Rule-making under the Administrative Procedure Act of the United States

Yun Heun Park*

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INTRODUCTION

The Administrative Procedure Act of the United States, enacted in 1946, marked the turning point in developing the administrative procedure. Thus, from studying the rule-making procedure of the United States under the A.P.A., I hoped to derive suggestions for future rule-making procedure in Korea.

Korean administrative agencies have been promulgating thousands of rules since the new Republic government was founded. Through this experience, we have developed relatively many guidelines or principles concerning the aspects of substantive law and intergovernmental rule-making procedure which must be followed by the agencies. But we have not developed procedural requirements within the meaning of the United States A.P.A. to give the public

* Legislator, The office of legislation
the opportunity of participation in rule-making. Of course, administrative agencies have occasionally invited presentation of opinion from affected parties or their representatives, or held public hearings as a part of rule-making procedure, but these procedures have not been standard practice and have not been systematic. The lack of procedural requirement has produced a lot of problems. The most serious problems, apart from these derived from a principle of government with the consent of the governed, have been (1) rule makers are prevented from having a channel through which they may obtain the information provided by these parties directly affected and most knowledgeable on the subject matter, and, accordingly this leads to the implementation of impractical rules, (2) the public's feeling that the rule is not one created by them but instead is one forced upon them by the government, thus it is difficult to get the public's cooperation in enforcing the rule.

I think, therefore, it is an urgent task for us to study and institute the participation of the affected public in rule-making procedure. But, in Korea, it is almost impossible for us to adopt procedural requirement in rule-making identical to that of the United States, because of our particular situation of being a developing country; i. e. the necessity of expedient rules concerning economics. Thus, our first step must be the selection of the methods for implementing these requirements, with respect to the particular situation in Korea.

Therefore, after surveying the United States rule-making procedure, I shall propose a bill on procedure for ordinance-making in Korea.

PART I THE DEFINITION OF RULE

1. The distinction between Rule-making and Adjudication

As a general Proposition, the existence of the right to be heard (or Administrative Procedure) depends upon the nature of the particular administrative function at issue. The applicability of the notice and hearing requirements of procedural due process to the field of administrative law is largely based upon the distinction between the legislative or rule-making functions of administrative agencies, on the one hand, and their judicial or adjudicative activities, on the other. In rule-making, there is usually no right to be heard in the absence of statutory provision. Therefore, one starts with the proposition that the requirements of procedural due process are not applicable to the exercise of legislative functions. Where administrative adjudications are involved, the starting point is a different one. Insofar as,
adjudicatory functions are concerned, conformity with the basic judicial standards of notice and hearing is normally held to be essential. Such "fair and open hearing" in connection with administrative adjudications is one of the "rudimentary requirements of fair play" and is "essential alike to the legal validity of the adjudication and to the maintenance of public confidence in the value and soundness of this fundamental process".\(^{(1)}\)

Thus, the distinction between rule-making and adjudication must be made before further proceeding; but probably no effort to provide a precise definition of the term "rule" was wholly successful.

The most helpful definitions of rule-making are those of professor Fuchs, Mr. Dickinson, and Mr. Justice Holmes. Professor Fuchs concludes that rule-making should be defined as

"the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations".\(^{(2)}\)

Similarly Mr. Dickinson says that

"what distinguishes legislation from adjudication is that the former affects the right of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it, while adjudication operates concretely upon individuals in their individual capacity".\(^{(3)}\)

Mr. Justice Holmes makes the following distinction;

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past fact and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes the existing condition by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial".\(^{(4)}\)

On these definitions, Professor K. C. Davis comments as follows:

"Each of these efforts at definition is (necessarily, probably) in some way lacking in precision. Rules are typically designed to apply to unnamed parties, but, like private bills enacted by a legis-

\(^{(1)}\) Morgan v. U.S., 304 U.S. 1, 15 (1938)
\(^{(2)}\) Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 265 (1938)
\(^{(3)}\) Dickinson, Administrative Justice and The Supremacy of Law, 21 (1927).
\(^{(4)}\) Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226.
lature, rules or amendments of rules may sometimes be directed to a problem of named individuals or a small group. Adjudications are typically designed to apply to named parties, usually only a few, but, like cases in courts, adjudications may involve hundreds or thousands of parties, and members of classes need not necessarily be named. Rules may often need to be applied in a further proceeding before the legal position of any individual will be definitely touched by them, but like statutes, rules are normally obeyed without enforcement proceedings. Rules ordinarily look to the future, although, like statutes, they are occasionally retroactive. Relatively, adjudication looks backwards, typically applying law and policy to past facts, but like equity decrees, declaratory judgments, and even orders to pay money, adjudications may be primarily concerned with the future. Opinions that accompany adjudications may have essentially the same effects as rules. These various difficulties are avoided by saying simply that adjudication resembles what courts do in deciding cases, and that rule-making resembles what legislatures do in enacting statutes. Then particular problems of classification can be resolved by keeping an eye on the consequences of the particular classification.\(^5\)

"Sometimes rules are identifiable because they are unmixed with other administrative output. Sometimes rules are blended with decisions or with informal interpretations or with prosecuting or with supervising. Mixed or unclassifiable functions are constantly carried on satisfactorily without any definite labeling. When some practical question hinges on the label, then the label should be affixed with an eye to producing a good result in the particular case. If the legislators were omniscient and had at their disposal linguistic precision tools, the interpreter's function would involve no more than finding and applying the meaning of words. But since legislators can neither anticipate all problems nor define terms with minute exactness, judges and administrators must necessarily cooperate with legislators in trying to build a sound and workable system. Judges or administrators who rest interpretations solely upon abstract meanings of words fail to do their part as working partners with legislators. The meaning of such a term as "rule" must frequently depend not only upon word contexts but also upon practical contexts.\(^6\)

"... The rule-making-adjudication distinction cannot be of much practical use in determining the requirements of procedural due process which an agency must follow in a particular case ... The label logic of separation of powers classification is too often specious. Why should a particular function of some agency be legislative or judicial? Why not recognize that the categories are largely survivals of governmental processes having little in common with the administrative process, and that a modern function may be somewhat judicial and somewhat legislative but neither wholly one

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(6) Ibid, 293, 294.
Professor Schwartz strongly criticizes Davis’s view and offers his own.

"Though of great value in pointing out the difficulties involved in reliance upon the rule-making-adjudication distinction, this statement goes too far in its implication that distinction should be rejected altogether. It is true that legislative and judicial functions cannot be as readily differentiated as one might desire for the purposes of determining the procedural requirements in a given case. But the rejection of the distinction leaves nothing upon which to construct a philosophy as to the effect of the due process concept upon administrative procedure. The fundamentals of justice in the common law world, which are at the base of constitutional concept, require that 'no man is to be deprived of his property without his having an opportunity of being heard'. At the same time, the claims of administration calls for some limitation upon the procedural requirements which are imposed, at least in cases similar to those where formal notice and hearing have been considered unnecessary in the past. The distinction between legislative and judicial function furnishes some guide, in this case the only available for drawing at least a tentative line between those cases where notices and hearing should be required as a matter of due process and those where it should not be ….”

“The key factor in Justice Holmes’ analysis is the element of time: A rule prescribes future patterns of conduct; a decision determines liabilities upon the basis of present or past facts.

The element of applicability has been emphasized by other commentators (Fuchs, Dickinson) as the key in differentiating legislative from judicial functions. According to them, a rule is a determination of general applicability, "addressed to indicated but unnamed and unspecified persons or situations", a decision, on the other hand, applies to specific individuals or situations …….

Both the approach of Justice Holmes and that of Professor Dickinson will enable one to distinguish between rule making and adjudication in the great majority of cases. There are, however, certain situations which cause difficulty. Thus, under Justice Holmes’ test, an administrative determination which is future in effect is a rule. This would lead to the conclusion that licensing or the issuance of injunctive orders, such as a cease and desist order of the National Labor Relations Board are instances of rule-making, which would be undesirable from the point of view of the procedural requirements which should be necessary in such cases. On the other hand, if the test of applicability be adopted, a function such as rate-making would be classified as judicial, although most of the authority on the point indicates that it is legislative in character.

For the purpose of determining whether notice and hearing must precede the exercise of a given

function, both the element of time and that of applicability should be taken into account. Thus, one can start with Mr. Justice Holmes' test and assume that if the exercise of a given administrative function is future in its effect, the function is legislative in character. This does not, however, mean automatically that those affected do not have the right to be heard prior to agency action. The applicability test of Professor Dickinson shows us that even if the agency action is legislative under Justice Holmes' test, if it is particular rather than general in its applicability, its effect is much the same as that of a judicial decision. "The legislative process, i.e., rule-making, is normally directed primarily at situations, rather than particular persons. Individual protestations of injury are normally and necessarily lost in the quantum of the greater good. If the legislative process is directed at particular persons—if the given rule is particular in its applicability—should not the persons affected be afforded the same opportunity to be heard as is available to them in the case of an administrative decision which is clearly judicial in nature?" (Notes omitted) (8)

To develop law on a subject, an agency often has a choice between the method of rule-making and the method of adjudication, and parties may be importantly affected by the choice the agency makes. For instance, F.C.C. issued the Commission's Multiple Ownership Rules for limiting a single owner a certain number of stations. Thus, in United States v. Storer Broadcasting Co., (9) the F.C.C., without hearing denied an application for an additional television, because a grant of the application would violate the said rules, issued earlier the same day. In this case, the applicant admitted having more than the maximum number of stations allowed by the rules, and therefore the applicant was not entitled to a hearing on the question that was crucial to him, even though the Act required a "full hearing" on such an application. The Supreme Court held:

"We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations upon their presentation of applications... that set out adequate reasons why the Rule should be waived or amended. The Act, considered as whole requires no more". (10)

When the S.E.C. made the opposite choice, the Supreme Court refused to disapprove, even though the developed was applied retroactively. The Court declared:

"The function of filling in the interstices of the Act should be performed, as much as possible,

(8) Bernard Schwartz, Procedural Due Process in Federal Administrative Law, 25 N.Y.L. Rev., 552-
(9) 351 U.S. 192.
(10) 351 U.S. 205.
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'through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.'

Attempted definitions of rule-making usually try to differentiate between rule-making and adjudication and do not attempt to draw a line between interpretative rules and various kinds of announcements, interpretations, opinions, releases, ruling practices, usages, and policies. Something that either is akin to rule-making or is rule-making takes place when particular courses of official action are repeatedly followed. More than a century ago the Supreme Court observed that

"usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." (12)

Congress was relieving employers from liability under the Fair Labor Standards Act, the Walsh-Healey Act and the Bacon-Davis Act when they act in good faith in reliance on the administrative interpretation.

An agency may announce policies informally through press releases or reports or speeches. The practical effect of these is often almost the same as rules, and yet a good deal may hinge on the form. In Columbia Broadcasting System v. U.S., the majority of the Supreme Court did not deny that a mere press release would not be reviewable, and the minority argued that a press release would have the same practical impact. (13) In some circumstances even a speech of a commissioner may have about the same effect as formal rules. If by any informal method, including a press release, a prosecuting agency makes known what it will not prosecute, the result may be closely akin to a rule.

The term "ruling" signifies an interpretation or an application of a rule or statute or practice to a particular situation. Rulings usually have some of the qualities of both rules and decisions. Sometimes the important effect is the establishment of a rule for the future, and sometimes the primary impact is on a named party. What the Federal Reserve Board calls rulings are said to partake somewhat of the characteristics of individual case decisions, of interet-

(12) U.S. v. Macdaniel, 32 U.S. 1, 14, 150.
(13) 316 U.S. 407.
ations, of advisory or advance opinions, and of implementations of the statutes and the regulations themselves.\(^{14}\) In the Treasury Department’s arsenal of rules and rulings of varying dignity, not only does the relative weight of each type of pronouncement remain uncertain but frequently amendments of rules cannot be distinguished from interpretations or new applications. Under the new terminology established by the Revenue Code of 1954, “Revenue Rulings” include what were previously known as memoranda of the General Council(G.C.M.’s), rulings of the Income Tax Unit of the Bureau of Internal Revenue(I.T.’s), and Mimeographs.

The Department’s Cumulative Bulletin formally cautions that the various rulings show

“the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Treasury”.

The difficulty is exemplified by the fact that the Supreme Court has quoted and applied the Treasury’s words of caution,\(^{15}\) has asserted that the departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute,\(^{16}\) and has given weight to I.T.’s\(^{17}\) and to an opinion of the G.C.\(^{18}\) In some circumstances, interpretations embodied only in rulings and not in regulations or Treasury Decisions are given “Great Weight”.\(^{19}\)

Agencies often have a choice, for clarifying the meaning of rules, between amending the rules and interpreting them. The interpretation may be made in an adjudication or it may be a mere announcement. Sometimes the determination of whether an interpretation is an amendment of a rule becomes important. An instructive case is *Gibson Wine Co. v. Snyder*.\(^{20}\)

In this case, the court held that what was involved was “an interpretative ruling” requiring neither hearing nor approval by the Secretary. The Court went on to hold that because the change was not an amendment of the rule, the district court had properly taken evide-

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\(^{16}\) Biddle v. Commissioner, 302 U.S. 575, 582.

\(^{17}\) McFeely v. Commissioner, 296 U.S. 102, 108.

\(^{18}\) Helvering v. Wilshire Oil Co., 308 U.S. 90, 98.

\(^{19}\) U.S. Truck Sales Co. v. U.S., 229 F. 2d 693, 698.

\(^{20}\) 194 F 2d 329(1952).
nce on the question whether or not the boysenberry is a variety of blackberry. One of the three judges asserted in dissent that the change was an amendment.

2. The A.P.A. Definition of Rule

5 U.S.C.S 551 (4) provides: (4) 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations there of, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.

The surprising feature lies in the words "or particular" in the A. P. A. definition of rule. Professor K. C. Davis explains this question as follows:

"If these words 'or particular' are literally applied, almost every process except licensing becomes rule-making. An order requiring specified affirmative action in the future, such as an order of the N.L.R.B. requiring the employer to reinstate employees with back pay, fits perfectly the Act's definition of 'rule'. Yet prior to the Act such a proceeding was a typical example of adjudication. An ordinary award of money, either a determination requiring A to pay B, or a determination that X is entitled to a payment from government funds, comes within the Act's definition of 'rule'. Literally interpreted—the essence of what has heretofore regarded as adjudication. ... Such an interpretation would rob provisions of the Act relating to 'adjudication' of virtually all meaning, for such provisions would apply to hardly anything except a part of licensing. ... The legislative history yields a satisfactory solution. In early drafts, 'rule' was defined as 'any agency statement of general applicability designed to implement... The manifest purpose was to provide a definition which would adopt the accepted meaning. That purpose was never changed. True, the words 'or particular' were added. But the legislative history is very clear as to the purpose of that addition. The House Judiciary Committee reported: 'The change of language to embrace specially rules of 'particular' as well as 'general applicability' is necessary in order to avoid controversy and assure coverage of rule-making addressed to named persons' ... but the words 'or particular' are added to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability.

The words 'or particular' were not intended to change into rule-making what before the Act was regarded as adjudication. Those words mean no more than that what is otherwise rule-making does-
not become adjudication merely because it applies only to particular parties or to a particular situation.

The overall result is that 'rule' still has about the same meaning as it did before the Act, except that the Act clarifies some points that were doubtful. The definition of Professor Fuchs emphasizing 'unnamed and unspeccified persons or situations' is still a good definition, except that under the Act a rule may also apply to named or specified persons or situations when it has enough other characteristics of a rule. Before the Act, the nature of licensing was doubtful, under the Act licensing functions are explicitly classified as adjudication. Before the Act, prescribing or approving plans of corporate reorganization might well have been regarded as adjudication, since that function is one which courts customarily perform; under the Act approving or prescribing corporate or financial structures or reorganizations thereof is rule-making. Before the Act, prescribing rates and wages and prices for the future was probably legislative for most purposes, but nevertheless sometimes required a "quasi-judicial procedure"; under the Act, the procedural requirements designed for adjudication do not apply to prescribing rates and wages and prices for the future. Before the Act, independent valuation proceedings, like those conducted over several decades to find the valuation of railroad properties, probably could not be classified definitely as either rule-making or adjudication; under the Act such proceedings are probably rule-making.\(21\) (notes omitted)

The California A.P.A. is noteworthy because it does not contain the words "or particular".\(22\) The A.P.A. by no means solves all problems of classifying proceedings as rule making or adjudication. Most questions concerning classification of borderline and mixed functions still remain. Indeed, the Act adds some new difficulties to such problems. The same function may come within the Act's definition of rule making and also within the Act's definition of licensing.

But the way to solve problems of classifying activities which analytically fall into more than one category or into no category is to keep an eye on producing a good practical result in the particular case. The various provisions of § 554 apply only to adjudication, not to rule-making. The ideas of both courts and agencies about the desirability or undesirability of applying the requirements of § 554 to particular proceedings should assist the classification in each case.

3. The Terminology of "Interpretative" and "Legislative" Rules

\(21\) Davis, Administrative Law Treatise, 295, 296, 297.
\(22\) Calif. Gov't. Code, § 11371 (b).
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Procedural requirements as to rule-making of the A.P.A. principally does not apply to interpretative rules. 5 U.S.C. § 553(b) reads, in part, as follows:

"Except when notice or hearing is required by statute, this subsection does not apply
(a) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;

From the standpoint of breadth of discretion in rule-making which is recognized by the courts, that is, the extent to which the courts will restrict themselves in overturning administrative rules or regulations, and the legal effect given to such rules or regulations, rules or regulations are often classified as "legislative" and "interpretative".

In the Comptroller of Treasury v. M.E. Rockhill, Inc., the court explained:

"...There are several different classes of administrative rules. Some are legislative rules, which receive statutory force upon going into effect. Others are interpretative rules, which only interpret the statute to guide the administrative agency in the performance of its duties until directed otherwise by decisions of the courts. Some rules are merely rules of procedure. Others implement the statute by stating the policy by which the agency will be governed in the exercise of its authorities". 3, 4

Accordingly, the distinction between interpretative and legislative rules is not merely academic, but practical. Legislative rules are accorded by the courts or by express provision of statute the force and effect of law immediately upon going into effect. In such instances the administrative agency is acting in a legislative capacity, supplementing the statute, filling in the details, or "making the law" and usually acting pursuant to a specific delegation of legislative power. When a rule is legislative, the reviewing court has no authority to substitute judgment as to the content of the rule, for the legislative body has placed the power in the agency and not in the court. A legislative rule is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued purs-

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(23) 107 A 2d 93, 98.
(27) Utah Hotel Co. v. Industrial Com., Supra.
uant to proper procedure, and reasonable. The requirement of reasonableness stems both from the idea of constitutional due process and from the idea of a statutory interpretation that legislative bodies are assumed to intend to avoid the delegation of power to act unreasonably. (28)

Interpretative rules are those which purport to do no more than interpret the statute being administered, to say what it means. They constitute the administrator's construction of a statute. (29) In such instances the administrative agency is merely anticipating what ultimately must be done by the courts; that is, they are performing a judicial function rather than a legislative function, and interpretative rules have validity in judicial proceedings only to the extent that they correctly construe regulation to which the individual must conform. (30)

The above mentioned have illustratively been explained by the Utah Supreme Court in *Utah Hotel Co. v. Industrial Commission* (1944). Decision of this case reads in part:

"...From the statement of the case in the briefs of counsel, it is clear that the so-called regulation under construction in this case is nothing more than an initial guess by the administrative tribunal as to what the statute (see 42-2a-19) means. In the petitioner's brief, it is stated that the point determined did not involve the tax or the collection thereof, but rather involved deciding the question of whether, under Section 42-2a-19, the hotel company was an employer of orchestra members or not. As we have now determined that Section 42-2a-19 did make the hotel company an employer of orchestra members, it is difficult to see upon what basis it could be held that the erroneous administrative construction of this statute could change it. An administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight. To do so would in effect amend the statute. Construction may not be substituted for legislation. *U.S. v. Missouri Pac. R. Co.*, 278 U.S. 269, 49 S Ct 133, 73 L Ed 322,...".

In *Manhattan General Equipment Co. v. Commissioner of Internal Rev.*, 297 U.S. 129, the court held that an administrative regulation which was contrary to the statutory provision was nullity. In so holding, the court said: 'The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not.

(28) Davis, Supra, 299.
(30) Utah Hotel Co. v. Industrial Com., Supra.
the power to make law... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity... And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable...

While the distinction between the various types of administrative regulations has not yet crystallized in the court opinions, it is noted in a marked way in current legal writings. See Von Bauer, Federal Administrative Law, p. 489; Alvord, Treasury Regulations and the Wilshire Oil Case 1940, 40 Col. L. Rev. 252; Lee, Legislative and Interpretive Regulations, 1940, 29 Geo. L. J. 1; Feller, Addendum to the Regulations Problem, 1941, 54 Har. L. Rev articles cited therein. In Alvord's article... the distinction is clearly drawn. He notes that issue is not one of nomenclature, but is far more fundamental. The article points out that "Legislative Regulations are prescribed pursuant to a specific delegation of legislative power. They purport to prescribe for the future a rule of general application. They have the force and effect of law. On the other hand "Interpretive Regulations", are merely the administrator's construction of a statute. In the case of legislative regulations, the questions before a court for judicial determination, if a regulation is attacked, are only whether the delegation of power was valid, whether the regulation was within that delegation, and if so, whether it was a reasonable regulation under a due process test. Alvord states that the courts will not and should not substitute their opinions for that of the administrative officials in determining the policy of legislative regulations. On the other hand, where an interpretive regulation is involved, the ultimate question before the court is: what does the statute mean?

As mentioned above, classification as legislative or interpretive is not an end in itself. Such classification does establish the difference between two types of regulations and contributes to understanding of such difference. However, because of incomplete or not all embracing statements in various authorities, there is confusion as to the criteria for the classification.

Professor K. C. Davis says that the question whether a rule is legislative or interpretative

(31) Davis, Supra, 302 and note 15 cited therein.
depends upon whether or not it issued pursuant to a grant of lawmaking power, and he further says that his proposition is supported by the action of courts in a great many cases, although the proposition is seldom articulated, and although a substantial amount of confusion persists.\(^{(31)}\)

But other scholars say that the distinction should be between rules that interpret and those that do not interpret, instead of between those that rest upon a grant of lawmaking power and those that do not, because many of the rules issued pursuant to a grant of lawmaking power merely interpret other law.\(^{(32)}\)

**PART II  PROCEDURES FOR RULE-MAKING**

1. **In General**

The federal A.P.A. makes no attempt to produce uniformity of rule-making procedures. Instead, it provides minimum standards for party participation, not going beyond general notice of the proposed rule and the requirement of opportunity to make written presentations and to appear. That is, the Act does not require a hearing for rule-making, but it provides a detailed procedure to be followed, when rules are required, by another statute, to be made on the record after opportunity for an agency hearing. The procedures under A.P.A. are thus almost as diverse as they were before the A.P.A. was enacted.

Existing rule-making methods are summarized follows: no participation by the parties affected, consultations and conferences between the agency and the parties, consultation with advisory committees representing parties, written briefs or presentation of written data, speech making hearings, and trial type hearings.\(^{(33)}\) Thus rules may be formulated through any one or more of these methods.

A good deal of rule-making is done today without any kind of participation of parties. This is true in the federal system of nearly all regulations which are within the exceptions to 5 U.S.C.S 553, (S 4 of the A.P.A.). 5 U.S. C. S 553 reads in part:

\(^{(32)}\) F.C. Newman takes this position.

\(^{(33)}\) K.C. Davis, Administrative Law Treatise, Vol. I, 360. Professor Fuchs listed four methods as the administrative rule-making procedures from the different points of view: “The administrative rule-making procedures that have grown up as a result of the interplay of the foregoing factors may be separated for convenience into four general types. These are (1) investigational procedure, (2) consultative procedure, (3) auditive procedure, and (4) adversary procedure.” Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev., 257, 273.
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(a) This section applies, accordingly to the provisions thereof, except to the extent there is involved

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule-making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include...

Except when notice or hearing is required by statute, this subsection does not apply.

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

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

Party participation in rule-making may sometimes be contrary to the public interest. An example is a provision of the Rules of Procedure of the Board of Governors of the Federal Reserve System. The reasons may be that

"public participation or delay would prevent the action from becoming effective as promptly as necessary in the public interest, would permit speculators or others to reap unfair profits or to interfere with boards' actions taken with a view to accommodating commerce and business with regard to their bearing upon the general credit on the situation of the country..."or would twice serve no useful purpose.".

Except in the states whose statutes require hearings for rule-making (such as Iowa, Massachusetts, Minnesota, Nebraska, Ohio, Virginia and Wisconsin), the usual maximum requirement is what is prescribed by the Model A.P.A.-notice and opportunity to submit data or views orally or in writing.

The Administrative Conference of the United States has made two recommendations directly related to rule-making procedure, one is Recommendation 5: Representation of the Poor in Agency Rule-making of Direct Consequence to Them. The other is Recommendation 16:

(35) Ibid.
(36) Model A.P.A. S 2(3)
Elimination of Certain Exemptions from the A.P.A. Rule-making Requirements.\(^{(37)}\)

2. Written Presentations, Consultations, and Conferences

Informal written or oral consultation with affected parties or with advisory committees is the mainstay of rule-making procedure. The principal requirement of the A.P.A. is "opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner". The Model State A.P.A. calls for "opportunity to submit data or views orally or in writing".

The consultative process may take many forms. The administrator or staff member may talk over possible rules with selected parties, by telephone or in person, singly or in groups, by systematically and formally arranged conferences or interviews or in connection with fortuitous contacts occasioned by other business. Sometimes consultation involves collaboration in planning and drafting, as when technical representatives of shipping companies cooperate with technicians of the Customs Bureau in preparing rules concerning construction of vessels.\(^{(38)}\) When parties are too numerous and individuals may not be representative, some organization often supplies what is needed. For instance, in the F.C.C. "regular contacts are maintained with well-established trade associations and some licensees and carriers.

The Attorney General's Committee generalized concerning the method of conferences: "The practice of holding conferences of interested parties in connection with rule-making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendant that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule-making process, it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented, conferences have evident advantage over hearing in the development of knowledge and understanding."\(^{(39)}\)

Written presentations and inquiries are often a consultative technique. Questionnaires may serve the function of a Gallup Poll, taking a do-you-want-this, do-you-want-that form.\(^{(40)}\) Especially useful is the submission of tentative rules for written comments. Procedures for

\(^{(39)}\) Ibid.
\(^{(40)}\) Davis, Supra 365.
written presentations are occasionally so elaborate as to approach the methods of adjudication.

When regulations are interpretative, the method followed by the Internal Revenue Service is noteworthy. Even though the A.P.A. exempts interpretative regulations from the procedural requirements of S 4, the Treasury customarily publishes a notice in the Federal Register, setting forth the proposed regulations in full, and stating that consideration will be given to any data, views, or arguments pertaining thereto which are submitted in writing to the Commissioner of Internal Revenue within thirty days from publication of the notice. The final regulation usually recites: "After consideration of such relevant suggestions as were presented by interested parties regarding the proposed rules, the following regulations are hereby adopted." The only inconvenience in the system is the delay and the cost of publication. The advantages are that the Treasury Department learns the views of interested parties, and the parties are given the satisfaction of having opportunity to participate.\(^{(41)}\)

3. Advisory Committees

The use of advisory committees is often important whether or not hearings are later held on proposed rules. It should be noted, however, that, so far as concerns the interests of those to be affected by the regulations, the utility of this method will depend to a considerable degree on the extent to which such persons are organized in groups capable of representing their interests, and where such organization exists, on the diligence with which such groups will participate in the work of formulating regulations. Benjamin, Commissioner of the New York Board of Standards and Appeals, cautions that the consultative method may operate unfairly unless all the conflicting interests are effectively represented, directly or indirectly and that the method may miscarry if the agency selects consultants who are the best suited.

The most elaborate experience the federal government has had with a detailed mechanism for choosing and using advisory committees may have been that of the Wage-Hour Division under the Fair Labor Standards Act of 1938. The Act provided a 25¢ minimum wage for the first year, 30¢ for the next six years, and 40¢ thereafter, but it also provided for increasing the minimum to as much as 40¢ during the first seven years "as rapidly as is economically feasible without substantially curtailing employment."\(^{(42)}\) Instead of giving

\(^{(41)}\) Ibid.
\(^{(42)}\) 29 U.S. CA. S. 208 (a).
this power to the Administrator, the Act placed the primary authority in industry committees to be appointed by the Administrator. Each committee was composed of equal numbers of representatives of the public, of employees, and of employers, and a two-thirds vote was required. Altogether, 70 industry committees were appointed. The Committees had power only to make recommendations, but the Administrator could approve or reject recommendations only in their entirety and could not revise them. Of 113 recommendations, only six were disapproved.\(^{(43)}\)

The industry-committee system under the Fair Standards Act may at some future time become a forerunner of miniature republics operating in economic or functional areas within frameworks laid down by the Constitution and by Congress. The experience shows that apart from congressional directions provided in the statute and apart from congressional, executive, judicial, and public supervision of administration, an administrative process itself may intrinsically be constructed on a principle of government with the consent of the governed. Furthermore, the experience proves that a successful marriage can be brought about between the democratic methods embodied in the device of the representative committee and relatively scientific methods supplied by the economists and the statisticians who advised the Administrator.

No wage order could be entered under the system without a concurrence of the ideas produced by these two methods. To the extent that members of committee used the procedures of bargaining and mediation within the committees, instead of merely studying the available materials to arrive at a purportedly judicial judgment on the questions at issue, the democratic process operated effectively, and at the same time the Administrator's supervision and final approval of recommendations protected against the excesses and irrationalities of democratic processes and assured a compliance with the basic will of Congress.\(^{(44)}\)

4. Hearings

1) Hearing Required by General Legislation

Most general administrative procedure legislation avoids the requirement of hearings for rule-making. As we saw before, the federal A.P.A. provided for no more than "opportunity to participate in the rule-making through submission of written data, views, or arguments

\(^{(43)}\) Davis, Supra 368.
\(^{(44)}\) Ibid, 370.
\(^{(45)}\) S. 4 (b).
with or without opportunity to present the same orally in any manner. Similarly, the Model State A.P.A. does not require a hearing.

Many of the state statutes are somewhat comparable. California, for instance, provides "opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally." Arizona, Indiana, Michigan, and North Dakota have similar statutes.

The states whose administrative procedure legislation requires hearings for rule-making (usually with specified exceptions) include Iowa, Massachusetts, Minnesota, Nebraska, Ohio, Virginia, and Wisconsin.

Although the variations from state to state are considerable, a good example of these statutes is that of Ohio where a rule is invalid unless the prescribed procedure is followed. The agency is required to give notice of thirty days of proposed rule-making. The agency "shall conduct a public hearing at which any person affected may present his position, arguments, or contentions orally or in writing, and at said hearing may offer and examine witnesses and present evidence tending to show that said proposed rule will be unreasonable or unlawful". The effective date of a rule may not be earlier than the tenth day after the rule has been filed in its final form with the Secretary of State. The principal exception to the procedural requirements is that the Governor may issue a written order declaring an emergency, but even then a rule becomes invalid after sixty days unless the agency has by then followed the prescribed procedure.

Statutes like that of Ohio are much less desirable than the Federal Act, the Model Act, and the California Act, for the conclusion is an easy one that a large portion of all rules coming within the Ohio definition and not involving emergency should be free from rigid procedural requirements. The way to confirm this conclusion is to look over the changes that are made from time to time in rules and to see how seldom a public hearing is appropriate.

(46) S.2 (3).
(49) Kentucky Statute provides: "Where practicable to do so, state agencies are encouraged to give notice, to interested persons, of proposed regulations, and conduct hearing upon the proposed regulations prior to adoption thereof." Ky. Rev. Stat. S. 13. 125.
(50) Davis, Supra 373.
2) Hearing as Procedural Due Process Requirement

The right to be heard is the fundamental principle upon which the administration of justice in the common law world is based. In the United States, the application of this principle to the field of administrative law has been facilitated by the existence of the constitutional concept of procedural due process.

The dominant factor in the development of the procedural aspect of American administrative law has been the provision of federal and state constitutions that no person may be deprived of life, liberty or property without due process of law. While the consideration of whether an administrative body must give notice and an opportunity to be heard to interested individuals frequently involves difficulties of statutory interpretation, the ultimate legal problem is whether the procedure utilized satisfied the guarantee of due process of law.\(^{154}\)

As a requirement to which administrative procedure must conform, due process is not necessarily the same as judicial process. To require conformity to the details of court-room procedure might be to hamstring the effectiveness of administration. Courts have accepted the desirability of some procedural flexibility in the performance of administrative functions; at the same time, they have been reluctant to impose even the basic essentials of notice and hearing as a uniform requirement to the validity of all administrative action.

As we saw before, the existence of the right to be heard depends upon the nature of the particular administrative function at issue. The applicability of the notice and hearing requirement of procedural due process to the field of administrative law is largely based upon the distinction between the rule-making and the adjudication.

If the administrative proceeding at issue is one involving rule-making, the courts start with the assumption that there is no right to notice and hearing in the absence of provision therefor in the relevant enabling act; "... in legislation, or rule-making, there is no constitutional right to any hearing whatsoever".\(^{152}\) This general proposition has been established in the federal field since Bi-Metallic Co. v. Colorado.\(^{153}\) In that case, the court sustained an order of the State Board of Equalization of Colorado increasing the valuation of all taxable property in the city of Denver forty per cent as against the claim that it violated due

\(^{151}\) Gellhorn, Administrative Law 229 (2d. ed. 1947).

\(^{152}\) Willapoint Oysters v. Ewing, 174 F. 2d 676, 693-694.

\(^{153}\) 239 U.S. 441.
process because no opportunity was given to the affected taxpayers to be heard before the order was made. To Justice Holmes, who delivered the opinion of the Court, it mattered not that the taxpayers were adversely affected by the particular administrative order, for that was true of most governmental action. What did matter was the fact that the function involved was legislative in nature and widespread in applicability. "Where a rule of conduct applies to more than a few people", Justice Holmes asserted in an oft-quoted portion of his opinion.

"it is impractical that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule... There must be a limit to an individual argument in such matters if government is to go on". (54)

In the Bi-Metallic case, the administrative action applied uniformly to a relatively large area. The valuation of all taxable property in the city of Denver was increased by a certain amount. In this respect, the effect of the order at issue was much like that of an ordinary statute of the legislature. If the legislature had acted directly, those affected could not complain because they had not been given an opportunity to be heard prior to the passage of the statute.

If the result in this case had been reached as it might have been by the doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power. (55)

The analogy used by Justice Holmes of the direct exercise of power by the legislature is not, however, of itself sufficient to justify the exercise of delegated legislative power without notice and hearing. It is not enough to say that, because the exercise of such power by the legislature is not subject to certain procedural requirements, a similar exemption should be granted to administrative agencies. (56) A like contention was disposed of

(54) Ibid, 445.
(55) Ibid.
(56) Davis, Supra, 376.
by Mr. Justice McReynolds in *Southern Railway Co. v. Virginia*. "Counsel submitted that the legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the closing. Consequently they conclude the same end may be accomplished in any manner which it deems advisable, without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public". (57)

The Bi-Metallic case cannot thus be justified solely on the ground that, since the function involved could have been directly exercised by the legislature without giving those affected an opportunity to be heard, the same should be true of an administrative agency to whom authority has been delegated by the legislature. It is only where the given rate is general in its applicability that notice and hearing need not be given prior to its promulgation. If it applies only to particular individuals, its effect is much like that of a judicial decision, and the procedural requirements that are imposed where judicial functions are involved should be followed.

The decision in the Bi-Metallic case rests upon the fact that the administrative action there at issue affected a relatively large group. That Mr. Justice Holmes himself recognized this is shown by his distinguishing of *Londoner v. Denver* (58), which involved an assessment by a local board of a tax for the cost of paving a street upon the abutting land-owners. The court had stated there that "where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard. But said Justice Holmes, in the Bi-Metallic case, this principle does not apply where a rule which is general in applicability

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(58) 210 U.S. 373, 385 (1908).
is at issue. In *Londoner v. Denver*, a relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid. In other words, under the Bi-Metallic case, notice and hearing need not be given where the rule lays down a principle which is to be applied generally. The same is not true where the agency action, though legislative in character, affects the rights and obligations of particular individuals.

That this is the ground upon which the *Bi-Metallic* case and *Londoner v. Denver* can be distinguished is shown by the opinion of Mr. Justice Brandeis in the *Assigned Car Case* (59) Respondents there had brought suit to annul an order of the Interstate Commerce Commission which prescribed for all railroads subject to its jurisdiction a so-called "Assigned Car Rule" governing the distribution of cars among bituminous coal mines in time of car shortage. Among other things, it was claimed that the findings of the commission concerning discrimination were unsupported by evidence introduced at a hearing. This contention, said Justice Brandeis, overlooks the difference in character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under sections 1, 3 and 15 of the Interstate Commerce Act... In the case at bar, the function exercised by the commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the commission, like other legislators, may reason from the particular to the general. (60)

Perhaps the best example of a legislative function which is particular in applicability is the rate-making function. In fixing a rate for the future, an agency exercises a delegated power legislative in character. Yet, ever since *Chicago, M & St. P. Railway Co. v. Minnesota* (61) it has been recognized that due process requires the carrier effected to be given a hearing before its rates are prescribed. As stated by Mr. Justice Blackford, in dealing with the summary fixing of rates by a state commission,

"No hearing is provided for, no summons or notice to the company before the commis-

(59) 274 U.S. 564 (1927).
(60) Ibid, 583.
(61) 134 U.S. 418 (1890).
sion has found what it is to find and declared what it is to declare no opportunity pro-
vided for company to introduce witnesses before the commission, in fact, nothing which
has the semblance of due process of law". (62) Consequently, "while it is well settled that
Congress may delegate to the Interstate Commerce Commission, as an administrative
tribunal, the power to fix rates, provided they are just and reasonable, that result can be
lawfully accomplished by the commission only after a fair and full hearing of the carriers
affected." (63)

That rate-making must be preceded by notice and hearing although the agency concerned
is an instrument in a governmental process which according to the accepted classification is
legislative, not judicial, is thus well established. (64) The basis for imposing procedural re-
quirements in such cases is to be found in the effect of a rate order. Whatever the approp-
riate label, the order that emerges from a rate fixing proceeding is one that impinges upon
the property rights of particular carriers. The agency concerned must give a hearing adapted
to the consequences that flow from its action. In the exercise of a function such as rate-
making, the question of procedural due process cannot be solved merely by attaching a label
to the proceeding and placing it in a slot. Though historically and by nature, rate-making
is considered a legislative process and though one starts with the assumption that a hearing
is not a necessary part of the legislative process, notice and hearing are required where the
rate fixing function has been delegated to an administrative agency, because of the effect
of a rate order upon particular carriers.

The due process clause provides that no one shall be deprived of his property without
due process of law; and the due process which must be accorded in enforcement of a
reduction in rates includes a judicial type of hearing before a capable tribunal". (65)

The rate-making cases bear out the proposition that the key element in determining
whether notice and hearing need be given prior to the exercise of a delegated legislative
function is that of applicability. If the rule involved is particular in applicability, those af-
fected have a right to be heard prior to its promulgation. Even if the administrative function
involved is considered legislative in nature, because of the immediate effect upon particular

(64) Paraphrasing Cardozo, J., in Norwegian Nitrogen Products Co v. U.S., 288 U.S. 294, 318
(1933).
persons, it must be exercised in accordance with the procedural safeguards that are imposed in cases where judicial functions are involved.

Professor K. C. Davis comments on this standpoint as follows:

"Requiring a trial in the Londoner case and refusing to require it in the Bi-Metallic case may have been thoroughly sound. But the cases should not be interpreted as supporting the proposition that the requirement of a hearing should depend upon the number of parties. The emphasis should be upon the "individual grounds". The true test is whether the facts are general or concern individuals. No matter how numerous the parties, a trial usually is the expedient device for resolving factual controversies that relate to an individual, and no matter how few the parties a trial is usually unnecessary for developing general facts. ... There is, however, a high correlation between numerous parties and the generality of the facts, and between few parties and the specificity of the facts; accordingly courts which make the number of parties the criterion usually reach a good result". (66)

The distinction between rules of general and particular applicability, for the purposes of determining whether notice and hearing must be given, appears at first glance to have been lost sight of in Bowles v. Willingham. (67) In that case, the price Administrator, acting under the authority given him in section 2 (b) of the Emergency Price Control Act of 1942, had issued a declaration designating twenty-eight areas in various parts of the country, including Macon, Georgia, as defense rental areas. (68) Several weeks later, the Administrator issued Maximum Rent Regulation No. 26 establishing the maximum rents for housing in these defense areas. (69) The maximum rentals fixed for housing accommodations rented on April 1, 1941 were the rents obtained on that date. As respects housing accommodations rented for the first time since April 1, 1941, it was provided that the maximum rent should be the first rent charged after April 1, 1941. But in that case it was provided that the Rent Director might order a decrease on his own initiative on the ground, among others, that the rent was higher than that generally prevailing in the area for comparable housing accommodations on April 1, 1941.

At this stage, there were no procedural requirements which the administrator had to follow other than those specified in the enabling Act. The declaration designating defense

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(66) Davis, Supra 378.
(67) 321 U.S. 503(1944).
(69) 7Fed. Reg. 4905(June 30, 1942).
rental areas and the maximum rent regulation were clearly general in applicability within the principle of the Bi-Metallic case, and hence could be issued without giving all of those who may be affected an opportunity to be heard. But the administrative action which followed did apply only to a particular landlord. In June, 1943, the Rent Director gave written notice to Mrs. Willingham that he proposed to decrease the maximum rent for three apartments owned by her, which were first rented in the summer of 1941, on the ground that Mrs. Willingham filed objections to that proposed action together with supporting affidavits. The Rent Director thereupon advised her that he would proceed to issue an order reducing the rents. In the suit, it was claimed that the administrative procedure authorized by the Act violated the Fifth Amendment because there was no provision for a hearing to landlords before the order or regulation fixing rents became effective.

The court, through Mr. Justice Douglas, had no difficulty in disposing of Mrs. Willingham's contention on this point.

"Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia……. Congress need not make that requirement when it delegates the task to an administrative agency". (70)

Justice Holmes' opinion in the Bi-Metallic case is cited, and, as has been indicated, it supports the view that the general regulation fixing maximum rents in defense rental areas need not be preceded by notice and opportunity to be heard. But what about the order of the Rent Director reducing the rents for the apartments owned by Mrs. Willingham?

Though Justice Douglas is not as clear on this point as one might have wished, it would appear that his holding that notice and hearing are not required as a matter of due process extends as well to the particular order to Mrs. Willingham. Though apparently contrary to the normal rule applicable to the exercise of legislative functions which are particular in applicability, this result can be justified by other provisions of the statute and regulations and by the purposes of the Act. In the first place, under the regulations, a landlord in Mrs. Willingham's position was not absolutely denied a hearing. A hearing could be granted if an application for review or a protest was filed within a stated period after the issuance

(70) 321 U.S. 503, 519(1944).
of an order of the Rent Director.\textsuperscript{(71)} The postponement of the hearing till after the
taking of administrative action should not, of itself, invalidate such action, even though
a hearing is required by due process.\textsuperscript{(72)} In addition, as Justice Douglas points out, Congres-
sess has provided for judicial review of the Administrator's action.\textsuperscript{(73)} In such a case, he
implies, those affected are given an adequate hearing at the judicial level. It is true that
the above by themselves would normally not be enough to justify the promulgation of rule
particular in applicability without giving those affected an opportunity to be heard. In the
normal case, such opportunity must be given before the rule in question becomes effective,
and here its operation was not suspended pending consideration of the application for review
or protest. But a case involving wartime rent control is not a normal case, and it is this
which justifies some relaxation of procedural requirements.

3) Nature of the Hearing

The Federal A.P.A 5 U.S 553 (C), provides for when rules are required by statute to
be made on the record after opportunity for an agency hearing, section 556 and 557 of this
title apply instead of this subsection. At a hearing under section 556 and 557, the private
party is permitted to introduce all relevant evidence and arguments, to cross-examine
witnesses, and to rebut the evidence of the other side. The decision of the agency must be
based upon the evidence in the record of the hearing and must contain findings articulating
its bases. If the hearing has been held before a subordinate official of the agency, the
private party should be permitted to take exceptions to any intermediate report submitted
by him to the agency heads.

Until recently, it was not clear whether such hearings had to be conducted in all cases
in accordance with the formal adjudicatory procedures prescribed by the federal A.P.A..
The relevant sections of the A.P.A. are limited in applicability to cases "where rules are
required by statute to be made on the record after opportunity for an agency hearing". It
has been asserted that the "legislative history makes clear that the word 'statute' was used
deliberately so as to make sections 5, 7 and 8 applicable only where the congress has other-
wise specifically required a hearing to be held.\textsuperscript{(74)} Under this view, it is not enough that
due process demands a hearing in a particular case for the procedural requirements of the

\begin{itemize}
  \item \textsuperscript{(71)} 32 C.F. S.1300, 209~10, 1300, 215~40.
  \item \textsuperscript{(73)} 321 U.S. 503, 520(1944).
  \item \textsuperscript{(74)} Attorney General's Manual on the Administrative Act 41(1947).
\end{itemize}
A.P.A. to govern. There must be in addition some statutory command for notice and hearing.

Statutes requiring hearings are often interpreted to mean public meetings or arguments, and not trial (or formal adjudicatory hearing).\(^{(75)}\) But the meaning of the term "hearing", when hearing is not intended, is far from clear. Probably an opportunity to submit written evidence or written argument without an oral process is not within the term.\(^{(76)}\)

4) The A.P.A. Requirement and Choice between the Method of Rule-making and the Method of Adjudication

In the A.P.A., the rule-making procedure is different from the adjudication procedure. There, thus, have been controversies about whether an administrative agency has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirement of the Administrative procedure Act. In *N.L.R.B. v. Wymangordon Co.*, prevailing opinion said that the administrative agencies could not avoid the A.P.A.'s rule-making requirement by the process of making rules in the course of adjudicatory proceeding. But the prevailing opinion, in the same case, upheld the Board's action on the ground that it wasn't on the Excelsior rule.

In *N.L.R.B. v. Wymangordon Co.*, the prevailing opinion reads, in part, as follows:

"Mr. Justice Fortas announced the judgment of the court and delivered an opinion in which the Chief Justice, Mr. Justice Stewart, and Mr. Justice White join………

The Excelsior case involved union objections to the certification of the results of the elections that the unions had lost at two companies. The companies had denied to the unions a list of the names and addresses of employees eligible to vote. In the course of the proceedings, the Board invited certain interested parties to file briefs and to participate in oral argument of the issue whether the Board should require the employer to furnish lists of employees. 156 N.L.R.B., at 1238. Various employer groups and trade unions did so, as amici curiae. After these proceedings, the Board issued its decision in Excelsior. It purported to establish the general rule that such a list must be provided, but it declined to apply its new rule to the companies involved in the Excelsior case. Instead, it held that the rule would apply only in those elections that are directed, or consented to, subsequent to 30 days from the date of (the) decision. Id., at 1240, n.5.

\(^{(75)}\) For instance, Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294, in which the requirement of "having" was interpreted as not requiring a determination on the record by the Tariff Commission in recommending to the President a change in import duties.

\(^{(76)}\) Davis, Supra 375.
Specifically, the Board purported to establish 'a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties……, or after the Regional Director or the Board has directed an election……, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed'……

Section 6 of the National Labor Relations Act empowers the Board 'to make…', in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act. 29 U.S. C.S 156. The Administrative procedure Act contains specific provisions governing agency rule-making, which it defines as 'an agency statement of general or particular applicability and future effect', 5 U.S. C.S 551 (4) The Act requires among other things publication in the Federal Register of notice of proposed rule-making and of hearing; opportunity to be heard; a statement in the rule of its basis and purposes; and publication in the Federal Register of the rule as adopted……The Board asks us to hold that it has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative procedure Act.

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application……They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The 'rule' created in Excelsior was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the hearing; whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule-making.

The Solicitor General does not deny that the Board ignored the rule-making provisions of the Administrative Procedure Act. But he appears to argue that Excelsior's command is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it in the Excelsior proceeding, in which the requirements for valid adjudication had been met. This argument misses the point. There is no question that, in an adjudicatory hearing, the Board could validly
decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in Excelsior. The Board did not even apply the rule it made to the parties in the adjudicatory proceedings, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: i.e., to exercise its quasi-legislative power.

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See Frandly, the Federal Administrative Agencies 36-52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are rules in the sense that they must, without more, be obeyed by the affected public.

In the present case, however, the respondent itself was specially directed by the Board to submit a list of the names and addresses of its employees for use by the unions in connection with the election. This direction, which was part of the order directing that an election be held, is unquestionably valid—Even though the direction to furnish the list was followed citation to Excelsior Underwear, Inc., it is an order in the present case that the respondent was required to obey. Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.\(^\text{77}\)

In the same case, Mr. Justice Black's concurring, opinion, with whom Mr. Justice Brennan and Mr. Justice Marshall join, reads as follows in part:

"I agree with (the portions) of the prevailing opinion of Mr. Justice Fortas, holding that the Excelsior requirement that an employer supply the union with the name and addresses of its employees prior to an election is valid on its merits and can be enforced by a subpoena. But I cannot subscribe to the criticism in that opinion of the procedure followed by the Board in adopting that requirement in the Excelsior case, ""Nor can I accept the novel theory by which the opinion manages to uphold enforcement of the Excelsior practice in spite of what it considers to be statutory violations present in the procedure by which the requirement was adopted. Although the opinion is apparently intended to rebuke the Board and encourage it to follow the plurality's conception of proper administrative practice, the result instead is to free the Board from all judicial control whenever regarding compliance with procedures specifically required by applicable federal statutes such as the National Labor Relations Act, ... and the Administrative Procedure Act, ... Apparently under..."

the prevailing opinion, courts must enforce any requirement announced in a purported adjudication even if it clearly was not adopted as an incident to the decision of a case before the agency, and must enforce 'rules' adopted in a purported 'rule-making' even if the agency materially violated the specific requirements that Congress has directed for such proceedings in the Administrative Procedure Act. I for one would not give judicial sanction to any such illegal agency action.

In the present case, however, I am convinced that the Excelsior practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it, and for that reason I would hold that the Board properly followed the procedures applicable to 'adjudication' rather than 'rule-making'. Since my reasons for joining in reversal of the Court of Appeals differ so substantially from those set forth in the prevailing opinion, I will spell them out at some length......

Most administrative agencies, like the Labor Board here, are granted two functions by the legislation creating them: (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power. The line between these two functions is not always a clear one and in fact the two functions merge at many points.

The Act does specify the procedure by which the rule-making power is to be exercised......In this same statute, however, Congress also conferred on the affected administrative agencies the power to proceed by adjudication, and Congress specified a distinct procedure by which this adjudicatory power is to be exercised......Under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either rule 'making' or 'adjudication' under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rule-making or adjudication". (78)

In the same case, Mr. Justice Douglas' dissenting opinion reads as follows in part:

"The 'substantive' rules described by § 553 (d) may possibly cover 'adjudication', even though they represent performance of the 'judicial' function. But it is no answer to say that the order under review was 'adjudicatory'. For as my brother Harlan says, an agency is not adjudicating when it is making a rule to fit future cases. A rule like the one in Excelsior is designed to fit all cases at all times. It is not particularized to special facts. It is a statement of far-reaching policy covering all future representative elections. It should therefore have been put down for the public hearing prescribed by the Act.

(78) W. Gellhorn, C. Byse, Administrative Law (Fifth Edition), 632~635.
The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that are forthcoming. It gives an opportunity for persons affected to be heard. ... Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.

This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power makes them more and more remote from the people affected by what they do and makes more likely the arbitrary exercise of their powers. Public airing of problems through rule-making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

It has been stated that 'the survival of a questionable rule seems somewhat more likely when it is submerged in the facts of a given case' than when rule-making is used. See Shapiro, The Choice of Rule-making or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 946–947 (1965). Moreover, 'agencies appear to be freer to disregard their own prior decisions than they are to depart from their regulations'. Id., p.947. Failure to make full use of rule-making power is attributable at least in part to administrative inertia and reluctance to take a clear stand.

Rule-making is no cure-all, but it does force important issues into full public display and in that sense makes for more responsible administrative action.

I would hold the agencies governed by the rule-making procedure strictly to its requirements and not allow them to play free and loose as the National Labor Relations Board apparently likes to do..." (79)

In the same case, Mr. Justice Harlan's dissenting opinion reads as follows in part:

"Since the Labor Board's Excelsior rule was to be effective only 30 days after its promulgation, it clearly falls within the rule-making requirements of the Act.

Given the fact that the Labor Board has promulgated a rule in violation of the governing statutes, I believe that there is no alternative but to affirm the judgment of the Court of Appeals in this case. If, as the plurality opinion suggests, the N.L.R.B. may properly enforce an invalid rule in subsequent adjudications, the rule-making provisions of the Administrative Procedure Act are completely trivialized. Under today's prevailing approach, the agency may evade to commands of the Act whenever it desires and yet coerce the regulated industry into compliance. It is no answer to say that 'respondent was under no compulsion to furnish the list because no statute and no validly adopted required it to do so.' ... When the Labor Board was threatening to issue a subpoena which the

courts would enforce. In what other way would the administrative agency compel obedience to its invalid rule?

One cannot always have the best of both worlds. Either the rule-making provisions are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem.

In refusing to adopt this position, the prevailing opinion does not only undermine the Administrative procedure Act, but also compromises the most basic principles governing judicial review of agency action established in our past decisions. This courts landmark opinion in *S.E.C. v. Chener Corp.* 318 U.S. 80, 94(1943), makes it clear that we are obliged to remand a case if the agency has relied upon an improper reason to justify its action.\(^{(80)}\)

A troublesome area of law surrounds the central problem of the procedure required to change the immediate legal rights of particular parties through rule-making, without allowing a trial type hearing.

In *Dyestuffs and Chemicals, Inc. v. Flemming*,\(^{(81)}\) the petitioner produced coaltar colors long and widely used in coloring edible fat products, principally butter and oleomargarine. The Deputy Commissioner of the Food and Drug Administration published a notice of proposal to remove the coloring from the approved list for unrestricted use. After reviewing comments received, an order removed the coloring from the list. The statute allowed objections to be filed within thirty days, with a request for public hearing, and provided:

"As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objection." The requested hearing was denied on the ground that the objections raised were legally insufficient.

The court, before examining the petitioner’s argument that the statute imposed an unconditional requirement of hearing, analyzed the four objections and held each of them legally insufficient. Then it laid down the proposition: "If it is perfectly clear that petitioner’s appeal contains nothing material and the objections stated do not abrogate the legality of the order attacked, no hearing is required by law.

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\(^{(80)}\) Ibid, 638~640.
\(^{(81)}\) 271 F.2d 281 (8th Cir. 1959)
The Dyestuffs case probably stands as authority approving the denial of a hearing even when a hearing is required by statute, on objections an administrator deems legally insufficient, even when the issues of legal sufficiency are live and difficult.\(^{(82)}\)

In *the American Airline, Inc. v. C.A.B.*, an eight-judge court held, five to three, that the C.A.B. through rule-making and without full adjudicatory hearing could adopt a policy that only all-cargo carriers could provide blocked space service. The prevailing opinion reads as follows in part:

“One August 7, 1964, the C.A.B., two members dissenting, issued a ‘policy statement’ regulation (PS-24), providing that only all-cargo carriers may provide ‘blocked space service’—essentially the sale of space on flights at wholesale rates, when ‘blocked’ or reserved by the user on an agreement to use a specified amount of space. Concomitantly, the Board vacated its suspension of a tariff proposing such blocked space service field by Slick Airways, one of the all-cargo carriers. Defensive tariffs, similar to but not identical with Slick’s were filed by American Airlines, Trans-World Airlines and United Airlines, petitioners here, who are combination carriers, i.e. carriers authorized to carry persons as well as property and mail. These tariffs were summarily rejected in order No. E-21170, August 11, 1964, brought before this court on petitions for review.

The C.A.B.’s regulation was the culmination of a rule-making proceeding... held pursuant to notice of January 23, 1964, and supplemental notice of June 22, 1964. All interested parties had opportunity, of which petitioners availed themselves, to present their positions to the Board through oral argument as well as written data, views, and rebuttals. The procedure followed by the Board admittedly complies fully with the requirements for rule-making established in Section 4 of the A. P.A., The question before us is whether this regulation effected a modification of petitioners’ existing certificates which, under S 401(g) of the Federal Aviation Act, 49 U.S.C. S 1371 (g), may be accomplished only after a full adjudicatory hearing. We hold that the regulation was validly issued."

2. Petitioners claim that S 401 (g) of the Federal Aviation Act, ...assures them an ‘adjudicatory hearing’ because the Board action amounts to a modification or suspension of existing rights under their certificates of public convenience and necessity.

In essence, petitioners argument is the same as the thesis this court accepted ten years ago in the Storer case, only to be reserved by the Supreme Court. This court held the multiple ownership rule of the F.C.C. invalid because of the inadequacy of the rule-making procedure followed in its adoption, an adjudicatory hearing being expressly guaranteed by statute to applicants for licenses.

Rule-making under the APA of the United States

The Supreme Court, however, held that notwithstanding the statutory hearing requirement the commission retained the power to promulgate rules of general application consistent with the Act, and to deny an adjudicatory hearing to applicants whose applications on their face showed violation of the rule. Storer's vitality is attested by its recent application in *F.P.C. v. Texaco*, 377 U.S. 33, 39 (1964), where the Supreme Court stated: The statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

petitioners argue that the Storer doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the C.A.R. regulation affected rights under existing certificates. That such a restrictive reading of the Storer doctrine is unwarranted, is shown by such decisions as *National Broadcasting Co. v. U.S.*, 319 U.S. 190,

The present case is different in particular aspects of the facts or statutory previsions from Storer and the Storer doctrine cases. However, the Storer doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule-making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule-making is not to be shackled, in the absence of clear and specific congressional requirement, by importation of formalities developed for adjudicatory process and basically unsuited for policy rule-making". *(83)*

APPENDIX

A PROPOSAL FOR KOREA: BILL ON PROCEDURE FOR ORDINANCE-MAKING

*Definitions*

(a) "Agency" includes president, prime minister ministry and agencies directly belonged to them, and the agencies authorized to make ordinance by the statute or superior ordinance.

(b) "Ordinance" means presidential decree, prime minister's ordinance, minister's ordi-

*(83) 359 F 2d 624, Certiorari denied, 385 U.S. 843.*
nance and their announcement of general applicability relating to functions which will be defined by the presidential decree.

(c) "Person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

(d) "Ordinance-making" means agency process for formulating, amending, or repealing an ordinance.

Institution of Ordinance-Making

The agency initiates ordinance-making on its own motion. However, in doing so, it may, in its discretion, consider the recommendations of other agencies and other interested persons.

Right to Petition

Any interested person may petition an agency requesting the adoption, amendment or repeal of an ordinance, or a permanent or exemption from any rule. Such petition shall state clearly and concisely:

(a) The substance or nature of the ordinance, amendment, or repeal requested;

(b) The reason for the request;

(c) Reference to the authority of the agency to take the action requested.

Notice of Proposed Action

At least 15 days prior to the adoption, amendment, or repeal of an ordinance, notice of the proposed action shall be:

(a) Published in such newspaper of general circulation, trade or industry publication, as the agency shall prescribe.

(b) Filed with the National Assembly and the office of legislation.

(c) Mailed to every person who has filed a request for notice thereof with the agency.

(d) When appropriate in the judgment of the agency, (1) mailed to any person or group of persons whom the agency believes to be interested in the proposed action and, (2) published in such additional form and manner as the agency shall prescribe.

Contents of Notice

The notice of proposed adoption, amendment or repeal of an ordinance shall include:

(a) A statement of the time, place, and nature of proceedings for adoption, amendment, or the ordinance.

(b) Reference to the authority under which the ordinance is proposed.
(c) Either the express terms or an informative summary of the proposed action.

(d) A statement of the time within which written comments must be submitted and the required number of copies.

(e) A statement of how and to what extent interested persons may participate in the proceeding.

**Public Proceedings**

On the date and at the time and place designated in the notice the agency shall afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing with or without opportunity to present the same orally. The agency shall consider all relevant matter presented to it before adopting, amending or repealing any ordinance.

**Proviso**

Sections on notice and public proceedings do not apply when the agency for good cause finds that notice and public proceedings thereon are impracticable, unnecessary, or contrary to the public interest.

**Hearings**

(a) As one of public proceedings, hearings will be held if required by statute or the agency finds it necessary or desirable. Hearings are fact finding proceeding, each hearing is nonadversary and there are no formal pleadings or adverse parties. Any rule issued in a case in which a hearing is held is not necessarily based exclusively on the record of the hearing.

(b) The agency designates a presiding officer for each hearing.

(c) The procedure in hearings held under this section is as follows:

1. The presiding officer makes an opening statement with particular reference to the notice of proposed ordinance making.

2. The presiding officer designates interested persons or their authorized representatives to speak at the hearing.

3. The presiding officer allocates enough time to each interested person on an equal basis so that his position may expressed fully and placed on the record, with those favor it speaking first followed by those who oppose it, initial statements being made as far as possible without interruption, and questions permitted after initial statements have been made by all designated persons.
(4) Arguments and oral statements are limited to the subject named in the notice of proposed ordinance making.

(5) Written information, views, arguments, or briefs may be offered for record, but may not be accepted after the hearing unless good cause is shown or the submission is requested by the presiding officer.

(6) The presiding officer of a hearing may deviate from the procedures prescribed in this section to assure a more complete and informative record.

Additional Ordinance-Making Proceedings

The agency may initiate any further ordinance-making proceedings that it finds necessary or desirable. For example, it may invite interested persons to present oral arguments, participate in conferences, appear at informal hearings, or participate in any other proceedings.