Administrative Procedure in
for waiver of substantive rules to be filed with an agency may become an instrument for eliminating many otherwise required adjudicatory hearings by barring them "at the threshold" through the exercise of a general power to make rules.\(^\text{187}\)

The other problem is the extent to which a party's participation in a rule-making proceeding may be said to constitute his "hearing" and thus discharge the agency from any obligation to afford him an adjudicatory hearing before taking action adverse to him.\(^\text{188}\) In the past it has been common for courts to look to the plain wording and context of statutory hearing requirements to determine the extent of hearing rights intended to be conferred upon the individual. With the passage of the Administrative Procedure Act, minimum (but vastly different) hearing procedures were provided for the majority of (a) adjudicative and (b) rulemaking proceedings to which that act applies. The problem as to when an agency might exercise its powers by rule-making procedure, as distinguished from being required to follow the more stringent hearing procedures prescribed for adjudication, was not of course settled or considered in relation to the act.\(^\text{189}\) If the agency has the authority to adopt a subsequent rule, it may do so, in which event the minimum rulemaking procedures of the act apply (with limited exceptions); if, on the other hand, its statute, applicable to the situation, requires what is commonly referred to as a formal adjudicative proceeding, it is necessary to follow the minimum procedures of the act relative to such adjudications. But in all events, as has been said, the act does not compel an election between proceeding by adjudication or by rulemaking, or vest power in the agency as to either. It fixes the procedure to be followed once the agency has made its judgment of whether to proceed by adjudication or by rulemaking;\(^\text{190}\) the minimum procedure provided for formal adjudication, conferring fuller

\(^{187}\) The Government tires of holding the hearings required by statute before action can be taken adverse to a party, the hearings being a source of administrative backlogs. It adopts a substantive rule permitting such action generally without hearings. The validity of such rule is attacked as a circumvention of statutory hearing requirements. The Government successfully contends that such statutory objections (including that of due process) are of no moment since its rules of practice and procedure permit the complaining party to petition for waiver of the offensive rule if he can show unique justification for a waiver of its application to his particular situation. See, e.g., FPC v. Texaco, Inc., 377 U.S. 33 (1964). This writer has commented that the Government (giving concreteness to the hypothetical illustration, the FPC) has created both an occasion of statutory collision and successfully avoided its resolution by resort to a procedural rule. FitzGerald, supra note 182, at 268-71.


\(^{189}\) NLRB v. A.P.W. Prods. Co., 316 F.2d 899, 905-06 (2d Cir. 1963).

\(^{190}\) Ibid.
rights upon private parties, seemingly cannot be satisfied by such hearing privileges as rulemaking affords. The recent decision of Transcontinent Television Corp. v FCC\textsuperscript{191} can be read to imply that participation in a rule-making proceeding may defeat an otherwise available statutory right to an adjudicative hearing with its fuller hearing requirements under the Administrative Procedure Act; if so read, the case blurs the distinctions between the minimum procedural requirements provided in the Administrative Procedure Act for these two classes of agency proceedings. If the actual facts of the Transcontinent case are weighed, however, including the somewhat ambiguous statutory provision relative to a hearing,\textsuperscript{192} it seems more reasonable to conclude that the court made a sensible adjustment of technically conflicting statutory provisions by reading them in full context as applied to the record before it. So construed, the Transcontinent decision is cause for no alarm among those who weigh with equal seriousness the due process rights of the individual and the achievement of governmental statutory objectives.

One other use of a procedural rule (in this instance an order applying to a single investigative proceeding) was approved in FCC v. Schreiber.\textsuperscript{193} In the past, petitions to enforce agency subpoenas duces tecum requiring the production of claimed "trade secrets" have received careful scrutiny by the courts, which in a number of instances have modified subpoenas before enforcing them.\textsuperscript{194} Recently, however, procedural rules were promulgated which have the effect of diminishing the judicial review traditionally accorded. In Schreiber the aid of a district court was sought by the FCC to enforce a subpoena duces tecum resisted on trade secret grounds. The respondent, a witness not subject to the regulatory authority of the FCC, was willing to comply with the subpoena only if the documents were held \textit{in camera}. There was no dispute relative to the FCC's authority to obtain the documents. The district court weighed the claim of irreparable competitive injury and upheld the respondent. The Supreme Court reversed, limiting the trial court's authority to consideration of whether the FCC's demand was an abuse of discretion, and placing the burden of proof on the respondent to show

\textsuperscript{191} 308 F.2d 339 (D.C. Cir. 1962).
\textsuperscript{192} "[R]easonable opportunity . . . to show cause by public hearing, if requested, why such order of modification should not issue." 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 316(a) (Supp. IV, 1963).
\textsuperscript{193} 65 S. Ct. 1459 (1965).
There is reflected in the Court's opinion—though not necessarily on the facts, which did not establish an impressive case for the claim of "trade secret" impairment—an apparent retrenchment from judicial principles applied in the past to relieve the subpoenaed witness from oppressive burden, partly under equitable powers of judicial supervision, partly on the theory that the court's order furnishes the basis for subsequent enforcement by contempt action and thus the enforced agency order in effect is a step in the judicial process. 195

The Court blends somewhat disconnected statutory provisions with agency and judicial hypotheses. Thus, Commission power to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" is linked with (1) section 3(c) of the Administrative Procedure Act relating to freedom of access to matters of official record; (2) the Commission duty to make annual reports to Congress; (3) likelihood of increased public acceptance of a Commission order (if any) at the completion of the proceeding; (4) probabilities of increased information being received by the agency from others if the respondent's information is coerced; and (5) the proposition that since competitors had furnished similar information publicly on a voluntary basis the respondent should be compelled to do likewise. The result in this case seems unimportant. It could have been reached by a per curiam holding that the respondent failed to establish irreparable injury: "the naked assertion of possible competitive injury does not..." 196

195 Professors Jaffe and Nathanson have characterized the lack of power on the part of administrative agencies generally to enforce their own subpoenas as "of a piece with the system . . . of committing the application of force to judicial supervision. . . ." Jaffe & Nathanson, Administrative Law, Cases and Materials 29 (2d ed. 1961). Professor Cooper, referring to the statement found in section 6(c) of the Administrative Procedure Act, not mentioned in the Schreiber decision, that the court shall sustain a subpoena "to the extent that it is found in be in accordance with law," concludes that the courts generally have used as a test whether the disclosure sought is unreasonable. As he points out, one device used by the courts has been the modification of the subpoena by order of the court requiring the agency to take steps to avoid public disclosure of trade secrets revealed to it. Cooper, Federal Agency Investigations: Requirements for the Production of Documents, 60 Mich. L. Rev. 187, 194 (1961). See also on the related matter of personal privacy, Newman, The Process of Prescribing Due Process, 49 Calif. L. Rev. 211 (1961); Newman, Some Facts on Fact-Finding by an Investigatory Commission, 13 Ad. L. Rev. 120 (1961). "Every foreign state that has deprived persons of fundamental 'property rights' has eventually also taken away the rights of the person. . . ." Jackson, The Task of Maintaining Our Liberties; The Role of the Judiciary, 39 A.B.A.J. 961, 963 (1953).
establish that the Presiding Officer abused his discretion in declining to accord confidential treatment. . .

Reminiscent of the Texaco approach, however, is the strained use of the procedural rule to shift an agency burden upon a respondent asserting a property right—the agency burden of demonstrating the rational need of public disclosure becomes the respondent's burden of showing that his plight should not be sacrificed to the asserted public need (justified not from the circumstances of the proceeding but from a joinder of what seems to be heterogenous, generalized and speculative factors). Thus, from a statutory power to conduct proceedings efficiently conducive to the ends of justice is born a procedural rule, applied with the approval of the Court to a sensitive trade secrets area, which finds its support in agency assertions little less naked than those of this subpoenaed witness.

202 Ibid.