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Report on Administrative Law to the Tennessee Law Revision Commission

Daniel J. Gifford

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Report on Administrative Law to the Tennessee Law Revision Commission

*Daniel J. Gifford**

In this article, Professor Gifford assesses existing Tennessee administrative law, and develops his suggestions to the Tennessee Law Revision Commission concerning the advisability of a state administrative procedure act. He evaluates the federal Administrative Procedure Act, and the Model and Revised Model State Administrative Procedure Acts, and concludes that the enactment of a generalized act based upon the original Model Act would be most appropriate.

The following discussion of certain aspects of administrative law is a revised version of a report prepared during the 1963-64 academic year in response to a request by the Tennessee Law Revision Commission for an evaluation of issues to be considered in adopting an administrative procedure act for the State of Tennessee. Because one of the Model State Administrative Procedure Acts would probably be used as the basis for a Tennessee Act, the discussion is based upon a comparative analysis of the workings of the original Model Act, the Revised Model Act, and the federal Administrative Procedure Act.

Whether a generalized administrative procedure act is desirable for Tennessee depends in part upon how one assesses the present workings of the various administrative bodies within the state and the present allocation of functions between courts and agencies. The resolution of the question also depends upon an evaluation of whether new statutory criteria would generate more uncertainty and dispute than they would resolve and whether the uncertainties generated by a new statute would be outweighed by procedural improvements in various agencies. As will be apparent from the discussion throughout the paper, there is great diversity in the tasks and functions of the various administrative bodies; hence, the perennial question associated with administrative law reform must be faced squarely and answered honestly: Is there sufficient common ground among the several agencies that some aspects of their procedures can be treated profitably under a single statute? If the answer is affirmative, then that common ground must be specified.

Although the language has been tightened somewhat from that contained in the report originally submitted to the Commission and

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although some changes have been made, the following pages contain substantially the original document. The reader is cautioned, therefore, that the report suffers from the limitations on research and analyses which were imposed by the tight time schedule in which the report was prepared. Also, I must confess at the outset my own lack of first-hand knowledge and experience with rate proceedings. Those recommendations which touch on rate matters are based largely upon my evaluations of the analyses of others. The following pages, therefore, are at best a tentative statement of some of the issues—together with some comments upon them—which Tennessee practitioners and legislators might use as a basis for reflection upon the state of present administrative procedure in Tennessee and for possible changes in that procedure.

TABLE OF CONTENTS

I. Introduction	781
A. Administrative Structure	781
B. Semantic Problems	781
C. Review Procedures	782
II. Rule Making	782
A. In General	782
B. General Policy Formulations	783
C. Prospective Policy Formulations	784
D. Facilitating Prospective Agency Action	785
E. Public Participation in Rule Making	786
1. In General	786
2. Public Participation Requirements in the Federal Act and the Model Acts	787
3. Mechanics of Notice	788
4. Public Participation Procedures of the Federal and Model Acts	788
5. Miscellaneous Procedural Matters	790
6. Challenges to the Validity of Rules Adopted With Defective Procedure Under the Federal and Model Acts	790
7. Submission of Views in Writing	791
8. Delayed Effectiveness of Rules	793
9. Informal Consultation	793
10. Advisory Committees	794
11. Hearings	795
12. Summary and Conclusions	798
F. Publication of Agency Rules and Policy Formulations	800
1. Provisions of Present Law	800
2. Types of Agency Rules to Which the Public Should Have Access	801

(a) Formal Rules, Interpretations, and Policy Statements Addressed to the Public	801
(b) Policy Statements Addressed to Particular Members of the Public	802
(c) Policy Statements Addressed to Agency Personnel	802
(d) Unarticulated Policy Formulations and Secrecy	803
(e) Materials Required to be Published Under the Federal Act and the Model State Acts	804
3. Means by Which Agency Rules and Policy Formulations Can Be Made Accessible	808
(a) In General	808
(b) Methods of Publication Under Federal and State Statutes	809
4. Recommendations	813
(a) In General	813
(b) Administrative Efficiency	813
(c) Policies Governing the Issuance of Initial Licenses	813
(d) Rules Embodying Standards of Conduct for Violation of Which Penalties Are Imposed	814
(e) Forms of Publication	814
G. Petitions for Adoption of Rules	815
III. Declaratory Determinations	817
A. Declaratory Rulings by Agencies	817
B. Declaratory Judgments by Courts	818
IV. Adjudication	823
A. In General	823
B. Some Procedural Provisions	823
1. Notice and Narrowing of Issues	823
2. Pleadings	824
3. Hearing Officers	825
4. Discovery	826
5. Pretrial Conferences	827
6. Adjournments	828
7. Other Methods of Simplifying Proceedings: Documentary and Oral Presentation	828
8. Elimination of Unnecessary Oral Presentation	830
C. Evidence	830
1. In General	830
2. "Residuum" Rule	832
3. Repetitious and Irrelevant Material	832
4. Material Within an Agency's Specialty	833
5. "Accusatory" Proceedings	834
6. The Federal Act and the Model Acts	834
7. Conclusions	837
D. Internal Separation of Functions and Communications Within the Agency Structure About Issues in Pending Adjudications	838
1. In General	838
2. The Federal Administrative Procedure Act	839
3. The Model State Administrative Procedure Acts	843

4. The Fact-Law Distinction of the Federal Act and the Model Acts	847
5. Relevancy of "Accusatory" and "Technical" Nature of the Proceedings to Separation of Functions	851
6. Official Notice	852
(a) Scope	852
(b) Limitation of Notice to "Facts"	854
(c) "Evaluation of Evidence"	855
(d) Effect of the Official Notice Provisions on Agency-Staff Relations	857
7. Reflections on Some Aspects of Internal Separation of Functions and Communications Within the Agency Structure About Issues in Pending Cases	858
(a) "Investigations"	858
(b) Problems Posed by an Adversary Mentality	863
8. Recommendations	865
E. Decision-Maker's Familiarity With the Evidence and Issues	866
F. Agency Opinions	869
G. Miscellaneous Matters	872
1. Notice of Procedural Protections	872
2. Right to Counsel	872
3. Subpoenas	872
(a) In General	872
(b) Subpoenas Against the Agency	873
(c) Enforcement of Subpoenas	874
H. Disqualification for Bias	875
V. Investigations	875
VI. Settlements and Informal Negotiations	877
VII. Licenses	877
VIII. Judicial Control of Administrative Action in Tennessee	878
A. In General	878
B. Constitutional Aspects of Statutory Certiorari Review	880
C. Constitutional Aspects of Common-Law Certiorari Review	881
D. Constitutional Requirements for Judicial "Independent Judgment" Upon Certain "Legislative" Agency Action	883
E. Scope of Review of Agency Factual Determinations in Common-Law Certiorari Proceedings	884
F. Statutory Interpretation as a "Fact" Question	887
IX. Selected Tennessee Agencies	888
A. The Regulatory Boards	888
B. Commissioner of Revenue	895
C. Commissioner of Agriculture (partial survey)	900
X. Conclusions	904

I. INTRODUCTION

A. *Administrative Structure.*—Administrative processes defy characterization because of the variety of issues and types of proof which they encompass. Although administrative processes are commonly divided into rule making and adjudication, there is no clear line separating rule making from adjudication and large areas of administrative processes fall into a gray zone which possesses substantial elements of both rule making and adjudication, and thus can properly be said to be neither.¹ In proceedings to which named persons are parties, decision-making methods vary greatly depending upon the type of issues involved. In rate-making and other proceedings which raise technical issues,² for example, the involvement of an agency staff may be much greater than in proceedings without technical questions. The presence of a technical issue may alter the structure of the effective decision-making body to include technician-subordinates as well as the agency head.³ This restructuring occurs, however, within a procedural framework which seems to be organized on the assumption that the agency head is the sole decision maker.⁴

B. *Semantic Problems.*—Because administrative processes are relatively new instruments of government, they have not yet developed a distinctive vocabulary. Instead, they have utilized the vocabulary of the courts, creating a potential source of confusion for many, including the bar and the courts themselves. Words such as “fact,” “law,” “discretion,” “substantial evidence,” and “material evidence,” which have accepted, if open-ended, meanings as applied to the judicial process, take on new and often not generally appreciated meanings when they are used to describe elements of administrative processes which are often significantly different from their judicial analogues. The similarity of language and the difference of function contain substantial potential for misunderstanding. This potential is especially strong in the development or application of policy in a

1. Thus, for example, the promulgation of “rules” which apply to only a few persons have the particular aspects that are usually associated with adjudication.

2. See text accompanying notes 96-102 *infra*.

3. Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform or Retrogression?*, 1963 DUKE L.J. 593, 618; Jaffe, *Basic Issues; An Analysis in Symposium—Hoover Commission and Task Force Reports on Legal Services and Procedure*, 30 N.Y.U.L. REV. 1273, 1283 (1955). See text accompanying notes 371-76 *infra*.

4. The Tennessee statutes, for the most part, do not advert to the reality of staff or other assistance in the determination of a disputed issue by the agency head. Some exceptions exist, however. *E.g.*, TENN. CODE ANN. § 56-513 (1955), which provides that in a hearing to determine the lawfulness of fire insurance rates charged, the Commissioner of Insurance and Banking “may avail himself of the services of such experts as he may deem necessary or advisable for that purpose.”

border area between "law" and "fact."⁵ Thus, a reviewing court ought to give greater deference to an agency's evaluation of "evidentiary" or "basic" facts into "secondary" facts⁶ than it would to a trial judge's evaluation of the same facts because, while appellate judges are as competent to evaluate basic facts as a trial judge, they may not be as well equipped as a specialized agency to evaluate such facts in light of the relevant statutory purposes. Furthermore, the very creation of an agency may be evidence of a legislative intent that the evaluation of basic facts should be performed by that agency.⁷ The Tennessee courts,⁸ however, have sometimes ignored this difference and have equated their reviewing function over agencies with the reviewing functions of appellate courts over trial courts. The shifting meanings of the word "law" are illustrated by the fact that courts are prone to say that they alone have the power to decide all questions of "law."⁹ However, when the legislature has given rule-making power to an agency, the function of giving content, within a certain range, to the "law" has been entrusted solely to the agency; the court's power to resolve questions of law is only a power to interpret the outer limits of administrative power.

C. *Review Procedures.*—These semantic difficulties resulting from the application of judicial vocabulary to administrative proceedings have tended to obscure from judges and counsel alike the proper relation of the courts to administrative bodies—a relation which ought to be an allocation of function based upon relative competence. Even when the courts have correctly appraised their function, however, they have sometimes described their decision in words which were not well-chosen and which may have been misleading.

II. RULE MAKING

A. *In General.*—"Rule" and "rule making" are imprecise terms frequently used in discussions of administrative processes. Rules are usually thought of as having general application and prospective force, although many acknowledged "rules" may not be very general and

5. The ambiguity of the terms "law" and "fact" in administrative processes constitutes one of the principal difficulties.

6. Cf. *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 432 (2d Cir. 1951) (Frank, J., concurring).

7. *Miller v. Wiley*, 190 Tenn. 498, 230 S.W.2d 979 (1950); *Reese v. Hake*, 184 Tenn. 423, 199 S.W.2d 569 (1947); *Ezell v. Hake*, 184 Tenn. 319, 198 S.W.2d 809 (1947). See text accompanying notes 533-36 *infra*.

8. *Tennessee Cartage Co. v. Pharr*, 184 Tenn. 414, 199 S.W.2d 119 (1947).

9. *E.g.*, *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*, 195 Tenn. 593, 261 S.W.2d 233 (1953).

in some jurisdictions may be retroactive. The following discussion of "rule making," therefore, is prefaced with separate treatments of general and prospective policy formulations.

B. *General Policy Formulations.*—Efficient administration is promoted by action which is, to the extent possible, of general rather than of particular application.¹⁰ The efficiency of dealing with many similar matters at once through formulation of general rules or standards is obvious.¹¹ Such generalized policy formulations permit factors and issues concerning negotiations and the institution of enforcement proceedings to be promptly¹² and consistently¹³ dealt with. Generalized policy formulations also permit efficient disposition of questions, applications, and other requests from the public. When agency policy formulations are made known prior to agency-public contact, the number of questions, applications, and requests, may well be reduced, with a consequent saving in time by agency personnel. The extent to which policy formulation can be performed on a general basis, however, will vary with each agency and with types of issues.¹⁴ In instances in which an issue occurs with relative infrequency, the formulation of general principles for dealing with it may be an inefficient use of agency time.¹⁵ In instances where superficially similar issues occur in great variation of form, formulation of principles or guidelines may be an impossibility and may carry with it a tendency to gloss over important but unapparent differences.¹⁶ Since general principles or guidelines may be formulated by an agency in varying degrees of specificity, less specific principles permit matters to be worked out later when the question of their application arises.

As members of the public become aware of agency policy formulations they may be in a position to guide their conduct accordingly. This factor suggests that it is important for agencies charged with furthering patterns of public conduct not only to formulate policies but also to publicize them. It also suggests the importance, in fair-

10. Cf. 1 BENJAMIN, COMMISSIONER'S REPORT ON ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 296 (1942) [hereinafter cited as BENJAMIN REPORT].

11. Cf. 1 BENJAMIN REPORT 296.

12. *Ibid.*

13. Consistency is promoted by formulations of policy having general application "particularly where there is a numerous adjudicating personnel." *Ibid.* See also *id.* at 258.

14. *Id.* at 295.

15. Cf. *id.* at 298, recognizing that "the amount of time available to an agency for quasi-legislation, as against the other uses to which the time of the agency's personnel might be put, is one consideration" against overly formal rule-making procedures. It is also a consideration against formulating some types of substantive rules.

16. Cf. dissent of Mr. Forbes to the *Report of the Committee on Ratemaking*, 15 AD. L. REV. 175, 179 (1963). "[T]he problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

ness to the public, of publicizing policies with respect to which the public will be held accountable.

C. Prospective Policy Formulations.—Prospective policy formulations can have the effect of reducing the number and scope of issues open to contest in enforcement proceedings and other adjudications which decide, retroactively, the lawfulness of past conduct.¹⁷ By thus simplifying and shortening the adjudicatory process, such prospective policy formulation may (1) save time and expense for both the agency and the parties, and (2) give additional direction to that process. To the extent, however, that such prospective policy formulations are particular, rather than general, in their scope, the time and expense saved in after-the-fact adjudications may be offset by time and expense consumed in before-the-fact determinations of those issues.

From the standpoint of the regulated public, retroactive policy formulation is objectionable when it is capable of interfering with their reasonable expectations.¹⁸ The sense of injustice resulting from such interference will be especially strong (and perhaps vocal) when prospective policy formulation could or would have induced a course of conduct which would not have conflicted with those policies or would have conflicted with them in a lesser degree. Moreover, a threat of retroactive policy formulation may seriously interfere with the planning of future transactions by those subject to agency regulation.¹⁹

Retroactive policy formulation loses some of its objectionable features in those instances in which prospective policy formulation would not substantially affect the course of conduct pursued by those subject to agency regulation. Indeed, in some cases a regulated person might prefer a retroactive proceeding to prospective policy formulation. Thus, for example, a regulated utility might sometimes prefer that the reasonableness of a rate be determined retroactively in a reparations proceeding rather than in a proceeding setting future rates if in the former proceeding it would have the advantage of using as evidence the actual results of operations.

An agency will often be influenced to formulate policies prospectively by the desire to encourage certain patterns of conduct by those subject to its control. The degree to which this influence operates

17. 1 BENJAMIN REPORT 296.

18. To the extent that the public is aware of policy trends, expectations of favorable agency action may lose some of their reasonableness. Cf. *Federal Water Serv. Corp.*, 18 S.E.C. 231, 258 (1945).

19. 1 BENJAMIN REPORT 259, 262, 296. It has been said that "The essence of effective economic activity is planning." JAFFE & NATHANSON, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 408 (1961).

will depend upon the likelihood that an announcement of prospective policy formulation would encourage the desired conduct. An announcement that conduct, which prior to the announcement was generally believed to be lawful, will result in punishment is likely to have the desired effect. When, however, the regulated public has merely a general idea of what the agency expects from it, prospective policy formulation and announcement which specifies in detail a type of conduct which the agency finds objectionable may have the effect of removing inhibitions on conduct which is not within the specifics of that announcement but which previously was generally thought to involve serious risk of agency displeasure. In such situations, the agency may feel that it is not a part of its function to facilitate close-to-the-line conduct.²⁰ Even where given conduct is generally believed to cause agency displeasure, however, express confirmation of that belief by the agency combined with an express or implied threat of sanction for its performance may have an additional deterrent effect. If the agency disclaims an exclusive effect for its new policy pronouncement, moreover, the likelihood of removing pre-existing inhibitions on conduct may be reduced.²¹

D. Facilitating Prospective Agency Action.—Retroactive interference with reasonable expectations can be minimized by publicizing policy formulations and by avoiding, to the extent possible, the formulation of new policy in penalty proceedings.²² Despite the theoretical inconsistency, agencies ought to be authorized to act prospectively only (in the agencies' discretion) when issuing "interpretative" rules.²³ The courts have a residual power to reverse adjudicative determinations for abuse of discretion whenever an agency improperly for-

20. See remarks, *id.* at 407. Although these remarks are addressed to declaratory orders, they are applicable to prospective policy formulation, whether individually or generally addressed: "there is some feeling that persons should not be enabled to cut the pattern of their action to the minimum requirements of legality. Equity has sometimes refused to specify the exact letter of performance in order to leave a margin of doubt to promote generous compliance."

21. See text accompanying notes 22-26 *infra* for a consideration of means available for encouraging prospective action.

22. While all adjudications are in a sense retroactive, it is desirable that the application of policy in penalty proceedings be confined to the extent possible to those policies that the parties could reasonably have expected would be applied in an adjudication. Compare *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

23. Although an "interpretative" rule, since it is a construction of a pre-existing statute or regulation, theoretically would apply retroactively as well as prospectively, such a rule does not differ in practical effect from a "legislative" rule which generally has only prospective force. Specific authorization to confine interpretative rules to the future in the agency's discretion would remove whatever doubts an agency might have with respect to the propriety of considering hardships imposed upon regulated persons in determining the scope (in time) of its "interpretative" rules.

mulates new policy in a penalty proceeding;²⁴ this power, however, is difficult to use and possesses significant susceptibility to abuse.²⁵

Agencies should be encouraged to issue interpretative rules and other policy statements by exempting such rules and policy statements from the mandatory imposition of formal rule-making requirements²⁶ involving pre-issuance acceptance of written submissions and other forms of public participation. Failure to exempt the agencies from formal procedures might otherwise discourage them from making public disclosure of prior policy formulations which they intend to apply in adjudications.

E. Public Participation in Rule Making. 1. In General.—Since action that is often considered to be “rule making” varies in the degree of its retroactive impact, in the persons to which it applies, in the types of action to which it relates, and in the types of persons who will be affected by the rule, it is difficult to discuss “rule making” in a generic way.²⁷ Rather, it will be necessary at every point to advert to the types of activity with which agency action is concerned and to the necessity for confining limiting procedures to specific types of regulation.

The principal justification for public participation in rule making is that such participation serves as a means for an agency to obtain information about the content of the area to be regulated and about possible deficiencies or objections to particular rule provisions of which it is unaware.²⁸ This justification is lacking, of course, to the extent that the agency concerned is itself knowledgeable in the subject matter being regulated.²⁹ Other suggested justifications for public participation in rule making include a supposed public relations function through which a more willing and generous compliance with rules is supposedly secured.³⁰ Finally, public participation in the rule-

24. *Cf.* NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

25. *Cf.* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

26. See Administrative Procedure Act § 4, 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1964) [hereinafter cited as APA]; MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2 [hereinafter cited as MODEL ACT]; REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 [hereinafter cited as REVISED MODEL ACT]. The federal act exempts “interpretative rules” from formal rule making procedures. APA § 4(a). *Accord*, GA. CODE ANN. § 3A-104(a) (Supp. 1966); ORE. REV. STAT. § 183.330(3) (Supp. 1965).

27. *Cf.* 1 BENJAMIN REPORT 27.

28. FINAL REPORT OF ATT’Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE 102 (1941) [hereinafter cited as FINAL REPORT]; II WIS. LEGISLATIVE COUNCIL REP. (Part II)—ADMINISTRATIVE RULE MAKING 79 (1955) [hereinafter cited as WIS. REP.].

29. *Cf.* Cohen, *Some Aspects of Maryland Administrative Law*, 24 MD. L. REV. 1, 13 (1964).

30. WIS. REP. 79.

making process has been urged as an end desirable in itself as a form of public participation in government.³¹

2. *Public Participation Requirements in the Federal and Model Acts.*—Under the federal act and the two Model Acts, requirements for public participation depend in the first instance upon the definition of rule making. The federal act defines³² “rule” broadly but excludes³³ from formal rule-making requirements “interpretative rules, general statements of policy, rules of agency organization, procedure, or practice” and “any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The two Model Acts define “rule”³⁴ slightly less broadly than does the federal act, but (apart from “emergency” rules under the Revised Act) they make no exceptions to their requirements for public participation,³⁵ so that the overall scope of their public participation requirements is broader than the scope of those requirements in the federal act.

It is not clear that the approach of the Model Acts is desirable. Public participation often would be unnecessary since no one could be adversely affected by many rule-making actions;³⁶ sometimes adversely affected persons would be unable or unprepared to participate in rule-making procedures; the agency may be so knowledgeable about its intended action that public participation could not substantially increase its knowledge; and in some cases, the cost of those procedures balanced against the incremental knowledge that the agency would be likely to obtain from them would make such procedures prohibitively expensive. The imposition of formal procedures, moreover, might in some instances dissuade an agency from informing the public about policies which it has adopted and intends to apply

31. *Ibid.*

32. APA § 2(c).

33. APA § 4(a). Cf. GA. CODE ANN. § 3A-104(a) (Supp. 1966); ORE. REV. STAT. § 183.330(3) (Supp. 1965).

34. MODEL ACT § 1(2); REVISED MODEL ACT § 1(7). The Georgia and Oregon versions of the Model Acts exempt from notice and public participation requirements general statements of policy and interpretive rules. GA. CODE ANN. § 3A-104(a) (Supp. 1966); ORE. REV. STAT. § 183.330(3) (Supp. 1965).

35. The Revised Model Act contains, in addition to public participation procedures applicable to all rules, provisions for a mandatory oral hearing in the case of “substantive” rules when such a hearing is requested by a specified number of persons. REVISED MODEL ACT § 3(a)(2). See text accompanying notes 47-53 *infra*. See also note 34 *supra*.

36. Benjamin, for example, sees little need for public participation in the formulation of procedural regulations. 1 BENJAMIN REPORT 300. Procedural regulations are exempted from the notice requirements of the federal act. APA § 4(a).

in adjudications.³⁷ Perhaps the best approach would be to combine a broadly worded provision requiring a minimum form of public participation with the federal act's provision vesting agencies with power to dispense with notice and formal procedures upon a finding that notice and public participation would be "impracticable, unnecessary, or contrary to the public interest."³⁸

3. *Mechanics of Notice.*—The Model Act requires an agency adopting rules, "as far as practicable" to "publish or otherwise [to] circulate notice of its intended action."³⁹ The federal act and the Revised Model Act, however, require notice by publication in an official bulletin which must include, *inter alia*, "either the terms or substance" of the proposed rule or "a description of the subjects and issues involved."⁴⁰ In addition, the Revised Act improves upon the federal act by requiring mailed notice "to all persons who have made timely request of the agency for advance notice of its rule-making proceedings."⁴¹ The Revised Act requires that notice precede rule-making action by twenty days except when "an imminent peril to the public health, safety, or welfare requires otherwise;"⁴² neither the federal act nor the Model Act requires a given period of time for notice. It would be desirable for the interval between notice and presentation of views to be long enough to permit adequate preparation of those views. It would also be desirable for the notice to inform its recipients of the deadline for the presentation of views.

4. *Public Participation Procedures of the Federal Act and the Model Acts.*—Except for the special type of rule making discussed below,⁴³ which is required by statute to be "on the record after opportunity for an agency hearing," the federal act provides that interested persons be afforded an opportunity to submit written data, views, or arguments; oral argument or testimony is permitted in the discretion of the agency.⁴⁴ The original Model Act requires agencies to "afford interested persons opportunity to submit data or views orally or in

37. Cf. 1 BENJAMIN REPORT 298, where it is stated that "an administrative agency cannot be forced to promulgate regulations; and too elaborate and time-consuming quasi-legislative procedure might well discourage the process where it is important to encourage it."

38. Such an approach seems to have been followed in Massachusetts. See the broad (and precise) definition of "regulation" in MASS. ANN. LAWS ch. 30A, § 1(5) (1966), and the agency power, in the case of the issuance of certain regulations, to dispense with notice and opportunity to present views in MASS. ANN. LAWS ch. 30A, § 3(3) (1966).

39. MODEL ACT § 2(3).

40. APA § 4(a)(3); REVISED MODEL ACT § 3(a)(1).

41. REVISED MODEL ACT § 3(a)(1).

42. REVISED MODEL ACT § 3(b).

43. See text accompanying notes 96-102 *infra*.

44. APA § 4(b).

writing."⁴⁵ The Revised Model Act similarly requires opportunity to be afforded interested persons "to submit data, views or arguments, orally or in writing,"⁴⁶ but makes an oral hearing mandatory in the case of "substantive" rules if requested by twenty-five persons, a governmental subdivision or agency, or an association having not less than twenty-five members.⁴⁷ Sensing opportunities for abuse of the Revised Act's oral hearing provision, the Kentucky Legislative Research Commission suggested that the Revised Model Act's language be modified to require a mandatory oral hearing "if requested by either ten percent or twenty-five of the persons who will directly be affected by the proposed regulation, or by a governmental subdivision, or by an association having not less than twenty-five members."⁴⁸ Although the modification was designed⁴⁹ to limit oral hearings to those directly affected by proposed rule making action, it may partly fail in its purpose, since the mandatory hearing provision seems still capable of abuse through a demand for a hearing by an association having not less than twenty-five members, although neither the association nor its members would be "directly" affected by the proposed regulation.⁵⁰ While some states have followed the Revised Model Act provisions,⁵¹ and a few require mandatory "public hearings" for all or much rule making,⁵² most states that have a comprehensive administrative procedure act seem either to have a rule-making provision like the original Model Act, some less stringent provision, or none at all.⁵³

45. MODEL ACT § 2(3).

46. REVISED MODEL ACT § 3(a)(2).

47. *Ibid.* Accord, WIS. STAT. ANN. § 227.02(e) (1957). See note 51 *infra*.

48. KY. LEGISLATIVE RESEARCH COMM'N REP. NO. 12—ADMINISTRATIVE PROCEDURE LAW IN KENTUCKY 59 (1962) [hereinafter cited as KY. REP. NO. 12].

49. The 10% insertion was made to assure a right to a hearing to persons who might be substantially affected by a rule, although they were few in number. *Ibid.*

50. The failure to apply the "directly affected" language to associations is probably an oversight. The Georgia version of the Revised Model Act has adopted the "directly affected" phrase from the Kentucky report and has also failed to apply it to associations. GA. CODE ANN. § 3A-104(a)(2) (Supp. 1966).

51. The Revised Model Act provisions are embodied in GA. CODE ANN. § 3A-104 (Supp. 1966). Among administrative procedure statutes omitting provisions for public 303 (1965); R.I. GEN. LAWS ANN. § 42-35-3 (Supp. 1966); Wyo. Stat. ANN. § 9-276.21 (Supp. 1965). Accord, WIS. STAT. ANN. § 227.02(e) (1957).

52. A mandatory "public hearing" for all or a substantial amount of rule making seems to be required by HAWAII REV. LAWS § 6C-3 (Supp. 1965); NEB. REV. STAT. § 84-907 (1958); OHIO REV. CODE ANN. § 119.03(c) (Baldwin 1964); VA. CODE ANN. § 9-6.6 (1964). Massachusetts requires a mandatory public hearing for some types of rule making and provides for oral or written public participation for other types of rule making. MASS. ANN. LAWS ch. 30A, §§ 2, 3 (1966). See also note 38 *supra*. MINN. STAT. ANN. § 15.0412(4) (Supp. 1966) requires a mandatory "public hearing" after notice to interested persons who have preregistered to be notified of rule-making proceedings. Compare MINN. STAT. ANN. § 15.0412(3) (Supp. 1966).

53. Oral or written public participation seems to be made mandatory by ALASKA STAT. § 44.62.210 (1962); ARIZ. REV. STAT. ANN. § 41-1002(B) (1956); CAL. GOV'T

5. *Miscellaneous Procedural Matters.*—Taken literally, the language of the Revised Model Act contains a suggestion of more personal consideration of written submissions by the agency head than does the federal act. The Revised Model Act expressly commands that, “the agency shall consider fully all written and oral submissions respecting the proposed rule,”⁵⁴ whereas under the federal act an agency is required to consider only “all relevant matter presented.”⁵⁵ In juxtaposition with that of the federal act, the language of the Revised Model Act seems to contemplate a lesser use of staff help in sifting out irrelevant and repetitious material.

The Revised Model Act further differs from the federal act by requiring the agency to issue a “concise statement of the principal reasons for and against” the adoption of the proposed rule, “incorporating therein its reasons for overruling the considerations urged against its adoption” if such a statement is requested by an interested person before the rule’s adoption or within thirty days thereafter.⁵⁶ Although the federal act requires that the agency adopt “a concise general statement” of the “basis and purpose” of the rules adopted, whether anyone requests such a statement or not,⁵⁷ such statement need not be as detailed as the one required by the Revised Model Act.

6. *Challenges to the Validity of Rules Adopted with Defective Procedure Under the Federal Act and the Model Acts.*—The imposition of procedural requirements carries with it the danger that a rule may be held invalid because of a failure by the agency promulgating that rule to observe those procedural requirements. The federal act

CODE § 11425; COLO. REV. STAT. ANN. § 3-16-2(2) (1963); KAN. GEN. STAT. ANN. § 77-421 (Supp. 1965); ME. REV. STAT. ANN. tit. 5, § 2351(3) (1964); MD. ANN. CODE art. 41, § 245(c) (1965); MICH. STAT. ANN. § 3.560(21.2)(3) (1963); ORE. REV. STAT. § 183.330(3) (Supp. 1965); WASH. REV. CODE § 34.04.020(3) (1965); W. VA. CODE ANN. § 29A-3-3 (1966). Cf. IOWA CODE ANN. § 17A.3 (Supp. 1966). North Dakota provides for public participation, in the discretion of the agency concerned, in the form of a public hearing on a petition for reconsideration of a rule. N.D. CENT. CODE ANN. § 28-32-04 (1960). *Accord*, IOWA CODE ANN. § 17A.13 (Supp. 1966), except that the public hearing is mandatory in Iowa. Compare IOWA CODE ANN. § 17A.3 (Supp. 1966). Among administrative procedure statutes omitting provisions for public participation in rule making are FLA. STAT. ANN. ch. 120 (Supp. 1966); MO. ANN. STAT. ch. 536 (1953); and PA. STAT. ANN. tit. 71, § 1710 (1960). Compare MASS. ANN. LAWS ch. 30A, §§ 2, 3 (1966). See KY. REV. STAT. § 13.125 (1963) (directions for notice and hearing precatory only). Cf. TEX. REV. CIV. STAT. art. 6252-13(2)(c) (1962) (procedural rules only).

54. REVISED MODEL ACT § 3(a)(2).

55. APA § 4(b). Cf. CAL. GOV'T CODE § 11425.

56. REVISED MODEL ACT § 3(a)(2).

57. APA § 4(b). The Oregon act which in general follows the original Model Act here uses the quoted language of the federal act. ORE. REV. STAT. § 183.330(3) (Supp. 1965).

handles the notice aspect of this problem by limiting mandatory notice to publication in the *Federal Register*⁵⁸—a requirement with which compliance is relatively easy. The Model Act prevents the problem from arising in connection with notice by requiring an agency to “publish or otherwise [to] circulate notice of its intended action” only “as far as practicable.”⁵⁹ The Tennessee version of the Model Act adopted for the Public Service Commission insulates rules from challenge on grounds of either lack of notice or lack of opportunity to be heard. It provides that:

no person shall be entitled to challenge the validity of such a rule, or the amendment or repeal of such a rule, on the grounds that he failed to receive such notice or that he was not given an opportunity to be heard.⁶⁰

Although the Revised Model Act provides⁶¹ expressly that a rule shall not be valid unless adopted in “substantial compliance” with the notice and public participation provisions of the act, it provides a two-year statute of limitations on challenges to the validity of a rule on procedural grounds.⁶²

7. *Submission of Views in Writing.*—Submission of views in writing by interested members of the public, as provided in the federal act and Model State Acts, is perhaps the simplest form of public participation in rule making. Although agencies should be receptive at all times to the views of the public regarding their policies,⁶³ an invitation to the public to submit views upon a proposed rule or draft of a proposed rule may⁶⁴ serve to focus public attention on the proposal, and thus facilitate the presentation of informed views upon issues concerning which the agency is contemplating action. Collecting a number of such views at the same time and at a time when the agency’s attention is directed to the particular problems dealt with in a proposed rule or draft may improve the quality of the rule being promulgated.

58. APA § 4(a).

59. MODEL ACT § 2(3). Cf. MODEL ACT § 6(2).

60. TENN. CODE ANN. § 65-202(d) (1955). Compare MICH. STAT. ANN. § 3.560(15) (1961), which provides that the “filing or publication of a rule” raises “a rebuttable presumption” that the rule was duly adopted, issued or promulgated.

61. REVISED MODEL ACT § 3(c).

62. *Ibid.*

63. Cf. WIS. REP. 104; HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 243 (1943).

64. The formulation by an agency of a proposed draft may provide a focus for comment by those concerned, but, as Benjamin has pointed out, “the process of tentative formulation involves an element of prejudice that may lead to a reluctance to accept criticism and suggestions for change.” 1 BENJAMIN REPORT 308. Benjamin, however, felt that “if hearings are to be kept to the point and within reasonable bounds, they must usually be directed to regulations already tentatively formulated.” *Ibid.*

The submission of views in writing would facilitate the efficient allocation of time within an agency in connection with the consideration of the points raised by those views. Thus, submission of written statements would permit subordinate personnel within the agency structure to synthesize and summarize the points raised in those statements prior to their consideration by the agency head.⁶⁵ Furthermore, the submission of written views would be conducive to a more detailed presentation and a more thorough treatment of issues by the persons submitting them than might be possible if these views were submitted only through oral testimony. Other advantages of a written-submittals method of public participation include the absence (to the agency concerned) of recording and transcribing expenses ordinarily associated with most forms of oral hearings and the absence of a distance deterrent⁶⁶ to public participation which, in some cases, would be connected with a public hearing at a single location in the state.

The principal drawbacks to limiting public participation solely to the submission and acceptance of written views are (1) the lack of assurance to the public that its submissions are considered by the agency head or by higher eschelon personnel or by any one;⁶⁷ (2) the lack of opportunity for oral exchange or discussion between persons submitting views and agency officials⁶⁸ and among the private persons themselves,⁶⁹ and the absence of cross examination; (3) the burden of preparing written submissions which might in some types of cases

65. Compare *Morgan v. United States*, 298 U.S. 468 (1936), which refers with approval to "practicable administrative procedure in obtaining the aid of assistants within the department" and to evidence being "sifted and analyzed by competent subordinates." Cf. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936), quoted in *Southern Continental Tel. Co. v. Railroad & Pub. Util. Comm'n*, 199 Tenn. 122, 126, 285 S.W.2d 115, 117 (1955), where it was stated that "judicial judgment may be none the less independent because informal and aided by the sifting procedures of an expert legislative agency."

66. WIS. REP. 91.

67. This may be the basis for the Revised Model Act provisions which expressly command that "the agency shall fully consider all written and oral submissions respecting the proposed rule" and which require the agency if requested by an interested person to "issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption." REVISED MODEL ACT § 3(a)(2).

68. The written submittals method of public participation, by itself, provides no opportunity by which the agency or its staff can seek clarification about points made ambiguously or without treatment in depth. Exchange between the agency or its staff and the public could be supplied, however, by combining other forms of public participation in which exchange is possible with the written submittals device.

69. Unless written submissions are made public during the rule making proceedings, those submissions will not be fully exposed to challenge by opposing groups. Cf. 1 BENJAMIN REPORT 308.

prove a deterrent to persons who would be willing to testify orally at a hearing.

8. *Delayed Effectiveness of Rules.*—In addition to the provisions in the federal act and the Revised Model Act providing for written submissions with respect to proposed exercises of rule-making power, those acts further require that normally final rules be promulgated in advance of their effective date.⁷⁰ Besides serving to educate members of the public so that they will be prepared to comply with a rule when it becomes effective,⁷¹ a rule's delayed effectiveness provides an additional period in which the public may make known to the promulgating agency deficiencies in the rule.⁷² It will be observed, however, that delayed effectiveness will fail to perform its objectives to the extent that the public is unaware of the rule or its provisions. For that reason it is desirable that the rule be made known to interested or affected persons prior to the commencement of the delayed-effectiveness period.⁷³

9. *Informal Consultation.*—Another form of public participation in rule making involves informal communication by an agency with those who will be affected by a proposed rule. Such communications can involve both written and personal contact.⁷⁴ Because this device can be utilized over a period of time⁷⁵ during which the agency is refining its understanding of a regulatory problem and shaping its ideas, it has some advantages over the written-submittals device. Continuing and representative consultation by an agency with affected interest groups may help that agency in formulating the terms of a rule which will deal with a complex or technical problem.⁷⁶ Effective

70. APA § 4(c); REVISED MODEL ACT § 4(b).

71. WIS. REP. 110-11.

72. FINAL REPORT 114-15; 1 BENJAMIN REPORT 309.

73. See, e.g., WIS. STAT. ANN. § 227.026(1) (1957) (rule effective on first day of month following publication in the Wisconsin administrative register).

74. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.02 (1958) [hereinafter cited as DAVIS]; FINAL REPORT 103; WIS. REP. 80-82; Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 274-76 (1938). An example of a statutory provision which may expressly authorize such informal discussion is TENN. CODE ANN. § 59-1238 (Supp. 1966), which provides that the Commissioner of Insurance and Banking shall establish an assigned risk plan with respect to automobile liability insurance policies "after consultation with the insurance companies authorized to issue automobile liability policies in this state."

75. "Questionnaire" type communications can be used with large numbers. DAVIS § 6.02, at 365; cf. FINAL REPORT 112. However, informal consultation which is continuing and representative can usually best be effected when the consultation involves a proposed rule or other regulatory problem which affects or may affect only a small number of identifiable interest groups.

76. Consultation with the interest groups affected may also create some good will for the agency among those subject to the rule.

regulation of many areas would normally require a certain amount of informal contact between an agency and those who will be regulated or affected by a new rule. It is important, however, that the agencies be aware of the dangers involved in concentrating their informal contacts upon only one or a few regulated persons, and thereby securing a biased or otherwise unrepresentative view of regulatory problems.

10. *Advisory Committees.*—Another method of public participation in rule making involves a device usually described as an advisory committee,⁷⁷ which may be composed⁷⁸ of representatives of groups which will be affected by a proposed exercise of rule-making power.⁷⁹ While in certain situations the use of an advisory committee may be advantageous,⁸⁰ the formation of such a committee carries with it the danger of excluding⁸¹ one or more affected interests.⁸² As a check

77. DAVIS § 6.03; FINAL REPORT 103; WIS. REP. 83; Fuchs, *supra* note 74, at 275.

It has been suggested that there is a danger that an advisory committee will seek to dictate to the agency, rather than to advise. To the extent that the agency or its staff is unable or unwilling to question the committee about the bases upon which it or its members have formed their conclusions, the likelihood of committee dictation to the agency is increased. Such a situation would be most likely to exist when no agency representative sits on the committee, when the committee is a permanent one upon which the agency habitually relies, or when the agency is understaffed. The Wisconsin Legislative Council recommended that the difficulty of committee dictation to the agency could be met by making all advisory committees temporary rather than permanent. WIS. REP. 85.

78. Besides the advisory committee which is composed of representatives of the interests to be affected by the rule, the Wisconsin Legislative Council distinguished two other types of advisory committee: "One is the technical advisory committee composed primarily of experts whose function is to furnish technical advice rather than to represent particular interests. Another is the interdepartmental coordinating committee composed of governmental officials whose function is to furnish advice on some problem which cuts across departmental lines." The Council noted that the above two types of advisory committee and the committee composed of representatives of interest groups "are not mutually exclusive and often can be profitably combined." WIS. REP. 83.

79. Agency representation on the committee will help to insure that the committee is kept aware of agency views and policies. This will encourage recommendations that will have a substantial chance of acceptance by the agency.

80. Compare FINAL REPORT 104: "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 attendance 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 advantages over hearings in the development of knowledge and understanding."

81. Representation of all affected interests is important (1) in order to insure that all viewpoints have been presented in the discussion concerning the proposed rule; and (2) because the formality of the committee will accentuate the lack of representation of the unrepresented groups, possibly engendering a feeling of resentment.

82. FINAL REPORT 104.

against a failure of the committee to secure all opinions,⁸³ consideration ought to be given to the holding of a subsequent public hearing⁸⁴ in those instances in which all interested groups may not be represented on the committee.

11. *Hearings*.—Public participation can also be effected through various types of hearings. One type of hearing might involve the oral presentation of views by witnesses⁸⁵ representing affected interests and by interested members of the public. Such a hearing seems reasonably well adapted to permitting many participants with assorted points of view to participate and thereby to bring to the attention of the agency a wide spectrum of comment about the various aspects of a proposed rule or proposed exercise of rule-making power. Although the oral part of a hearing of this type may not be particularly well adapted to an in depth exploration of particular substantive objections to, or to improving the phrasing of, a technical or complex rule or group of rules, the acceptance of written statements in conjunction with such a hearing would provide a means whereby detailed analytical arguments may be presented to the issuing agency. A desirable feature of oral presentation is that it permits exchanges between the presiding official(s) and witnesses. Such exchanges may help to clarify points of testimony or to bring out the bases upon which the witnesses' conclusions rest.

The most serious objection to this type of hearing is its expense in the time of the presiding officials.⁸⁶ If it is deemed necessary to

83. WIS. REP. 85: "It has been asserted that important interests may be left unrepresented on a committee because of the difficulty of securing representation for unorganized groups. It is true that the advisory committee system works best where the various groups are well organized and readily distinguishable, but the disadvantages of unrepresented interests can, to a large extent, be overcome by supplementing the advisory committee technique with public hearings or by designating some members of the advisory committee as public representatives."

84. See *ibid.* *Accord*, 1 BENJAMIN REPORT 309 which suggests that "the consultative method should normally be supplemented by the method of public hearings." The Benjamin Report warns, however, that "those who participate in consultation are likely to have more influence on the final result than those who participate in the public hearings." *Id.* at 308.

85. The practice of swearing witnesses in legislative hearings is criticized as unnecessary in DAVIS § 6.06, at 382. But *cf.* WIS. REP. 103 which suggests that "if there is a tendency for persons appearing at hearings to present exaggerated and irrelevant views and arguments, there may be a psychological advantage in placing them under oath."

86. WIS. REP. 91. This expense can be held to a minimum by judicious restriction of the use of agency members as presiding officers. Compare *id.* at 102: "While it is not essential that the head of an agency preside at hearings, it would seem desirable for him or some representative of the agency's policy board to be present at hearings on the more important or controversial rule proposals. This would tend to assure interested parties that their views will be made known to the ultimate rule-making authority and to satisfy them that they have had their 'day in court.'"

record and transcribe the remarks of every witness who testifies, these expenses also could be unduly large.⁸⁷ If such a hearing is held before a responsible agency official, however, in those situations in which the substance of witnesses' oral remarks can be preserved in notes, it may not be necessary, to record all testimony. This would be true especially with respect to those witnesses who take advantage of the opportunity to submit written statements accompanying their oral testimony.⁸⁸ And when recording of witnesses' remarks is necessary, the use of a tape recorder can provide a record at nominal cost⁸⁹ which, on the basis of notes taken at the hearing, could be selectively transcribed.

Other problems relate to securing information and views from all interested persons. To the extent that persons affected by a proposed rule or proposed exercise of rule-making power are widely scattered throughout the state, many may be deterred from testifying by the expense and inconvenience of traveling to the hearing site.⁹⁰ This difficulty can be alleviated to some extent⁹¹ by the use of multiple-site hearings. Finally, some persons or groups affected by a proposed rule may be unwilling publicly to discuss in detail their views about a proposed rule. This difficulty can be met by holding closed hearing sessions or by permitting interested persons or groups to confer privately with the agency in an off-the-record manner,⁹² although closed hearing sessions and off-the-record consultations present problems in some circumstances.⁹³

87. WIS. REP. 91. The Wisconsin Legislative Research Council estimated in 1955 that the cost of obtaining the services of a stenographic reporter would be \$20 per day and the average cost of transcribing testimony would be approximately \$47 per day. *Id.* at 103.

88. Thus, the Wisconsin Industrial Commission has recorded testimony at hearings, but normally has not transcribed it, on the rationale that the oral hearing is merely supplementary to the submission of written statements. WIS. REP. 57-58. See also *id.* at 103.

89. Bloomfield, *The Revised Model State Administrative Procedure Act—Reform or Retrogression?*, 1963 DUKE L.J. 593, 611-12.

90. 1 BENJAMIN REPORT 308; WIS. REP. 91.

91. Views and statements made at one hearing location, not known to participants in a simultaneous hearing at another location, may fail to be challenged. 1 BENJAMIN REPORT 308.

92. WIS. REP. 56, 91.

93. Information imparted to an agency in confidence sometimes cannot be easily subjected to the critical comments of the public or affected persons. Although information gathered by receipt of written submissions might normally not be subject to private criticism, as the agency action develops more of an adversary flavor among private groups the lack of opportunity for some interests to challenge confidentially imparted information may become more important. Such information, however, may sometimes be exposed to challenge by disclosing the substance of the information without identifying details; and information about industry practices often could be challenged without knowledge of the identity of the person supplying that information.

When the interests affected are few in number, a conference-type hearing or meeting may be practicable.⁹⁴ In such a meeting representatives of the affected interests would meet with the agency and its staff to discuss their objections to, or views upon, a proposed exercise of the rule-making power. Such a meeting would permit a maximum of meaningful interchange among the agency, its staff, and each of the affected interests, and also would thus permit each of the affected interests to direct itself to essential points of difference without unnecessary consumption of time in expounding views about points which were undisputed or which the agency had already fully considered and rejected. By assisting in the clarification of differences and in the promotion of rational oral presentation, such an interchange might facilitate the development of subsequent written presentation of complex points.⁹⁵

Because no clear line separates rule making from adjudication, some types of agency action which are considered to be "rule making" for some purposes involve the determination of issues which affect substantial economic or other interests of opposing groups or of identifiable firms. In some of these instances it may be desirable to structure a hearing in more of an adversary manner.⁹⁶ Adversary rule-making hearings are provided for in the federal act. The act provides for a hearing intermediate between the fully adjudicative hearing and a normal rule-making hearing with respect to "rules required by statute to be made on the record after opportunity for an agency hearing."⁹⁷ This intermediate type of hearing procedure, apart from the notice, separation-of-functions, and other provisions of section 5 of the federal act, resembles the adjudicative procedures.⁹⁸

94. WIS. REP. 58.

95. There are always practical limits on the number of complex points that can be adequately developed. If areas of agreement can be ascertained at the outset, the available recourses of the parties and the agency can be devoted more adequately to exploring remaining areas of disagreement.

96. See FINAL REPORT 109: "whether their number is great or small, they may often gain or lose with relative finality in the rule-making proceeding itself. The content of the regulations when issued may be definite and the consequences of noncompliance severe, such as the loss of the right to do business. Under these circumstances, it may be desirable to let affected parties treat the rule-making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be publicly disclosed to opposing interests which may answer, explain, or rebut. For this purpose the procedure of consultation and conference and of nonadversary hearings may be inadequate. Where this is the case, hearings, in which information is introduced as evidence subject to refutation and often to cross-examination, have come to be employed."

97. APA § 4(b).

98. The framework for this intermediate type of hearing is contained in §§ 7 and 8 of the federal act. Section 7 provides that the officers who preside at hearings must be either the agency, an agency member, or an independent officer, vested with certain procedural powers. Section 7 contains the act's evidence and burden of proof

Basically, the intermediate type of hearing requires decisions to be based upon evidence contained in a record; and, it attempts to ensure that the decision is made by a body that is familiar with the issues.⁹⁹ Familiarity with the record is promoted by narrowing the issues presented to agency decision-makers through the mechanism of an initial, recommended, or tentative decision, and by providing the opportunity for the submission of written and oral arguments.¹⁰⁰ Although the act in terms commands that the record or those parts of the record cited in the briefs be considered before a sanction can be imposed or a rule or order issued,¹⁰¹ it is somewhat ambiguous as to whom the command is addressed. Familiarity with the record and arguments by hearing officers and the agency is also promoted by the requirement of a ruling upon each finding, conclusion, or exception presented, and the further requirement that a statement of findings and conclusions, and the reasons or basis for them, accompany every decision.¹⁰²

12. *Summary and Conclusions.*—The various methods of public participation in rule making are adapted to different ends and achieve different purposes. Thus, the public hearing device permits an agency to appraise itself of public reactions to a problem or to a proposed rule. It has as one attribute a flagging function with respect to problem areas. The oral part of such a hearing by itself may not render much assistance to an agency in solving a problem of any

rules. Under § 7 parties are given the right to present their cases by oral or documentary evidence and to conduct such cross-examination "as may be required for a full and true disclosure of the facts," and the decision must be confined to the record. Section 8 of the act provides that whenever the agency has not presided at the reception of evidence, either an initial decision shall be made by an independent hearing officer (who may or may not have been the presiding officer at the reception of evidence) or the agency may cause the record to be certified to it for an initial decision. If the initial decision by the hearing officer is not appealed to or reviewed by the agency, that decision becomes the decision of the agency. If the agency makes an initial decision, an independent hearing officer is first required to make a recommended decision. In lieu thereof the agency may issue a tentative decision or any of its "responsible" officers (who can be prosecuting or investigative officers) may recommend a decision. Any such procedure may be omitted if the agency finds "upon the record that due and timely execution of its functions imperatively and unavoidably so requires." Section 8 provides for the submission of findings and conclusions, exceptions to prior decisions, and supporting reasons prior to each recommended, initial, tentative or final decision, and requires a ruling upon each finding, conclusion or exception presented. Every decision is required by § 8 to include a statement of findings and conclusions and the reasons therefor upon all the material issues of fact, law or discretion.

99. See note 98 *supra*.

100. APA § 8. See note 98 *supra*.

101. APA § 7(c): "no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party . . ."

102. APA § 8(b).

complexity which it uncovers. This flagging function may be useful, however, in focusing agency attention upon problem areas prior to the initiation of rule making. Also, after the general lines of a proposed new rule have been worked out a public hearing serves as a check on the conclusions of the agency and its staff and as a check upon the representative character of an advisory committee. Informal consultation, however, may be useful over the whole process of rule making, including intermediate and formulating stages where advisory committees may be most useful. Acceptance of written statements is well adapted not only to a thorough treatment of relatively narrow issues, but also to the wide coverage of issues which the public hearing can achieve. For example, written statements would be highly useful for the thorough presentation of policy arguments made with respect to the conclusions to be drawn from economic data. Also, some agencies seek widespread comment on rules by promulgating them in advance of their effective date in order that, by the submission of written statements or otherwise, defects can be brought to the agency's attention for correction prior to their effectuation.

It would be unwise to specify in detail the procedures to be used in every instance of rule making.¹⁰³ Moreover, legislation is not capable¹⁰⁴ of requiring the use of some types of public participation, such as informal consultation.¹⁰⁵ Legislation can be used, however, to set forth standards or principles embodying procedural objectives¹⁰⁶ which the several agencies can implement in ways that are adapted to their particular needs. Thus, agencies could be instructed legislatively about the desirability of employing some form of public participation whenever that participation would facilitate the acquisition of information which would be needed or useful in rule making, or when public participation in a form such as a public hearing would be advantageous due to the substantial impact of proposed rule making. An across-the-board imposition of the acceptance of

103. 1 BENJAMIN REPORT 312. Benjamin notes that rule-making circumstances vary too much to make any single form of procedure always desirable. In general, rule-making procedure is of less importance than adjudicative procedure because the publication of rules will subject them to general criticism and the rules are open to revision by both the agency and the legislature. *Id.* at 298, 312.

104. FINAL REPORT 105.

105. Appendix to *Statement of Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt* in A CODE OF STANDARDS OF FAIR ADMINISTRATIVE PROCEDURE § 209; FINAL REPORT 228. Compare, *e.g.*, WIS. STAT. ANN. § 227.018 (1957): "An agency may use informal conferences and consultations as means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. Each agency also is authorized to appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only."

106. FINAL REPORT 215.

written submittals as a minimum form of public participation might be unobjectionable, if it were limited to substantive rules and if the agencies were permitted to dispense with those procedures when they found them unnecessary or wasteful.¹⁰⁷

F. Publication of Agency Rules and Policy Formulations. 1. *Provisions of Present Law.*—At present, the Tennessee Code provides¹⁰⁸ for the printing and filing with the Secretary of State of “rules and regulations” of every state executive officer, board, department, bureau, authority, and commission which is authorized by law to promulgate rules and regulations “concerning the administration, enforcement and interpretation of any law of this state, except such as relate to the organization or internal management of such agency.” The Code further provides for the maintenance of those rules and regulations at the office of the Secretary of State and at the principal office of the agency promulgating them. Each agency is required by statute to furnish printed copies of its rules and regulations to any person who requests them.

Because the Code makes express reference to “interpretation,” it appears to require the filing of so-called interpretative rules. It is probable, however, that many statements of policy would not be sufficiently definite to be considered as “rules or regulations” subject to the filing requirement. The “internal management” exception¹⁰⁹ to printing and filing requirements may encompass instructions to agency personnel and, on a broad interpretation, rules governing agency procedures.¹¹⁰ The Code provides¹¹¹ for the issuance of a

107. See text accompanying notes 27-38 *supra*.

108. TENN. CODE ANN. §§ 4-501 through 4-505 (1955).

109. An analogue to the internal management exception of TENN. CODE ANN. § 4-501 (1955) is found in the original APA § 3(2) which exempts from public information requirements “any matter relating solely to the internal management of an agency.” The Model Act attempts to tighten this exception by adding the modifying phrase “and not directly affecting the rights of or procedures available to the public.” MODEL ACT § 1(2). Substantially similar language is in the REVISED MODEL ACT § 1(7)(A). In the Revised Model Act, moreover, the exception relates only to publication and not to other forms of public information. REVISED MODEL ACT §§ 1(7)(A), 2(a)(3). A narrow reading of the federal “internal management” exception was urged in U.S. COMM’N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV’T, REPORT OF THE TASK FORCE ON LEGAL SERVICE AND PROCEDURE 148 (1955) [hereinafter cited as HOOVER COMM’N TASK FORCE REP.]. Cf. Freedom of Information Act § 3(e)(2), 80 Stat. 250 (1966).

110. The internal management exception to rule publication requirements of the Model Acts would not excuse the publication of procedural rules. MODEL ACT §§ 1(2), 2(1), 4; REVISED MODEL ACT §§ 1(7), 2(2), 5. Compare original APA §§ 2(c), 3(2), 3(a)(2).

111. TENN. CODE ANN. § 4-506 (1955).

“written opinion or decision” by state “boards and commissions” when such is requested in writing by a party to a hearing, but there is no requirement that the opinion be filed with the Secretary of State, that it be maintained in his office or at the office of the agency, or that it be made otherwise available to the public. A responsibility rests on the boards and commissions issuing those opinions, therefore, to ensure that any new policy formulation embodied in an opinion or decision be promulgated as a rule to which the public will have access.¹¹² Moreover, the phrase, “boards and commissions” in the provision dealing with written opinions¹¹³ is narrower than the phrase “executive officer, board, department, bureau, authority, and commission” used in the provision¹¹⁴ dealing with the promulgation of rules and regulations. Since both provisions constitute part of the same chapter, there is an implication that a “written opinion or decision” is not required in the case of a hearing conducted by an executive officer, department, bureau, or authority. Since little reason exists for differentiating the latter agencies from boards and commissions in connection with the desirability of written opinions, the narrower coverage of the written opinion provision ought to be broadened.

2. *Types of Agency Rules to Which the Public Should Have Access.*—The public should have access to all rules, standards, criteria, and other conduct-formulating principles by which agency action affecting the public is governed or influenced, unless secrecy serves a public purpose or unless the cost or other burden of making that information publicly available outweighs its informative value to the public. Public availability should mean not merely availability to persons affected by agency action, but also availability to everyone; intelligent agency action should be able to withstand and to profit from the criticism of the press, scholars, and interested but unaffected members of the public.

(a) *Formal Rules, Interpretations, and Policy Statements Addressed to the Public.*—Easy public access to, and widespread knowledge of, agency policies embodied in formal rules, interpretations, and policy statements is generally desirable as a means of fostering conduct in conformity with those policies. Except as cost factors become important or the demand for identifiable kinds of agency policy formulations begins to lag,¹¹⁵ no distinction ought to be made in publicizing formal

112. See text accompanying notes 114-15 *infra*. Cf. text accompanying notes 153-61 *infra*.

113. TENN. CODE ANN. § 4-506 (1955).

114. TENN. CODE ANN. § 4-501 (1955).

115. See text accompanying note 160 *infra*.

rules, interpretations, or policy statements.¹¹⁶

(b) *Policy Statements Addressed to Particular Members of the Public.*—Because opinions in adjudications are in form addressed primarily to the parties in the case, present law directs that these opinions be furnished only to parties. However, adjudicative opinions may contain policy statements or formulations which have applicability to others. Accordingly, when opinions do contain policy statements or formulations which would add significantly to public knowledge of policy currently being pursued by an agency, at least those portions of them that can adequately convey the full policy statement or formulation should be made available to the public.¹¹⁷

(c) *Policy Statements Addressed to Agency Personnel.*—The federal agencies have been criticized¹¹⁸ for providing agency personnel with secret instructions which have verged on substantive rules.¹¹⁹ Whether or not the Tennessee agencies have disguised substantive rules in the form of instructions to personnel so as to come within the “internal management” exception to rule filing and printing requirements, I am not aware. While it is obviously unjust to penalize persons for failure to conform with rules whose content is kept secret, it does not appear that every type of instruction to agency personnel which may embody

116. The APA as originally enacted requires publication in the *Federal Register* of “statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.” See criticism of the failure of some agencies to comply with the act in Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929-43 (1950). Compare Freedom of Information Act, 80 Stat. 250 (1966), discussed in text accompanying notes 123-38 *infra*. The Revised Model Act requires the publication (with certain exceptions) of all “rules.” “Rule” is defined to mean “each agency statement of general applicability that implements, interprets, or prescribes law or policy. . . .” REVISED MODEL ACT § 1(7), 5. In addition to the requirement that “rules” be published the act further provides that each agency shall “make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its duties.” REVISED MODEL ACT § 2(a)(3). Section 2(a)(3) requires that policy formulations excluded from the definition of “rule” and thus not required to be published be made available for public inspection. The Hoover Commission Task Force recommended that all agency interpretations and policy statements be made available to the public. HOOVER COMM’N TASK FORCE REP. 150. This was the basis of the Revised Model Act provision quoted above. Comment to § 2, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 209 (1961). *Accord*, FINAL REPORT 26-29. *But see* note 119 *infra*.

117. Newman, *supra* note 116, at 936-37.

118. FINAL REPORT 29; Newman, *supra* note 116, at 939-41. See also HOOVER COMM’N TASK FORCE REP. 150.

119. *Cf.* HOOVER COMM’N TASK FORCE REP. 149. Some types of instructions to agency personnel ought to have a claim to secrecy. Consider, *e.g.*, the various types of instructions and guides which govern criteria to be used by agency employees in the settlement of cases. Disclosure of at least some types of instructions which deal with appraisals of evidence issues might unduly weaken an agency employee’s hand in bargaining situations. *Cf.* text accompanying notes 406, 410-13 *infra*.

factors touching on substantive matters ought to be publicized.¹²⁰

(d) *Unarticulated Policy Formulations and Secrecy.*—In areas in which an agency wishes to prohibit conduct which is generally considered unobjectionable, the agency must make known its disapproval of a practice before that practice will be discouraged. The specificity or generality in which the agency speaks is an important factor in determining the extent of the conduct-inhibiting effect of an agency pronouncement. To the extent that an agency is considered generally to disapprove of a given practice, the burden of uncertainty as to how far the agency disapproval extends rests upon the regulated public. Agency promulgation of a rule articulating in detail the extent of the agency disapproval would remove the inhibitions in the regulated public concerning activity which fell within the pre-existing area of uncertainty but outside of the area of articulated disapproval. Such articulation would shift the burden of uncertainty from the regulated public to the agency; the agency would then bear the burden of being certain that the rule prohibited all undesirable conduct under pain of removing inhibitions upon conduct not specifically prohibited. A conscientious agency, therefore, would always consider whether its rules and policy pronouncements carried a risk that undesirable conduct might be encouraged because of their specificity. In general, however, when an agency has formulated policy for its own use in future dealings with the public, the public ordinarily ought to be informed of that policy and, at the very least, ought to have access to it. Even where an agency is unsure about the scope of its objections to certain kinds of conduct, disclosure of the operative standards of evaluation used by that agency may not unduly encourage undesirable conduct if the agency's uncertainty is reflected in standards which are open-ended on their face.

These reasons indicate that relatively firm agency policy formulations ought to be made public, at least where knowledge of those formulations would facilitate business or other private planning. Tentative policy formulations, however, probably should not be governed by a rigid rule. Their publication perhaps ought to depend upon the degree of certainty or doubt entertained by the agency with respect to those formulations, and upon an assessment of their effect upon conduct.

The Benjamin Report suggests¹²¹ that nondisclosure or secrecy

120. See note 119 *supra* and text accompanying notes 406, 410-13 *infra*. Cf. text accompanying notes 120-22 *infra*.

121. 1 BENJAMIN REPORT 259: "especially in the early stages of administrative adjudication in a given field, an administrative tribunal, which *must* decide the particular cases before it, may still with reason be unwilling to commit itself for the future on the basis of its present decisions, and may reasonably prefer to leave its decisions unpublished until its views are further crystallized." See also *id.* at 296.

should be permitted concerning policy formulations which the agency has made of necessity in connection with adjudications or other circumstances, the wisdom of which the agency is unsure, on the apparent rationale that publication of such a policy formulation may encourage public conduct in accord with the formulated policy. While the agency's objectives in such situations can evoke some sympathy, the public has an interest in knowing what policies have been in fact formulated and applied, even though those policies are subject to revision. Moreover, the agency can discourage¹²² reliance upon its opinions by stating that its policies have not crystallized and that it has not as yet had the opportunity to consider fully the points involved. Although nondisclosure of an application of an uncertain policy formulation cannot be clearly distinguished from nondisclosure of an unapplied tentative policy formulation as its effect on the encouragement of possibly undesirable conduct, the fact that application may evidence a firmer commitment to the policy plus a general dislike of secret government activity induces me to reject the suggestion of the Benjamin Report.

An agency ought to have discretion to keep secret those policy formulations which restrictively govern enforcement and penalty criteria. These rules may simply reflect judgments as to how an agency's limited resources can most efficiently be utilized; they may, for example, be reflected in instructions to enforcement personnel to spend most of their time investigating more serious violations. Again, rules codifying an agency practice of overlooking minor infractions and reserving heavier penalties for serious violations may be based on an assessment of the regulatory methods which are best equipped to promote agency-desired conduct by regulated persons. Public access to those rules might tend to encourage infractions to which severe penalties would not attach.

(e) *Materials Required To Be Published Under the Federal Act and the Model State Acts.*—In addition to publication requirements relating to organizational and procedural information, section 3 of the federal Administrative Procedure Act, as originally enacted, required every agency to publish in the *Federal Register* "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public."¹²³ Although the federal act defines "rule" broadly to include, *inter alia*, "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" and expressly includes in the rule definition prospective

122. Such discouragement may not be complete, however.

123. APA § 3(a).

rate making and approvals of corporate or financial structure,¹²⁴ publication in the *Federal Register* of many rules of particular applicability has been avoided by section 3's exclusion of "rules addressed to and served upon named persons in accordance with law" from its publication requirements.¹²⁵ Although the definition of "rule" appears broad enough to encompass most policy formulations, the phrase "substantive rules adopted in accordance with law" does not encompass all policy formulations, *viz.*, it does not encompass "procedural" policy formulations.¹²⁶ The noninclusiveness of the phrase may be important in reading the proper meaning into the additional publication requirement regarding "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public." It is possible for some administrative "statements" to be made to one or a few individuals, with no intention that they be made available to the public at large.¹²⁷ In such circumstances the original section 3 apparently would not require publication; nor under restrictive interpretations of other provisions of section 3 would administrative statements to one or a few individuals be open to public inspection.¹²⁸ A newly enacted revision of section 3, however, omits the phrase "formulated and adopted by the agency for the guidance of the public" and requires publication of "statements of general policy or interpretations of general applicability formulated and adopted by the agency."¹²⁹ The amendment also contains a public disclosure requirement pertaining to "statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*."¹³⁰ Under the amendment, agency policy statements to one or a few individuals will be available to the public at large at least for inspection and copying. The quoted

124. APA § 2(c).

125. APA § 3(a)(3).

126. Section 3(a)(2) of the original federal act provided for the publication of procedural requirements in the *Federal Register*.

127. See, *e.g.*, Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20TH INST. ON FED. TAX. 1 (1962). Mr. Caplin argues that authority can more easily be delegated to subordinate personnel to answer individual taxpayer requests for tax rulings when widespread reliance upon those rulings is not anticipated.

128. Since almost any final agency action would seem to be either a "rule" or an "order" as those terms are defined in APA §§ 2(c), (d), the public availability requirements of APA § 3(b) would seem to apply to almost all final agency actions. A restrictive interpretation of those sections, however, seems implicit in the NLRB Rules and Regulations, 29 C.F.R. § 102.117(b) (1965) which restricts access to regional director and General Counsel decisions not to prosecute unfair labor practice charges.

129. Freedom of Information Act § 3(a)(D), 80 Stat. 250 (1966).

130. Freedom of Information Act § 3(b)(B), 80 Stat. 250 (1966).

provisions of the new section 3, however, do not seem to affect publication or disclosure practices concerning policy statements made to one or a few individuals by subordinate agency personnel.¹³¹

The phrase "formulated and adopted by the agency for the guidance of the public," which modifies the publication requirement for "statements of general policy or interpretations" in the original section 3, might also allow agencies to avoid mandatory publication of policies of leniency towards minor infractions or initial violators of agency rules.¹³² Policies of this kind might be practical for adoption, but agencies would rarely intend that members of the public guide their conduct by them. Under the new section 3, which omits that phrase, agencies wishing to avoid public disclosure of leniency policies might have to rely on an absence of agency "statements" of those policies, which, in turn, would require a reading of "statements" as used in section 3 as excluding internal agency descriptions of their leniency policies addressed to themselves or to agency employees. This potential for embarrassment was probably unforeseen by the drafters of the new section 3; it illustrates the dangers involved in adopting publication requirements which are both detailed and general in their application.¹³³

The only requirement of public disclosure of adjudicative opinions contained in the federal Administrative Procedure Act, as originally enacted, was a provision making those opinions and orders "available to public inspection." Even there an exception was made for "those required for good cause to be held confidential and not cited as precedents."¹³⁴ The amendment gives the public an express right to copy as well as to inspect and expressly requires disclosure of concurring and dissenting opinions.¹³⁵ The "good cause"¹³⁶ exception has been eliminated in favor of a list of more specific and narrower exemptions.¹³⁷ No obligation to publish adjudicative opinions, is contained in the amended act; however, the texts of significant adjudicative

131. The provisions of the amendment quoted in the text refer to policies which have been adopted by the agencies. They would seem therefore, to exclude statements of subordinate personnel which have not been adopted by the agencies. Nice questions may arise under the act about subordinates exercising authority delegated to them by their agency. In a sense all authority exercised by subordinate agency personnel is derived from the agency for whom they work. Statements of subordinate personnel may be affected, however, by § 3(c) of the amendment.

132. See text following note 122 *supra*.

133. Cf. text accompanying notes 657-63 *infra*.

134. APA § 3(b). The amendment contains an injunction against using publicly unavailable opinions as precedents. But can an agency official preclude acting in at least partial reliance upon a prior opinion of which he has knowledge? If he can and does, is he trying to be inconsistent? Compare DAVIS § 4.10, at 89-90 (Supp. 1965).

135. Freedom of Information Act § 3(b), 80 Stat. 250 (1966).

136. APA § 3(b).

137. Freedom of Information Act § 3(c), 80 Stat. 250 (1966).

opinions of many of the major federal agencies are published apart from the *Federal Register-Code* system.¹³⁸

The original and Revised Model State Administrative Procedure Acts contain almost identical publication provisions.¹³⁹ They provide for the publication of all effective "rules." Since the publication requirements of the Model Acts relate to "rules," agencies will not be required to publish policy formulations if they do not fall within the definitions of a "rule." The original Model Act defines "rule" broadly, excepting only internal management regulations "not directly affecting the rights of or procedures available to the public."¹⁴⁰ The Revised Model Act defines "rule" as:

each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.¹⁴¹

Since procedural information is required to be adopted in "rule" form under both acts,¹⁴² it is governed by their publication requirements. "Rule," under both acts, would seem to include internal directives and regulations to the extent that they affect private "rights" and, under the Revised Act, are not embodied in "intra-agency memoranda." Since most agencies administer statutes which deal with "privileges" rather than "rights," the use of the latter term in the Model Acts may create only a narrow obligation to publish internal rules.¹⁴³ The Revised Act appears to exclude from its publication requirement (and from its rule-making procedures) any policy formulation which an agency chooses to embody in a memorandum. It would further appear that almost any written matter which is not in printed form might be aptly described as a memorandum. The "rule" definitions apparently do not include opinions in adjudications even though such opinions would seem to interpret "law or policy" and even though they contain statements generally applicable to

138. A noninclusive list of federal agencies whose significant decisions are published would include the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, National Labor Relations Board, and the Securities & Exchange Commission.

139. MODEL ACT § 4; REVISED MODEL ACT § 5.

140. MODEL ACT § 1(2).

141. REVISED MODEL ACT § 1(7).

142. MODEL ACT § 2(1); REVISED MODEL ACT § 2(a)(2). Compare MODEL ACT § 2(2), with REVISED MODEL ACT § 2(a)(1).

143. In appropriate cases, however, it is hoped that courts might give a broad meaning to the term "rights."

matters regulated by the issuing agencies. The exclusion of adjudicative opinions from the "rule" definitions and hence from the publication requirements seems to follow from the fact that the procedures required for the adoption of a "rule," under both acts, are incompatible with adjudicative procedures. In this connection, the exclusion of "declaratory rulings" from the "rule" definition of the Revised Act suggests that a more precise definition would also have excluded opinions in contested cases.¹⁴⁴ Although adjudicative opinions and the three express exceptions to the definition of "rule" are not required by the Revised Act to be published, sections 2(a)(3) and (4) of that act require that an agency shall:

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

Although "rules" whose publication is omitted because publication would be "unduly cumbersome, expensive, or otherwise inexpedient" are required to be "made available on application to the adopting agency" "in printed or processed form," opinions, memoranda, and similar policy formulations other than "rules" are required merely to be made available for public inspection.¹⁴⁵ The rationale for the differing treatment may be a judgment that opinions and memoranda may be in less demand than "rules," and that imposing the printing or processing requirements on the agencies for opinions and memoranda would, therefore, be too burdensome or expensive. To the extent that agencies are conscientious in incorporating all of their policy formulations (including those developed in adjudications) into their rules, the rationale of the Revised Model Act may gain additional support. It would be desirable, however, that those documents available for public inspection also be available for copying and photographing.

3. *Means by Which Agency Rules and Policy Formulations Can Be Made Accessible.*

(a) *In General.*—In determining the means by which information about current¹⁴⁶ agency policies can be made available to the public,

144. An opinion would seem to implement or interpret law or policy. REVISED MODEL ACT § 1(7). The Massachusetts act recognizes this and excludes decisions in adjudicatory proceedings from its definition of "regulation." MASS. ANN. LAWS ch. 30A, § 1(5)(e) (1966).

145. REVISED MODEL ACT § 2(4). Even availability for public inspection was not required by the original Model Act.

146. Difficulties encountered in keeping published rules current seem to have been major stumbling blocks in the efforts of several states to publicize administrative action.

it must be borne in mind that there are various degrees and kinds of availability. The maintenance of one or more filing establishments in which agency information is made accessible to the public constitutes a certain minimal degree of public availability. Publication in a privately owned newspaper also makes agency information publicly available. Publication in an administrative bulletin probably achieves a higher degree of public availability. Distribution of information concerning agency policies via mailing lists compiled on an agency basis, subscription to which is available to any interested person, is a different kind of public availability, as is publication in books or pamphlets furnished or sold by agency or other government personnel.

(b) *Methods of Publication Under Federal and State Statutes.*—In the federal publication system, rules are published principally in the *Federal Register* and the *Code of Federal Regulations*. The *Register* is published daily except Sundays, Mondays, holidays, and days following holidays. Periodically, most of the rules which have been published in the *Federal Register* are incorporated into the *Code of Federal Regulations*.¹⁴⁷ The *Code* has been entirely revised several times since its first edition in 1938, and supplements are published at least annually.¹⁴⁸ Rules of individual agencies are also published, and groups of rules for which a separable demand exists are often separately obtainable.¹⁴⁹ Although opinions in applications are required by the federal Administrative Procedure Act only to be made available for public inspection,¹⁵⁰ many important opinions are published separately from the *Register-Code system*.¹⁵¹

The provisions of the two Model Acts provide that a designated government officer "shall compile, index, and publish all effective rules adopted by each agency" and that "Compilations shall be supplemented or revised as often as necessary [and at least once every 2 years]."¹⁵² The acts also provide for the publication of "a [monthly] bulletin" which is designed to keep the compilations up to date. Finally, they provide that omissions may be made from the compilations and bulletins if the omitted material could only be

Wis. REP. 151-53. See also HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES 40-41 (1952), referring to the inconvenience entailed under the California system of replacing superseded pages in the California Administrative Code.

147. See, e.g., Newman, *supra* note 116, at 948-49.

148. See, e.g., Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFFALO L. REV. 410, 414 (1965).

149. E.g., INTERSTATE COMMERCE COMMISSION PAMPHLET: GENERAL RULES OF PRACTICE (1962).

150. APA § 3(b). See text accompanying note 138 *supra*.

151. See note 138 *supra*.

152. MODEL ACT § 4; REVISED MODEL ACT § 5.

published in the compilations and bulletins with difficulty and if the material is available for distribution on request.¹⁵³ The provisions of the acts seem to require publication of a compilation of all rules of all agencies rather than compilations of rules by each agency.¹⁵⁴ They are silent about publication of groups of rules which are less than all of the rules promulgated by an agency and for which there exists a separable demand. They say nothing about the form of publication—whether in bound volumes (with or without “pocket” supplements), in loose leaf form, or in pamphlets.

State legislation concerning publication of agency rules varies considerably. Some states have enacted the language of the Model Acts substantially verbatim;¹⁵⁵ others under different statutory provisions, have taken the direction which seems to be suggested by the Model Acts and have enacted or adopted publication systems em-

153. MODEL ACT § 4(3); REVISED MODEL ACT § 5(c).

154. This is the interpretation made in Cohen, *supra* note 148, at 416. Compare, however, the use of the plural “compilations” in MODEL ACT § 4(1), and REVISED MODEL ACT § 5(a), with the singular “the compilation” in MODEL ACT § 4(3). Cf. REVISED MODEL ACT § 5(c). The plural form of “compilations” in MODEL ACT § 4(4) and REVISED MODEL ACT § 5(d) is not helpful because it is used in conjunction with the plural “bulletins” and both acts establish only one bulletin. MODEL ACT § 4(2); REVISED MODEL ACT § 5(b). Compare the additional language in ORE. REV. STAT. § 183.360(1) (Supp. 1965).

155. E.g., GA. CODE ANN. § 3A-107 (Supp. 1966); MO. REV. STAT. § 11140.103 (1959) (omits authorization to exclude rules whose publication would be cumbersome, expensive or inexpedient); ORE. REV. STAT. § 183.360 (Supp. 1965); R.I. GEN. LAWS ANN. § 42-35-5 (Supp. 1966); WASH. REV. CODE ANN. § 34.04.050 (1965). The Washington statute omits the direction to “publish” the compilation, but since the compilation is required to be made available at a price covering publication costs, it is not entirely clear that the omission was not an oversight. See also note 156 *infra*.

Michigan, which has a statute largely based on the original Model Act, has adopted more detailed publication provisions. Michigan requires the Secretary of State to “compile, index, and publish all administrative rules . . . in a publication to be known as the Michigan administrative code.” A “revised edition” of the code is required to be published “when directed . . . by the legislature.” Quarterly and annual supplements to the code are required to be published. Each quarterly supplement is required to contain the rules filed “not less than 30 days before the end of the preceding calendar quarter” and the annual supplement is required to include “all rules theretofore published in a calendar year.” Both the quarterly and annual supplements are required to be indexed. MICH. STAT. ANN. § 3.560(12) (Supp. 1965). Under the Michigan system a researcher is required to search through the code, the annual supplement, and the quarterly supplement since the last annual supplement. He is then sure that his information is current within three months. The Michigan statute contemplates separate publication by the agencies of their rules and groups of their rules, MICH. STAT. ANN. §§ 3.560(12a), 3.560(13) (1961), and attempts to provide for economical separate publication by providing for the maintenance of the text and type of the administrative code and supplements in order to facilitate such separate publications of the individual agencies. MICH. STAT. ANN. § 3.560(12a) (1961). The law further requires the code to be “arranged, indexed and printed in such manner as to make the type or plates available and convenient for the publication of separate pamphlets or the portions relating to different state agencies.” MICH. STAT. ANN. § 3.560(13) (1961).

bodying administrative codes kept current by periodic bulletins (which in some cases are in the form of insertable loose-leaf pages).¹⁵⁶ Some states, however, including some which have followed the Model Acts in other respects, have expressly provided for rules compilations on an agency basis. Some of these states have also expressly provided for separate agency publication of separable groups of rules.¹⁵⁷ Some state statutes which are partially based on the Model

156. Administrative codes are provided for in ALASKA STAT. § 44.62.130 (1962); CAL. GOV'T CODE §§ 11409-15 (Supp. 1966); CONN. GEN. STAT. REV. § 4-50 (1966); FLA. STAT. ANN. § 120.051 (Supp. 1966); IND. ANN. STAT. § 60-1570 (1961); IOWA CODE ANN. § 17.21 (Supp. 1966); KAN. GEN. STAT. ANN. § 77-427 (Supp. 1965); KY. REV. STAT. § 13.096 (1962); MICH. STAT. ANN. § 3.560(12) (Supp. 1966); WIS. STAT. ANN. § 35.93 (Supp. 1966). See also MINN. STAT. ANN. § 15.0413(5) (Supp. 1966). Cf. N.J. CONST. art 5, § 4 (1947). Among the states adopting the publication provisions of the Model Acts are GA. CODE ANN. § 3A-107 (Supp. 1966); MO. REV. STAT. § 1140.103 (1959); ORE. REV. STAT. § 183.360 (Supp. 1965); R. I. GEN. LAWS ANN. § 42-35-5 (Supp. 1966); WASH. REV. CODE ANN. § 34.04.050 (1965). Cf. OKLA. STAT. ANN. tit. 75, §§ 255, 256 (1965). See ARIZ. REV. STAT. ANN. § 41-1006 (1956), referred to in note 159 *infra*. See also notes 157, 158, 160, & 167 *infra*. See generally KY. REP. NO. 12, 5; WIS. REP. 153; HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES 38-40 (1952); Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFFALO L. REV. 410, 416-18, 423-26 (1965).

In some states rules publication systems embody a rules compilation in loose-leaf form which is supplemented with periodic bulletins which are also published in loose-leaf form and which can be inserted in the compilations at appropriate places. In some such states it is possible to purchase the complete compilation or only those parts of the compilation in which the purchaser is interested and subscriptions to the bulletins may be had for all issues or only for those issues which pertain to any one or more parts of the compilations. See, e.g., WIS. STAT. ANN. § 35.93(7) (Supp. 1966). See also HEADY, *op. cit. supra* at 39; KY. REP. NO. 12, 5. Wisconsin agencies are permitted to distribute copies of their rules, but normally are expected to use the plates of the compilation and bulletin.

A loose-leaf mechanism eliminates the need for periodic editions of a rules compilation which exists under the federal bound-volume system. It also eliminates the slight inconvenience of pocket supplements and the necessity of checking periodic bulletins published between pocket supplements. It is expensive, however, and has been criticized for imposing upon subscribers the task of inserting pages into the compilation! WIS. REP. 166, 173. Cf. HEADY, *op. cit. supra* at 40-41.

Apart from state systems which provide for subscriptions by interested persons to be notified of new rule making or for the immediate newspaper publication of new rules, none of the state systems have the currency of the federal system because none of them provides a counterpart to the almost daily *Federal Register*. It is not clear, however that absolute currency in a rules compilation and supplement would be worth the effort and expense that would be required to achieve it. A subscription procedure might, in many cases, be the best combination of economy and effectiveness with which to seek currency. Encouragement of the regulated public to check with agencies for recent rules changes before acting upon the basis of published rules would also seem to be a practical alternative.

157. Rules publication on an agency basis is contemplated by HAWAII REV. LAWS § 6C-5 (Supp. 1965); IDAHO CODE ANN. § 67-5205 (Supp. 1965); MD. ANN. CODE art. 41, § 247 (1965); MASS. ANN. LAWS ch. 30A, § 6 (1965); NEB. REV. STAT. §§ 84-903, 905 (1958); OHIO REV. CODE ANN. § 119.05 (Baldwin 1964); VA. CODE ANN. § 9-6.7 (Supp. 1966); W. VA. CODE § 29A-3-7 (1966). See also PA. STAT. ANN. tit. 71, § 1710.21 (Supp. 1966). See also WYO. STAT. ANN. § 9-276-23 (Supp. 1965). Most of these statutes permit a further break-down into publication by regulatory subject

Acts lack provisions for the publication of a periodic bulletin.¹⁵⁸ Some states use means other than publication to inform the public about the existence of rules.¹⁵⁹

The high cost of producing and revising a comprehensive administrative code probably accounts for the failure of some states to adopt such a system, and for the emphasis in some statutes, partially based on the Model Acts, upon publication on an agency basis.¹⁶⁰ The failure of some states to adopt periodic bulletins containing rules of all agencies is probably due to doubts that such a publication would be worth its cost to its potential users.¹⁶¹

matter. The present Maryland provision has replaced a publication provision based upon the original Model Act. Cf. CAL. GOV'T CODE § 11414; IOWA CODE ANN. § 17A.14 (Supp. 1966). Compare IND. ANN. STAT. § 60-1508 (1961) (authorization for rules publication on agency basis), with § 60-1507 (administrative code). See also note 167 *infra*. See Cohen, *supra* note 156, at 423-26 for a list of publication sources in the various states.

158. Statutes which are at least partially based on the original or Revised Model Acts and which do not provide for the publication of a monthly or other periodic bulletin published less than once a year include HAWAII REV. LAWS § 6C-5 (Supp. 1965); IDAHO CODE ANN. § 67-5205 (Supp. 1965); ME. REV. STAT. ANN. tit. 5, § 2353 (1964); MD. ANN. CODE art. 41, § 247 (1965); MASS. ANN. LAWS ch. 30A, § 6 (1966); NEB. REV. STAT. §§ 84-903, 905 (1958); VA. CODE ANN. § 9-6.7 (1964); WYO. STAT. ANN. § 9-276.23 (Supp. 1965). Compare MINN. STAT. ANN. § 15.0413(5) (Supp. 1966), with MINN. STAT. ANN. § 15.047(1) (Supp. 1966).

159. North Dakota, for example, provides for filing copies of each rule in every county of the state and also provides that each rule "shall be mailed . . . to the secretary of the state bar association." N.D. CENT. CODE § 28-32-03 (1960). A requirement similar to the quoted provision previously existed in MINN. STAT. ANN. § 15.045 (1946). Mailing copies of new rules to subscribers to such a service is a method used to inform the public about new rules, *inter alia*, in COLO. REV. STAT. ANN. § 3-16-2(11) (1963). See also COLO. REV. STAT. ANN. § 3-16-2(9) (1963) (inspection and copying). Inspection and copying is used, *inter alia*, under N.C. GEN. STAT. §§ 143-97 (1964). See also VT. STAT. ANN. tit. 3, §§ 701-04 (Supp. 1965); cf. ARK. STAT. ANN. § 5-503 (1956). Compare ILL. REV. STAT. ch. 127, §§ 268-268.1 (Supp. 1966). ARIZ. REV. STAT. ANN. § 41-1006 (1956) is unclear as to whether copies of a compilation are to be printed and sold or whether inspection and copying of a compilation prepared for official use only is contemplated.

160. Cost, plus lack of demand for an administrative code, would weigh against such publication. Professors Frankel and Gellhorn reported with respect to the New York code that: "When the newly compiled volumes appeared as the legislature had directed, only 58 sets were sold throughout the entire State of New York; and in no year were more than 70 of the annual supplements purchased. During the first dozen years, direct printing costs alone (exclusive of all the added personnel and overhead costs) came to \$113,888.04; total sales were \$11,471.85." *Hearings on S. 1663 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 678 (1964). Heady reported that in 1951 there were 160 standing subscriptions to the entire California bulletin and about 1,100 partial subscriptions. HEADY, *op. cit. supra* note 156, at 40. The small number of subscriptions to the entire bulletin may have been due to the fact that access to the complete compilation could be had at all law libraries and that reprints of the rules of the individual agencies were easily available.

161. Cf. notes 156 & 160 *supra*.

4. *Recommendations.* (a) *In General.*—It is difficult to make recommendations concerning the publication of agency rules and policies which would be applicable without distinction to all agencies and to all types of rules and policies. Of course, a comprehensive publication system like the *Federal Register* and *Code of Federal Regulations* would be ideal, but the cost of establishing and administering such a system would probably vastly outweigh the benefit that could be expected from it. In large measure, therefore, the amount and kind of publicity which should be given to the publication of agency rules and policies ought to be guided by the objectives of efficient regulation and fairness to affected persons.

(b) *Administrative Efficiency.*—In some areas, efficient regulation will be promoted by publicizing agency rules and policies so that all those who wish to comply with them will be able to do so.¹⁶² Opinions of the Attorney General, which perform in large measure the function of agency rules, are generally not published; yet the administrative interpretations of the tax laws, for example, are governed by those opinions.¹⁶³ If the administration of the revenue department could be more cheaply and efficiently carried out by publicizing those opinions and thereby shifting to the taxpaying public a greater share of the burden of complying with the tax laws, then economy of administration would suggest that these opinions be published.

(c) *Policies Governing the Issuance of Initial Licenses.*—In initial license determinations, agency policies by definition, become known to the affected party in the decision granting or denying the license. Since the denial of an initial license does not involve the imposition of a penalty for past conduct, knowledge of agency policy prior to the submission of a license application may not be as necessary as it would be in areas in which agency policy determines the imposition of penalties.¹⁶⁴ Prior knowledge of agency policies is desirable here, however, in order to facilitate business or other planning in regard to activities for whose completion ultimate agency approval will be necessary. Knowledge of the standards applied by an agency to determine initial license grants is also desirable in order to assist persons in meeting agency requirements for licensing, and to facilitate informed argument to the agency about the propriety of initial license grants.

162. See text preceding note 115 *supra* and text following note 120 *supra*.

163. See the discussion of Attorney General's opinions in text accompanying notes 611-19 *infra*; *cf.* text accompanying notes 571-75 *infra*.

164. But an interference with reasonable expectations, especially when one has invested substantial sums in those expectations may create hardship akin to a penalty.

(d) *Rules Embodying Standards of Conduct for Violation of Which Penalties Are Imposed.*—It is important that agency rules or policies which are used as criteria by which the lawfulness of past conduct is judged in penalty proceedings be publicized to those persons subject to them. Thus, in penalty proceedings involving conduct which has allegedly deviated only from agency rules, justice would normally require that no person be punished who did not have an adequate opportunity to learn of those rules before acting.¹⁶⁵

In those areas in which an agency deems itself responsible for shaping or developing patterns of conduct to conform to agency or statutory policy, an agency may feel that imposing penalties is an awkward (and perhaps largely unworkable) way to achieve its result—especially if regulated persons are in doubt about those policies. Consequently, such an agency would tend to inform persons subject to its regulation of its views as to proper conduct or to issue reminders to them, and to impose punishments only as a last resort when those admonitions and reminders were ignored. This practice, which is required by the federal act and the Revised Model Act prior to license revocations proceedings,¹⁶⁶ would eliminate much of the injustice which would result from a failure to promulgate rules ahead of time.

(e) *Forms of Publication.*—As long as each agency makes copies of its rules available to any person requesting them, the form in which the rules are reproduced ought to be determined by the respective agencies in accordance with dictates of economy and convenience. Probably the agencies would decide on the basis of their experience that separable demands exist for various groupings of rules, and thus cost might be reduced by making those various rule groupings available separately.¹⁶⁷ The agencies should take steps to keep their rules publications current, as by including mimeographed attachments to rules booklets. Providing mailing list service to subscribers of current and prospective rules changes in a manner analogous to that provided for in the Revised Model Act,¹⁶⁸ wherever a

165. FULLER, *THE MORALITY OF LAW* 51 (1964).

166. See text following note 478 *infra*.

167. 1 BENJAMIN REPORT 325, noting that the purchase price of a general rules publication "may be prohibitive for many individuals who are in fact interested only in a limited field. It is desirable, therefore, that, as far as practicable, the regulations of individual agencies, subdivided as far as is practicable, should be available for separate distribution or purchase;" WIS. REP. 151: "If all or most rules are printed in a single bound volume, there . . . is some loss of economy due to the fact that very few people are interested in obtaining all rules in existence, yet they are required to purchase all in order to obtain the few in which they are interested;" Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 954 (1950), referring to the "convenience and economies" resulting from the reprints of rules of individual agencies.

168. REVISED MODEL ACT § 3(a)(1). See text following note 146 *supra*.

demand for such a service is found to exist, would also be desirable. Finally, agency personnel should be aware of their responsibilities for informing the public of current policies and standards; and, accordingly, they should take every opportunity, by furnishing requested advice and by volunteering information or agency publications, to assist interested and affected persons in planning their conduct to conform with those policies.¹⁶⁹

G. Petitions for Adoption of Rules.—The federal act and the Model Acts each contain provisions expressly conferring upon “interested” persons the right to petition agencies for the adoption of an amendment or repeal of a rule (including an “interpretative” rule).¹⁷⁰ If, in the absence of other proceedings, a petition for the issuance, amendment, or repeal of a rule would be considered to be done “in connection with [an] agency proceeding,” the federal act seems to require that denials of rule-making petitions be made promptly and that the ground for denial be stated.¹⁷¹ If a federal agency wished neither to deny a petition nor to grant it immediately (as might be the case, for example, if the agency wanted to conduct further study on a rule proposed by a petitioner), the effect of the act’s provisions concerning notice and statement of grounds is unclear. The general intent of the statute seems to require the agency to notify the petitioner about the status of his proposed rule and the reasons for that status.

The original Model Act provides in section 5 that:

Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Under the Model Act, the obligation imposed upon agencies to act upon a petition requesting the exercise of their rule-making power is a nebulous one. The agencies are themselves entrusted with formulating by rule the procedures which will govern their consideration and disposition of such petitions. If an agency fails to formulate such procedures, its obligation to consider and act upon a rule-making petition never comes into being. In 1943, Wisconsin enacted a petition-for-rule-making provision similar to that contained in the Model Act. The Wisconsin Legislative Council reported in 1955¹⁷² that only 12 out of 46 administrative agencies had promulgated the procedural

169. Cf. HORSKY, *THE WASHINGTON LAWYER* 92-97 (1952).

170. APA §§ 2(c), 4(d). MODEL ACT §§ 1(2), 5; REVISED ACT §§ 1(7), 6.

171. APA § 6(d).

172. WIS. REP. 105-06.

rules called for by that provision, and that only four agencies had received formal petitions for the adoption of rules, although most had received informal requests for rule-making action. The staff of the Council stated that "on the basis of our research, it seems reasonable to conclude that the type of provision presently existing in Wisconsin is not functioning as it was intended to function. It has been largely ignored by both the agencies and the public." The staff recommended "that the form and content of and the procedure for submitting such a petition be prescribed by statute," and that an agency's duty to act on a rule-making petition be spelled out by statute. The staff concluded that a provision which "would require an agency either to hold a hearing on a petition or to deny it in writing" would be advisable.

Legislative prescription of a form for a rule-making petition which could be superseded by affirmative agency action seems as useful as the mandatory form suggested by the Wisconsin Council; it would also possess an element of flexibility lacking to the Council suggestion.¹⁷³ The second suggestion of the Wisconsin Council seems to have been followed in section 6 of the Revised Model Act which, after repeating practically verbatim the provisions of section 5 of the original Model Act, adds the following sentence:

Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denials) or shall initiate rule-making proceedings in accordance with Section 3.

It is generally agreed that private persons should be able to petition agencies to exercise their rule-making powers, but it is not clear that agencies should be obligated to act upon every petition within a thirty-day period.¹⁷⁴ In order to protect agencies from dissipating their agencies in answering a rash of rule-making petitions, each agency ought to be allowed to deal collectively with petitions raising similar points and to excuse itself from any time limit when compliance with such a time limit would interfere with the efficient administration of the statutes entrusted to it. Furthermore, an agency should be free to give additional study to a problem raised in a rule-making petition rather than be forced to accept or reject a proposed rule which may be poorly drafted or badly thought out.

In an attempt to protect the agencies from harassment by frivolous

173. KY. REP. No. 12, 63. The Commission adopted this provision from MASS. ANN. LAWS ch. 30A, § 4 (1966). *Accord*, CONN. GEN. STAT. ANN. § 4-44 (1966).

174. The Oklahoma version of the Revised Model Act has substituted "a reasonable time" for the 30-day period in which agency action on a petition for rule-making action is required. OKLA. STAT. ANN. tit. 75, § 305 (1965).

petitions, Wisconsin limited the right to petition to municipalities, corporations, and five or more interested persons.¹⁷⁵ The Kentucky Legislative Council recommendations, which modified section 3(a) (2) of the Revised Model Act by requiring that the twenty-five or more persons who could force a mandatory rule-making hearing must be "directly affected,"¹⁷⁶ did not use a similar approach in connection with petitions for the adoption of rules. The difference in approach is probably due to the belief that rule-making proceedings not involving oral hearings are not so great an imposition upon an agency's functioning. The degree to which rule-making proceedings interfere with the proper functioning of an agency, however, may depend partially upon the deadlines imposed for deciding rule-making petitions and the extent to which the personal attention of the agency head is required in the disposition of those petitions.¹⁷⁷

III. DECLARATORY DETERMINATIONS

A. *Declaratory Rulings by Agencies.*—The federal act and the two Model Acts provide for the issuance of declaratory rulings by agencies¹⁷⁸ and for judicial review of those rulings.¹⁷⁹ The federal act and the original Model Act merely authorize agencies to issue declaratory orders;¹⁸⁰ the Revised Model Act is less clear than the other two acts about the power of agencies to refuse to issue declaratory rulings.¹⁸¹ Requiring agencies to issue declaratory rulings on all requests made to them might impose too great a burden on agency time and energies. If mandatory declaratory rulings were to be required, some showing that the persons seeking rulings are seriously contemplating

175. WIS. STAT. ANN. § 227.015 (1957).

176. KY. REP. NO. 12, 59. See text accompanying note 48 *supra*.

177. *Cf.* text accompanying notes 181-82 *infra*.

178. APA § 5(d); MODEL ACT § 7; REVISED MODEL ACT § 8. Compare the Michigan administrative code (which follows closely the original Model Act) containing no provision for declaratory rulings by agencies. MICH. STAT. ANN. §§ 3.560(21.1)—3.560(21.10) (1961).

179. The federal act impliedly authorizes judicial review of rulings by providing that a declaratory order may be made "with like effect as in the case of other orders." APA § 5(d). Similarly, the Revised Model Act states that "rulings disposing of petitions [for declaratory rulings] have the same status as agency decisions or orders in contested cases." REVISED MODEL ACT § 8. The original Model Act expressly provides for judicial review of declaratory rulings. MODEL ACT § 7.

180. APA § 5(d); MODEL ACT § 7.

181. Section 8 of the Revised Model Act requires agencies to provide by rule "for the filing and prompt disposition of petitions for declaratory rulings. . . ." The section seems to contemplate that all petitions will be acted upon. Note, however, that the obligation of an agency to dispose of rulings petitions is technically dependent upon its fulfillment of its obligation to adopt procedural rules pertaining to declaratory proceedings. *Cf.* text accompanying note 172 *supra*.

the conduct requested to be ruled upon perhaps ought to be required.¹⁸²

Agencies will probably be more likely to give information to those who ask for it about specific factual situations than to promulgate detailed rules having general applicability. They may be hesitant to use formal proceedings, some of which may be time-consuming and expensive as a means of giving information about current policies. Thus, declaratory rulings might be most useful in situations where evidentiary hearings would be unnecessary to ascertain basic facts and where only legal issues or policy considerations are involved. These considerations may partially explain the success of the federal tax rulings procedures under which rulings are issued upon stated facts.¹⁸³ Tending to discourage agencies from issuing rulings, however, may be the fear that they will be held to rulings despite the occurrence of new factors with which the rulings did not deal and that ambiguous rulings will be interpreted adversely to the issuing agencies. The prospect of a change in agency policy may also tend to discourage agencies from issuing rulings.¹⁸⁴

In seeking to promote certain types of conduct, agencies may not only avail themselves of the opportunity to enlighten persons about agency views concerning the propriety or legal consequences of their proposed conduct, but also may hesitate to take action against persons who have acted in good faith upon information furnished to them by those agencies. Conformity by agencies to the advice which they have previously given encourages the public to seek agency advice and encourages conduct in conformity with the advice given.¹⁸⁵ The bar and the agencies should become aware of other and less formal avenues of communication than declaratory rulings. "No action" letters, oral assurances of "no action," and discussions with staff members on enforcement policies may serve as well or better than formal declaratory rulings in many situations.

B. Declaratory Judgments by Courts.—The two Model Acts contain provisions for seeking a judicial declaratory judgment concern-

182. I do not mean to recommend the adoption of technical criteria resembling, for example, requirements of "standing" to sue in the federal courts. I would suggest that the expense and time of an agency which would be consumed in rendering a requested ruling should be balanced against the need for the ruling. An agency perhaps ought to be more ready to assume the existence of need during slack periods. Moreover, in cases where the preparation of a ruling request involves a substantial expenditure to the petitioner, that fact alone might indicate that the petition is not a frivolous one. Cf. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 523-24 (1965).

183. See Caplin, *supra* note 127, at 9, 13, where it is stated that the Internal Revenue Service gives between 30,000 and 40,000 rulings a year.

184. Cf. KY. REP. No. 12, 67.

185. HORSKY, *op. cit. supra* note 169, at 94.

ing the "validity" of agency rules.¹⁸⁶ In addition, the Revised Model Act provides for judicial determinations of rule "applicability."¹⁸⁷ Both acts have expressly negated any obligation upon a person challenging an agency rule in a declaratory judgment proceeding to request agency relief before coming into court. They do require, however, that the agency which has issued the challenged rule be made a party to the court proceedings.¹⁸⁸

A number of reasons can be given why, in at least some circumstances, a person challenging an agency rule should be required to seek relief initially before that agency: Prior resort to the agency concerned would afford it an opportunity to interpret the challenged rule, to exercise discretion not to enforce it, or to waive its application to the case at hand. In some of these instances, an apparent dispute may be disposed of at the administrative level, and courts will be left to deal with the more difficult controversies.¹⁸⁹ Also, initial resort to the agency which has issued a rule provides that agency with an opportunity to state reasons upon which it relies to support the validity of the challenged rule as it applies to the case at hand; hence

186. MODEL ACT § 6; REVISED MODEL ACT § 7.

187. REVISED MODEL ACT § 7. The Revised Model Act's declaratory judgment provisions have been followed in IDAHO CODE ANN. § 67-5207 (Supp. 1965); OKLA. STAT. ANN. tit. 75, § 306 (1965); R.I. GEN. LAWS ANN. § 42-35-7 (Supp. 1966). FLA. STAT. ANN. § 120.30 (Supp. 1966) also expressly provides for declaratory judgments on the applicability of agency rules. Compare KAN. GEN. STAT. ANN. § 60-1701 (1964). Cf. MO. REV. STAT. § 1140.105 (1959). Most state administrative procedure statutes which contain declaratory judgment provisions, however, provide merely for declaratory judgments on the validity of agency rules. ALASKA STAT. § 44.62.300 (1962); ARIZ. REV. STAT. ANN. § 41-1007 (1956); CAL. GOV'T CODE § 11440; GA. CODE ANN. § 3A-111 (Supp. 1966); HAWAII REV. LAWS § 6C-7 (Supp. 1965); MD. ANN. CODE art. 41, § 249 (1965); MINN. STAT. ANN. § 15.0416 (Supp. 1966); NEB. REV. STAT. § 84-911 (Supp. 1965); N.M. STAT. ANN. § 67-26-25 (1961); ORE. REV. STAT. § 183.400 (Supp. 1965); VA. CODE ANN. § 9-6.9 (1964); WASH. REV. CODE ANN. § 34.04.070 (1965); W. VA. CODE ANN. § 29A-4-2 (1966); WIS. STAT. ANN. § 227.05 (Supp. 1966). See also COLO. REV. STAT. ANN. § 3-16-5 (1964); MASS. ANN. LAWS ch. 30A, § 7 (1966); OHIO REV. CODE ANN. § 119.11 (Baldwin 1964). The Georgia and Hawaii statutes are of particular interest because, although they are both based principally upon the Revised Model Act, they have not adopted that Act's provision for a declaratory judgment upon the "applicability" of an agency rule. The Hawaii statute also provides that a declaratory judgment on rule validity may be obtained by any "interested person." HAWAII REV. LAWS § 6C-7 (Supp. 1965). This is another modification of the language of the Model Acts which may suggest that more lenient standards on who may be a plaintiff are embodied in the Hawaii statute than in the Model Acts. An opposite inference may be contained in the Georgia version of the Revised Model Act which apparently does not recognize interference with a "privilege" as a basis for instituting a declaratory judgment action. GA. CODE ANN. § 3A-111(a) (Supp. 1966).

188. MODEL ACT § 6(1); REVISED MODEL ACT § 7.

189. In those cases, however, in which an administrative hearing would not be necessary for the involved agency to determine the application of the challenged rule to the plaintiff, the agency could make that determination as a party to the court proceedings. An early statement of the inapplicability of the challenged rule to the plaintiff ought to result in the termination of the lawsuit.

the court which later passes upon the rule will be better informed.¹⁹⁰ Under the Model Acts, resort must be made to the agency which has issued a challenged rule by means of the declaratory judgment proceeding to which the agency is a party. This delayed resort ameliorates to some extent the permission in those acts to proceed immediately in court. In some cases, however, an agency may be unable merely as a party to court proceeding and without a prior administrative investigation adequately to determine how to interpret a given rule to the particular concrete situation involved in the case or whether to waive the rule's application to that case, or to specify the factors which it deems important in applying that rule to the person challenging it.¹⁹¹

The Model Act's provision for judicial declarations of rule validity without prior resort to the agency concerned may be of limited value to persons unsure of the applicability of rules to themselves.¹⁹² A declaration that the challenged rule is inapplicable would probably satisfy most plaintiffs. Under the original Model Act's procedure, such a declaration would principally be within the agency's discretion to give or to withhold. Accordingly, despite the Model Act's permission for a plaintiff to meet the agency for the first time in court, an initial resort to the agency would normally be of substantial practical importance. Under the Revised Model Act's procedure, a court may be asked to pass upon the applicability of an agency rule without a prior administrative determination of applicability.¹⁹³ That act seems to be drawn on the assumptions either that any policy-formulating roles which agencies may have in determining rule applicability can be performed as parties to court litigation, or that policy formulation is generally exhausted in the process of making rules. As to the first assumption, the easiest case in which an agency could decide upon its policy as a party to court proceedings would be one in which no "factual" dispute existed;¹⁹⁴ yet in this situation prior resort to the agency should be inexpensive

190. Cf. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

191. In certain types of cases, agencies may need to conduct their own hearings or investigations in order to be able to determine their own positions.

192. Cf. *Wise v. McCanless*, 183 Tenn. 107, 191 S.W.2d 169 (1945), invalidating a regulation only in its application to the plaintiff. *Wise* held a one-year liquor store license valid when the Commissioner of Finance and Banking issued a regulation prohibiting the operation of a liquor store within one hundred feet of a building to which the public was admitted and in which alcoholic beverages were consumed. *Wise's* store was so situated. The court upheld the reasonableness of the regulation but invalidated its application to the plaintiff for the remainder of his license period.

193. REVISED MODEL ACT § 7.

194. Cf. JAFFE, *op. cit. supra* note 182, at 436; Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327, 338 (1963).

and should result in a speedy determination.¹⁹⁵ It is possible that most agencies could adequately perform their policy formulating functions as parties to court proceedings, but that procedure might prove awkward in some instances.¹⁹⁶ The second assumption fails to make proper differentiations among the various kinds of agency activities. New policy formulation in penalty proceedings ought generally to be avoided; penalties should be imposed for violations of agency rules only as those rules are generally understood or perceived by those to whom they apply. But in promoting or encouraging future conduct, agencies are not punishing; accordingly, they should have some freedom to develop new policies in deciding upon particular applications of existing rules.

The Revised Model Act's declaratory judgment provision raises a number of problems to which it provides no answers. Does it authorize a court to determine that an applicant for a license is qualified for that license under a rule of an agency? Does it permit a person whose license is threatened with revocation for violation of an agency rule to have the validity of his conduct under that rule determined by a court rather than by the agency? Will the institution of a declaratory judgment suit divest an agency of jurisdiction to conduct a revocation proceeding? If so, will that divestiture occur even after the agency has instituted its own proceeding? Will the termination of the agency proceeding prevent a redetermination on the merits of the applicability of an agency rule to the party concerned in a declaratory judgment action? What would such a provision do to the enforcement of a rule issued by the Tennessee Commissioner of Agriculture that pastures on which animals having infectious diseases are located must be quarantined? Would it permit the court to determine for itself the degree to which a quarantine is necessary? Could agencies sometimes avoid the impact of the declaratory judgment provision by adopting rules providing for affirmative agency approval of specified courses in conduct? Existing case law would probably aid in answering some of these questions;¹⁹⁷ nevertheless

195. If the reason that an agency refused to determine a question of rule applicability when requested to do so is lack of staff, then requiring court determinations of rule applicability would place on the courts a burden that might be borne by that agency if its staff were expanded. On the other hand, to the extent that deciding cases of rule applicability diverted agency and staff time from more important matters, court determinations of rule applicability in unimportant cases might be desirable. See text accompanying note 200 *infra*.

196. See text accompanying notes 190-191 *supra*.

197. In refusing to grant declaratory relief on questions presented in pending criminal proceedings, the Tennessee courts may have given some indication of the approach which they might normally take towards pending license revocation proceedings. The rationale behind their refusals to entertain declaratory judgment suits in the

they raise some often neglected operational aspects of the Revised Model Act's declaratory judgment provision.

Although it would normally be wise under either act for regulated persons to make some initial resort to the agency concerned before attacking one of its rules in court, a practical aspect of dispensing with the initial resort to that agency as a legal prerequisite to a court challenge may be a shift of some bargaining power to a regulated person who, in negotiations with the agency, may threaten court attack on a rule without necessarily seeking relief in formal agency proceedings. The elimination of a requirement first to proceed before the agency before coming into court would facilitate challenges to rules, and hence would increase the bargaining power of a potential challenger whenever the total costs of litigating in a declaratory judgment suit appear substantially less than the total costs of litigating in an administrative proceeding which might be followed by a declaratory judgment suit. The ability immediately to seek court review of a rule might also speed up agency decisions about rule applicability.¹⁹⁸

Having suggested earlier some of the reasons why an initial agency determination of rule applicability would normally be desirable, it remains to be said that when an agency has exhausted its policy formulating function in making a rule and when interpretation of that rule needs only the skill which a court possesses, a court could properly

face of pending or imminent criminal proceedings seems to have been concern that judicial economy would be furthered by permitting the questions in dispute to be decided in the pending criminal litigation (which offered adequate means to have the questions answered) and a concern that the chancery courts' jurisdiction not be "extended" into the criminal area. *E.g.*, *Johnson City v. Caplan*, 194 Tenn. 496, 253 S.W.2d 725 (1952); *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S.W. 565 (1927). If this latter reluctance was based upon a felt need to avoid disrupting ordinary criminal procedures, then it is possible that the courts would refuse to interfere by declaratory or injunctive suits with agency proceedings involving certifications, license revocations, etc. Existing case law suggests that such a reluctance would be especially strong where the agency concerned had not yet fully formulated its policies or had not yet exercised the enforcement discretion committed to it. *General Sec. Co. v. Williams*, 161 Tenn. 50, 29 S.W.2d 662 (1930); *North British & Mercantile Co. v. Craig*, 106 Tenn. 621, 62 S.W. 155 (1901). *Cf.* *Erwin Billiard Parlor v. Buckner*, *supra*. Moreover, since many of those policy formulations and enforcement decisions would be part of the various agencies' ordinary tasks of administration, judicial interference with these activities would be likely to be either uninformed or unduly burdensome to the courts or both. *Cf.* *State ex rel. Jones v. Nashville*, 198 Tenn. 280, 279 S.W. 2d 267 (1955), which upholds a requirement of exhaustion of administrative remedies citing *inter alia* the burden which would otherwise be imposed upon the courts. See also *State v. Yonakum*, 201 Tenn. 180, 297 S.W.2d 635 (1956).

198. The ability to seek immediate court determinations of rule applicability might also promote administrative determinations of applicability where otherwise no administrative determination would be forthcoming.

dispense with a requirement for an initial agency proceeding where administrative determination would be expensive and time-consuming.¹⁹⁹ Indeed, the allocation of functions between courts and agencies is in part based upon notions of economical use of those institutions. If court determinations of some cases of rule applicability would be speedier and cheaper than agency determinations or if court determinations would save agency or agency staff time which would be employed in more important tasks, court determinations might be desirable.²⁰⁰ One method for securing the advantages, when they exist, of court determinations while preserving agency control over basic policies would be to provide for court determinations of rule-applicability when the agency certified approval of such a procedure.

IV. ADJUDICATION

A. *In General.*—Adjudication, which is a term commonly applied to the process in which an agency applies a policy to one or more persons in a proceeding to which those persons are parties and which terminates in an order directed to those persons, is commonly thought to affect more seriously the individual treatment of the parties to that process than other types of agency action; hence, the federal act and the Model Acts have surrounded the adjudicatory process with special procedural provisions which are designed to promote administrative action that is both rational and fair. Some of these provisions are designed to control information upon which the decision is based by subjecting at least some of it to the scrutiny and challenge of the parties; some are designed to promote familiarity by the decision-makers with the issues in dispute; and some are designed to narrow the issues in dispute. These acts also contain provisions providing for judicial review and provisions facilitating that review.

B. *Some Procedural Provisions.* 1. *Notice and Narrowing of Issues.*—Because of the presentation of each party's side of a case to the best of his ability is the means by which an adversary process ferrets out the information required for an informed decision, it is desirable that all of the arguments and evidence of each side be known early in proceedings which are "adversary" in nature.²⁰¹ The

199. See note 195 *supra*.

200. Cf. JAFFE, *op. cit. supra* note 182, at 128; Jaffe, *Primary Jurisdiction Reconsidered—The Antitrust Laws*, 102 U. PA. L. REV. 577, 587-88 (1954).

201. As is suggested by the discussion pp. 858-864, *infra*, the procedures used for issue-narrowing are inseparably related to an assessment of the respective functions of the agency head and his staff and their relations *inter se*. Here it should be noted that in at least many types of cases and perhaps especially in connection with adjudi-

earlier that knowledge is available to each side, the sooner will the issues—"factual" and other—emerge with clarity. Knowledge of all the issues in dispute facilitates effort in preparing and arguing issues which are not in dispute, and thus, it permits permitting each party to concentrate his efforts on the disputed issues. From the decision-maker's point of view, concise issues and well-organized, unrepetitious arguments and evidence are conducive to a proper disposition of cases.

2. *Pleadings*.—The need for parties to an administrative adjudication to learn of adverse contentions of the agency at an early date in order to prepare rebuttals or defenses is at least partially served by the federal act's requirement that persons entitled to notice of an agency hearing be "timely informed" of "the matters of fact and law" asserted.²⁰² Both Model Acts seem to be directed at requiring specificity in pleadings by agencies—a requirement that is emphasized in the Revised Act. The original Model Act required "the issues" to be stated in advance of the hearing, with a proviso that they might be stated later if amendment of pleadings became necessary.²⁰³ The Revised Act requires a statement of "the matters in detail" in an initial pleading, with a proviso that if such statement is impossible the initial notice may be limited to a statement of "the issues involved."²⁰⁴ Note the differentiation in the Revised Act between the "the matters in detail" and "the issues." The required statement of "matters in detail" accordingly takes on a connotation resembling evidentiary pleading. Unlike the original act, the Revised Act makes no mention of an "amendment" to a pleading. It does require, however, that a "more definite and detailed statement" be furnished "thereafter" if a notice is limited to a statement of the issues. This statement seems intended to be served before the hearing commences, but the act is ambiguous in this respect. The federal act provides,²⁰⁵ that in actions in which

cations involving complex or technical issues in which staff analysis may play a large part in the final decision of the agency, the clarification and narrowing of issues may be dependent upon participation by staff in the proceeding at an early date and their playing an active role. Cf. subsection 2 of Recommendation No. 19 of the Administrative Conference of the United States, printed in Fuchs, *The Administrative Conference of the United States*, 15 AD. L. REV. 6, 34-35 (1963). Cf. *Report of the Committee on Ratemaking*, 15 AD. L. REV. 175, 177 (1963), recommending "early and vigorous inquiry by the staff into all phases of the factual support for the rate at issue." The more "active" the staff role becomes, however, perhaps the more acute becomes the commingling of functions problem unless the staff members participating in the hearing are different from the staff members who assist in deciding. See discussion in text accompanying notes 401-03 *infra*.

202. APA § 5(a).

203. MODEL ACT § 8.

204. REVISED MODEL ACT § 9(a)(4).

205. APA § 5(a).

an agency is not the moving party, the agency "may by rule require responsive pleading;" the Model Act says nothing about a responsive pleading. The Revised Act provides²⁰⁶ that opportunity shall be afforded all parties "to respond" and present evidence and argument on all issues involved. Whether the "to respond" language contemplates a responsive pleading is unclear.

One problem with which these acts are concerned is the desirability of requiring more from an agency than a statement of charges in statutory terms. Considering the generality of many statutes administered by agencies, such a statement would sometimes give a party opposed to an agency little notice of the real issues in the case,²⁰⁷ however, statutes ought not to impose on the agencies impractical pleading requirements. Moreover, in many proceedings detailed pleadings may be impossible or may serve little useful purpose. Finally, the detail which is necessary or desirable in pleading may be a function of the other available means for discovering the substance of an agency's case.

In general, stringent pleading requirements are undesirable. Some specificity in pleading may be desirable, however, in the simple cases in which small sums or minor interests are involved and in which the use of pretrial discovery devices would be prohibitively expensive and unnecessary. Also, in the typical license revocation proceeding in which the licensee is accused of having violated, willfully or negligently, the law or the rules of an agency, the licensee ought to be given notice in some detail of the alleged factual occurrence which is the basis for the proceeding being undertaken against him, and his attention should be directed to the particular rule or section of the statute involved.²⁰⁸

3. *Hearing Officers.*—Many Tennessee statutes²⁰⁹ authorize the use of a hearing officer who is required to make findings of fact, conclusions of law, and a proposed order.²¹⁰ These statutes provide that

206. REVISED MODEL ACT § 9(c). A responsive pleading is required under CAL. GOV'T CODE § 11506(b).

207. But compare the effect of the license revocation provisions of the federal act and the Revised Model Act discussed in the text accompanying notes 478-80 *infra*. See also text accompanying notes 165-166 *supra*.

208. Consider the effect of the license revocation provisions of the federal act and the Revised Model Act, discussed in the text accompanying notes 478-80 *infra*. See also, *e.g.*, ALASKA STAT. § 44.62.370 (1962); CAL. GOV'T CODE § 11503.

209. TENN. CODE ANN. §§ 59-1716, 65-211, 67-3040, 67-3132, 67-3731 (1955 & Supp. 1966).

210. Compare California which requires every case to be presided over by a hearing officer. Although the agency may "hear" the case with the hearing officer, the hearing officer, nonetheless, rules on the admission and exclusion of evidence and

the agency head may approve the hearing officer's conclusions and order or may make his own findings and conclusions and issue his own order. To the extent that the parties are given the opportunity to argue before the agency head prior to his determination,²¹¹ the initial decision of the hearing officer will serve as a focal point for argument. However, to the extent that the parties are not allowed to argue before the agency head, the decision of the hearing officer will principally serve to facilitate the delegation of work by the agency head. For the hearing officer system to work effectively in narrowing and clarifying issues for the parties, the system requires in effect a trial before the hearing officer and appellate review by the agency head. Even when such a two-tier system exists, however, the hearing officer and the agency head may not agree on which factors are important. The hearing officer may focus the parties' attention on issues which are not the determinative issues in the mind of the agency head who renders the final decision. Again, the issue-narrowing benefits to be derived from a two-tier system of adjudication seem to be related to the types of issues in dispute. Narrowing issues for a second round of argument seems practical only for issues which do not turn on the credibility of witnesses; issues tied to credibility can probably be determined best by the person or persons who observed the presentation of the disputed testimony.²¹²

4. *Discovery*.—Few administrative procedure acts have provided in express terms for pretrial discovery.²¹³ Discovery, however, may perform an issue-narrowing function which, especially in complex cases, might result in better informed decisions. Pretrial discovery may also eliminate some of the problems which arise from ex parte contact between the agency head and his staff by bringing into the open the information and arguments which would form the subject of such contact.²¹⁴ In the federal court system widespread pretrial dis-

advises the agency on matters of law. The agency is given power over the other aspects of the hearing but may delegate any of them to the hearing officer. CAL. GOV'T CODE § 11512. When the agency hears with the hearing officer, the hearing officer is required to "be present during the consideration of the case and, if requested, shall assist and advise the agency." Where the hearing officer alone hears the case, he is required to prepare a proposed decision which is served on the parties and which may be adopted by the agency. Otherwise the agency may decide the case itself but only after affording the parties opportunity to present written or oral arguments. CAL. GOV'T CODE § 11517.

211. Such argument is provided for in APA § 8(b); MODEL ACT § 10; REVISED MODEL ACT § 11. See text accompanying notes 417-33 *infra*. But see CAL. GOV'T CODE § 11517, discussed in note 210 *supra*.

212. But see Blatt, *He Saw the Witness*, 38 J. AM. JUD. SOC'Y 86 (1954).

213. But see WYO. STAT. ANN. § 9-276.25(g) (Supp. 1965).

214. See subsection 2 of Recommendation No. 19 of the Administrative Conference of the United States, *supra* note 201: "It is important . . . that the staff be required,

covery has been utilized since the adoption of the Federal Rules of Civil Procedure in 1938. In general, pretrial discovery has permitted each side in a judicial proceeding to learn, prior to trial, the content of the other side's case. By so doing, it has largely eliminated surprise and has facilitated presentation of cases based upon their intrinsic merit rather than upon advantages of strategy. It has been used at times, however, to harass opponents with investigations which were not designed to be useful at trial and which were expensive to all parties. Many forms of discovery are expensive;²¹⁵ hence, discovery has been more readily available to wealthy than to poorer litigants.

5. *Pretrial Conferences.*—Pretrial conferences have been used by the federal judiciary for some time in an effort to clarify issues prior to trial and/or to facilitate settlements. Many federal agencies²¹⁶ have adopted the pretrial conference for use in their adjudications.²¹⁷ The extent to which a pretrial conference may be successful in narrowing issues may be related to the degree to which each party is familiar with the evidence, arguments, and analyses of his opponent. Accordingly, it would seem that a pretrial conference should be held after each side has been exposed to the evidence, arguments, and analyses of the other.²¹⁸ In at least some rate proceedings, some such exposure will occur in the initial procedures connected with a rate increase application. The applicant will normally submit his application together with supporting economic data and an analysis of that data which will tend to justify his application. The rejection of his application, which gives rise to the formal proceeding, will normally spell out the reasons why his request was rejected. To that extent the applicant and the involved members of the agency staff are aware of each other's respective positions, but to the extent that they will rely upon other data and arguments and upon witnesses in the formal adjudication, then provisions should be made for prior exposure to

as are other parties, to produce its evidence and state its position at an early point and be treated in all respects as a party."

215. *E.g.*, the taking of depositions is more expensive than the submission of written interrogatories. *Cf.* Wright, Wegner, & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97 (1952).

216. *E.g.*, F. T. C. R. PRAC. § 3.8; I. C. C. GEN. R. PRAC. § 1.68; S. E. C. R. PRAC. 8(c), (d); F. P. C. R. PRAC. & PROC. § 1.18. See also WIS. STAT. ANN. § 227.08 (1957).

217. FED. R. CIV. P. 16.

218. Compare *Report of the Committee on Ratemaking*, 15 AD. L. REV. 175, 181 (1963); "Without adequate procedures, active staff participation, and the necessary minimum of guidance through promulgation of agency standards, conference discussions on *substantive* matters are likely to prove a wasted effort and merely delay reaching an issue in the particular case."

such data, arguments, and testimony.²¹⁹

6. *Adjournments.*—When an issue which is a surprise to one party arises during a hearing, an adjournment will permit the surprised party to meet the new issues. Similarly, in extremely complex cases, the most effective way of narrowing the issues may be through the use of the adjournment device.²²⁰ Thus, the presentation of the case of a petitioner may be used itself to narrow the issues which a respondent (including agency staff) will be called upon to meet. After the petitioner has presented his case, the adjudication may be adjourned for a length of time sufficient to permit the respondent to meet the issues which have arisen in the petitioner's presentation. A number of courts²²¹ have followed this procedure in antitrust litigation in which the complexity of the issues precluded their clarification prior to trial.

7. *Other Methods of Simplifying Proceedings: Documentary and Oral Presentation.*—One way of simplifying proceedings is to correlate procedure to the types of issues in dispute. Procedure should be so organized as to achieve the maximum benefit, respectively, from that part of the proof or argument which is written and from that part which is oral.²²² It should also be organized with a view toward maximizing the potential contributions to the final decision of the agency and the members of his staff.

The presentation of technical or complex issues can best be made in writing since only in this way can data be presented in detail and complicated statements, arguments, and analysis be made with precision and clarity.²²³ Moreover, since evaluation of those issues depends upon time-consuming analyses and not primarily upon the belief or disbelief in the credibility of witnesses, testimonial evidence would often not seem to be of prime importance in the presentation of the affirmative side of a case. Examination and cross-examination of

219. Exposure to the main arguments of the staff seems to be the intent of §§ 9(g), 10(4) and 13 of the Revised Model Act. The lack of opportunity to know and to contest certain kinds of technical computations prepared by agency employees was the basis for the disapproval of agency procedure in *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292 (1937).

220. Cf. McAllister, *The Big Case: Procedural Problems in Anti-Trust Litigation*, 64 HARV. L. REV. 27, 42-43, 55 (1962); *Report of the Committee on Ratemaking*, 15 AD. L. REV. 175, 180 (1963). *But cf.* Recommendation No. 19(e) of the Administrative Conference of the United States, *supra* note 201.

221. McAllister, *supra* note 220, at 55.

222. See subsection 4(d) of Recommendation No. 19 of the Administrative Conference of the United States, *supra* note 201.

223. Cf. *Report of the Committee on Ratemaking*, 15 AD. L. REV. 175, 180 (1963): "The Committee agrees that increased use of written testimony should be encouraged, since its proven advantages outweigh any experienced disadvantage in most rate making proceedings."

witnesses in connection with the litigation of such issues is useful primarily as a device to discover the analyses underlying the conclusions²²⁴ of an opposing party and to explore inconsistencies in those analyses. Discovery and pretrial conferences provide alternate means for uncovering the evaluations and analyses of opponents. Successful cross-examination for the purpose of exposing inconsistencies in the analyses underlying the conclusions of an opposing party cannot occur unless the person being cross-examined has completed his analyses, and unless the cross-examiner has a sufficient understanding of those analyses to direct his questions toward the exposure of their weak points.

The foregoing considerations indicate that written data and arguments ought to be submitted and exchanged well in advance of the testimonial part of a hearing.²²⁵ Such submissions and exchanges would be consistent with the utilization of pretrial discovery and would facilitate the operation of a pretrial conference.²²⁶ Exchange of written data and arguments well in advance of such a hearing would also facilitate cross-examination of staff analysts on their analyses and would provide the private party with the opportunity to meet all staff objections to his presentation.

From the agency's point of view, testimonial hearings present it with the opportunity to evaluate the credibility of witnesses and, by questioning, to clarify points which have not been made with precision by the private parties in written submissions. The latter opportunity, by definition, will not arise unless the parties have made

224. Compare *Report of the Committee on Ratemaking*, 15 AD. L. REV. 175, 180 (1963): "[I]t may be impossible or impractical at present to require other parties to submit direct or rebuttal cases until completion of cross-examination of the rate proponent's case, or until the staff's position has been stated. It may not always be possible to prepare responsive direct cases or rebuttal prior to cross-examination." Cf. the Committee's further comment that "It is obviously desirable to limit . . . cross-examination which is merely intended to obtain factual information which could better be placed in the record by other procedures."

225. Compare subsections 4(a) and (b) of Recommendation No. 19 of the Administrative Conference of the United States, *supra* note 201, at 35:

"4. In order to reduce the time required for completion of the hearing and to improve the quality of the resulting record, federal rate agencies should, to the extent permitted by law:

"(a) Require the direct case of the party having the burden of proof to be submitted in writing with the rate filing or shortly after the case is designated for hearing.

"(b) Require the other parties, including the staff and intervenors, to prepare and exchange their direct evidence in written form substantially in advance of the date set for hearing. Rebuttal evidence should also be prepared and exchanged prior to the hearing, subject to the possibility of limited supplemental rebuttal under special circumstances." Cf. Korn, *Law, Fact and Science in the Courts*, 66 COLUM. L. REV. 1080, 1087 (1966).

226. A pretrial conference whose function was to clarify issues for trial would be more apt to be successful if the respective contentions of the parties were known to each other.

their written submissions sufficiently in advance of the oral hearing to permit the agency to familiarize itself with the arguments and analyses of the parties and unless the agency has so familiarized itself.

8. *Elimination of Unnecessary Oral Presentation.*—Further simplification and shortening of complex or technical proceedings can be accomplished by restricting the scope of testimonial hearings whenever such restriction is thought desirable.²²⁷ It has already been suggested that testimonial hearings may be of limited usefulness in proceedings which involve technical or complex issues; hence, transposing the presentation of economic arguments from oral to written form may promote desirable precision in presentation. Whenever the agency feels that the testimonial part of the hearing would be unduly time-consuming and would accomplish no proper purpose, it may be appropriate for the agency to utilize an analogue to the ICC's modified procedure.²²⁸ Under the so-called modified²²⁹ procedure, "facts"²³⁰ are required to be set forth in some detail in the responsive pleadings.²³¹ Cross-examination must be specifically requested in those pleadings, both as to particular witnesses and as to the subject-matter to be covered,²³² and cross-examination is permitted only when "material facts are in dispute."²³³ Similarly, any other request for an oral hearing must be contained in the responsive pleadings.²³⁴

C. *Evidence.* 1. *In General.*—Although some agencies²³⁵ have ob-

227. See subsection 4(d) of Recommendation No. 19 of the Administrative Conference of the United States, *supra* note 201, at 35:

"4. In order to reduce the time required for completion of the hearing and to improve the quality of the resulting record, federal rate agencies should, to the extent permitted by law:

"(d) Seek, wherever possible, to limit the evidentiary hearing, if one proves necessary, to cross-examination, and require the hearing examiner to limit cross-examination to those critical matters, not already disposed of through prior procedural steps, which are of such character that a trial-type hearing involving interrogation of witnesses would make a useful contribution."

228. 49 C.F.R. §§ 1.45-1.54 (1963 & Supp. 1966).

229. See also the discussion of "shortened" procedure in Woll, *The Development of Shortened Procedure in American Administrative Law* 45 *CORN. L. REV.* 56 (1959).

230. 49 C.F.R. §§ 1.49, 1.50 (1963 & Supp. 1966). *Cf.* the recognition given to "arguments" in addition to "facts" in the amended § 149(a).

231. 49 C.F.R. § 1.49(a) (Supp. 1966).

232. 49 C.F.R. § 1.53(a) (Supp. 1966).

233. *Ibid.*

234. *Ibid.*

235. See 49 C.F.R. § 1.75 (1963) (ICC adoption generally of judicial rules of evidence in nonjury trials). But Davis notes that "the ICC has a highly developed practice which depends upon degrees of precision for different inquiries involving statistical information." *DAVIS* § 14.10.

served, and do observe, in large measure the judicial rules of evidence, many agencies are not bound by these rules.²³⁶ The so-called rules of evidence are, for the most part, exclusionary rules; they provide for the exclusion from court proceedings of proffered evidence upon the basis of refined criteria. Basically the reasons for exclusion can be explained on the ground that the rejected evidence is (1) irrelevant, (2) untrustworthy, (3) unduly prejudicial, or (4) privileged.

The agency exemption from the rules of evidence appears to have been based upon a variety of factors, but principally upon the assumption that agencies generally are sufficiently sophisticated to be trusted to evaluate correctly evidence which would be too untrustworthy or prejudicial to be entrusted to the consideration of an inexperienced jury.²³⁷ Convenience and efficiency in adjudication often would indicate that doubtful questions of admissibility be resolved in favor of admission, rather than permitting substantial time to be consumed during the course of trial in the argument and determination of points of evidence. The practice of tentative admission subject to a later determination of admissibility seems to be the practice of trial judges sitting without juries; it is justified on the theory that judges are sufficiently sophisticated to be trusted with that evidence. At least some administrative bodies seem to possess, within their fields, a degree of sophistication equal to that of trial judges;²³⁸ accordingly there seems to be ground for trusting at least some agencies with evidence which is determined to be technically inadmissible only at the time of final decision on the merits.²³⁹ A further reason which has been given for agency exemption from the rules of evidence is that agencies are often staffed by non-lawyers and that holding non-lawyers to the evidence standards of courts would, by encouraging disputes upon points upon which agencies were not equipped to rule, seriously interfere with the smooth functioning of administrative

236. *E.g.*, 1 BENJAMIN REPORT 171.

237. *Cf.* 1 BENJAMIN REPORT 175.

238. The sophistication of an administrative body would be most readily admitted in its dealings with technical matters with which it has had prior experience. "Sophistication," however, may be synonymous with bias when specialization tends to promote strictness towards private parties or categorizations of them affecting the agency decision in situations where that decision ought to be based upon impartial evaluations of witness credibility. Consider, *e.g.*, the possible tendency of a licensing board to import professional prejudices into disciplinary proceedings.

239. MO. ANN. STAT. § 536.070(7) (Supp. 1966) provides that: "Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, unless it is wholly irrelevant, repetitious, privileged, or unduly long."

proceedings.²⁴⁰ This latter difficulty, however, could be avoided in large measure, if not completely, through the use by agencies of legal assistants who would advise them on points of evidence law when necessary.

Although trial judges in non-jury cases are generally permitted to admit inadmissible evidence, this practice seems to have been countenanced largely on the theory that the judges have excluded that evidence from their consideration when they made their findings.²⁴¹ If trial judges are permitted to admit inadmissible evidence on the ground that they lack the naiveté of juries, it would seem that trial judges ought to be permitted to consider that evidence in arriving at their findings. Their sophistication should enable them to discount the prejudicial elements of the evidence and to evaluate hearsay and other evidence which would be excluded from juries on the ground of untrustworthiness. At least those triers of fact who are vested with technical decision making and who, by virtue of their specialty, may be equipped to discount prejudicial factors and to evaluate for trustworthiness should be permitted to consider relative and probative evidence.

2. *"Residuum" Rule.*—Historically, a number of states have followed the so called "residuum" rule, which in effect provides that, while an agency will not be bound by judicial rules of evidence, an agency determination will be reversed unless it is supported by evidence which would be admissible in a court.²⁴² The basis for the residuum rule seems to lie in judicial reluctance to allow agencies to depart altogether from traditional rules of evidence and seems to be related to some extent to the appellate court practice of affirming trial court determinations in nonjury cases when such determinations are supportable by substantial admissible evidence, although the trial court had also received evidence which was technically "inadmissible." While the residuum rule eliminates the possibility of agency reversal because it has admitted judicially "inadmissible" evidence, it seems unnecessary to inject the judicial evidence rules into administrative processes at the review level.

3. *Repetitious and Irrelevant Material.*—There is a proper interest in excluding from the record testimony and exhibits which are repetitious or irrelevant. Records filled with repetitious and irrelevant material tend to defeat the rationality of adjudicative proceeding by obscuring both to the parties and to the agency the points in issue in

240. 1 BENJAMIN REPORT 174; Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 28 (1964).

241. DAVIS § 14.04, at 266-69.

242. *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916).

a mass of verbiage. Such unnecessarily voluminous records increase the difficulties which the parties face in meeting the real points of dispute and in making a presentation on the issues which the agency will consider determinative. They also increase the difficulty to the agency of arriving at a rational decision on the basis of the record and may even discourage an agency or hearing officer from reading or finding the truly relevant parts of the record.²⁴³ For these reasons, agencies should have the power to exclude such repetitious and irrelevant material. The power of exclusion, however, should not be made mandatory; otherwise, agency determinations could be upset if the reviewing court considered evidence which the agency had admitted to be irrelevant or repetitious.

4. *Material Within an Agency's Specialty.*—An agency should be permitted to use and to rely upon material used by experts and technicians in the field in which the agency is a specialist. Although the Revised Model Act refers to the agency's specialized knowledge in its provision dealing with official notice,²⁴⁴ it fails to give sufficient recognition to that specialized knowledge in its provisions dealing with admissibility. Furthermore, it would seem that an agency should be able to use and to rely upon learned treatises and similar matter dealing with subjects outside the agency's special competence which prudent and intelligent men would use and rely upon when faced with questions of similar magnitude.

An agency should not be required to follow courtroom procedure in admitting and qualifying presentations which involve policy arguments and predictions of future conduct. Such procedures are time-consuming and wasteful²⁴⁵ and may, in some cases, keep highly relevant information from the agency.²⁴⁶ If due regard is given to what-

243. Cf. Remarks of Judge Wyzanski quoted in McAllister, *supra* note 220, at 45: "Counsel cannot dump into the lap of the Court an undigested mass of documents comprising hundreds of thousands of pages and then expect the Court to read all of them, even if they were all to some degree both relevant and persuasive."

244. REVISED MODEL ACT § 10(4).

245. DAVIS § 6.06.

246. MO. ANN. STAT. § 536.070(11) (Supp. 1963) attempts to deal with exhibits involving statistical examinations, audits, surveys and the like. It provides that:

"The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures

ever special competence or sophistication an agency may possess within its field, no relevant information should be excluded. The procedures for introducing it ought to be simple in recognition of the fact that policy arguments, predictions, statistical evaluations, and the like are not the types of "evidence" with which courts normally deal but may be, or ought to be, the normal sources of information for some agencies. Furthermore, a statutory evidence provision ought not to interfere with the limitation of proceedings to written presentations when practicable.²⁴⁷

5. *"Accusatory" Proceedings.*—Although an across-the-board imposition of judicial rules of evidence would appear to be unwise, justification may exist for the use of those rules in some license-revocation proceedings and other proceedings which are primarily accusatory in scope, involve nontechnical issues and involve a determination whether certain physical events have in fact occurred.²⁴⁸ The adoption of the judicial rules of evidence in these situations would perhaps weaken the agency's power to enforce compliance with statutory policy, but it might strengthen the safeguards afforded a licensee or other private person accused of a law violation. A judgment about the application of rules of evidence to license revocation and similar proceedings would depend, therefore, upon the relative values accorded the enforcement of the various statutory purposes behind the several licensing statutes and to the protection of the economic interests of license holders.

6. *The Federal Act and the Model Acts.*—The Federal Administrative Procedure Act contains no exclusionary rules of evidence, but it provides that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence"²⁴⁹ and that no sanction should be imposed or rule or order issued unless "in accordance with the reliable, probative, and substantial evidence."²⁵⁰ In contrast to the federal act's carte blanche admissibility,

or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility."

The Missouri provision would have its advantages in connection with locally made surveys and audits; it would, however, hinder the use by agencies of studies made by experts which constituted part of a specialized literature in a field.

247. See text accompanying notes 227-34 *supra*.

248. Although more restrictive rules of evidence may be desirable in such proceedings, rules of evidence designed for a jury may not be entirely satisfactory in an agency hearing.

249. APA § 8(c); IND. STAT. ANN. § 63-3008 (1961).

250. APA § 8(c). The Hawaii administrative procedure act which in most respects follows the Revised Model Act has substituted the second sentence of APA § 8(c) for subsection (1) of § 10 of the Revised Model Act and added a requirement that the rules of privilege be observed. HAWAII REV. LAWS § 6C-10(a) (Supp. 1965). ORE.

the Model Act provides that "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs."²⁵¹ The Model Act, like the federal act, gives discretionary power to agencies to exclude "incompetent, irrelevant, immaterial, and unduly repetitious evidence."²⁵² However, it may have incorporated a "residuum" rule through its judicial review provision which provides that an agency decision in a contested case must be supported by "competent," material, and substantial evidence.²⁵³ The Revised Model Act adopts as an exclusionary rule "the rules of evidence as applied in [non-jury] civil cases"²⁵⁴ in the courts of the state involved. However, it then provides that "when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."²⁵⁵ The bracket enclosing the word "non-

REV. STAT. § 183.450 (1965) is similar except that it provides "that hearsay shall not be admitted over an objection based on lack of opportunity to cross-examine."

251. MODEL ACT § 9(1).

252. *Ibid.*

253. MODEL ACT § 12(7)(e); DAVIS § 14.06, at 277.

254. REVISED MODEL ACT § 10(1).

255. The Revised Model Act's evidence provisions are followed in the Georgia, Idaho, Rhode Island and West Virginia statutes which are based largely upon the Revised Model Act in other respects as well. GA. CODE ANN. § 3A-116 (Supp. 1966); IDAHO CODE ANN. § 67-5210 (Supp. 1965); R.I. GEN. LAWS ANN. § 42-35-10 (Supp. 1966); W. VA. CODE ANN. § 29A-5-2 (1966). Other state statutes which either have incorporated the Revised Model Act's evidence provisions or which have otherwise provided for court rules of evidence and which provide for exceptions to those rules when compliance with them would be impractical include: FLA. STAT. ANN. § 120.27 (Supp. 1966); ME. REV. STAT. ANN. tit. 5, § 2405 (1964); MICH. STAT. ANN. § 3.560 (21.5) (1961); N.D. CENT. CODE § 28-32-06 (1960). See also COLO. REV. STAT. ANN. § 3-16-4(7) (1963) (conformity to court evidence rules "to extent practical" required). Virginia permits the reception of "all relevant and material evidence" but provides that hearsay and secondary evidence of the contents of a document shall not be receivable if the witness whose statements are the subject of the hearsay or the original document is available. VA. CODE ANN. § 9-6.11 (1964). See also ORE. REV. STAT. § 183.450(1) (Supp. 1965). Compare MO. STAT. ANN. § 536.070 (Supp. 1966). See N.J. STAT. ANN. § 84A-16(3) (Supp. 1966).

The Hawaii, Oklahoma, and Wyoming statutes which in many other respects follow the Revised Model Act do not follow its evidence provisions. HAWAII REV. LAWS § 6C-10 (Supp. 1965); OKLA. STAT. ANN. tit. 75, § 310 (1965); WYO. STAT. ANN. § 9-276.26 (Supp. 1965). The original Model Act's evidence provisions are followed in Maryland, Minnesota, Nebraska and Washington, which in other respects have followed that act. MD. CODE ANN. art. 41, § 252 (1957); MINN. STAT. ANN. § 15.0419 (Supp. 1966); NEB. REV. STAT. ANN. § 84-914 (Supp. 1965); WASH. REV. CODE § 34.04.100 (1965). The New Mexico Uniform Licensing Act's evidence provisions are also based on the original Model Act. N.M. STAT. ANN. § 67-26-11 (1961). Cf. TENN. CODE ANN. § 65-209 (1955). Other state administrative evidence provisions which avoid using court evidence rules include ARK. STAT. ANN. § 5-710 (Supp. 1963); IND. STAT. ANN. § 63-3008 (1961); MASS. ANN. LAWS ch. 30A, § 11(2)

jury" is explained by the drafters of the Revised Model Act to have been inserted "because in some states it is difficult to differentiate between the rules followed in jury and non-jury cases."²⁵⁶ This appears to be an understatement.²⁵⁷ The strictness of the Revised Model Act's adherence to judicial rules of evidence depends, of course, upon the ease or lack of ease with which the excepting phrase "not reasonably susceptible of proof under those rules" may be satisfied and whether that phrase will be interpreted in an absolute sense or in light of the circumstances of each proceeding. The Revised Model Act raises the danger that many technicalities and refinements in the judicial rules of evidence, which have no place in adjudication before a specialized tribunal, may be imported into administrative proceedings. The original Model Act's standard of acceptability by reasonably prudent men is better,²⁵⁸ although a supplementary standard phrased in terms of the specialized activities of each of the agencies might be desirable.²⁵⁹

By requiring agencies to give effect to "the rules of privilege recognized by law," the original Model Act²⁶⁰ and the Revised Model Act²⁶¹ may be superior to the federal act, which is silent with respect to privilege.²⁶² The original Model Act, by providing that docu-

(1966); PA. STAT. ANN. tit. 71, § 1710.32 (1962). Cf. OHIO REV. CODE ANN. §§ 119.09, 119.12 (Baldwin 1964). After authorizing agencies to admit all testimony having reasonable probative value, the Wisconsin statute provides that "basic rules of relevancy, materiality and probative force, as recognized in equitable proceedings, shall govern the proof of all questions of fact." WIS. STAT. ANN. § 227.10(1) (1957). Alaska and California provide for the admission of evidence "on which responsible persons are accustomed to rely in the conduct of serious affairs" but nonetheless expressly adopt a version of the residuum rule in providing that hearsay evidence may be used to supplant or explain other evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. ALASKA STAT. § 44.62.460(d) (1962); CAL. GOV'T CODE § 11513.

256. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 216 (1961).

257. DAVIS § 14.04, at 267-68.

258. Compare VA. CODE ANN. § 9-6.11(a) (1964): "All relevant and material evidence shall be received, except that: (1) the rules relating to privileged communications and privileged topics shall be observed; (2) hearsay evidence shall be received only if the declarant is not readily available as a witness; and (3) secondary evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence is the more effort should be made to produce the eyewitness or the original document."

259. The Virginia statute, while good in other ways, does not recognize any expertise in agencies. See note 258 *supra*.

260. MODEL ACT § 9(1).

261. REVISED MODEL ACT § 10(1).

262. Cf. HAWAII REV. LAWS § 6C-10(a) (Supp. 1965) which added the rules of privilege to evidence provisions adopted from the federal act.

mentary evidence may be received in the form of copies,²⁶³ expressly abolishes the best evidence rule. By providing that documentary evidence may be received in the form of excerpts or incorporation by reference, the Model Act facilitates holding of records to a minimum size. The Revised Model Act adopts a modification of the best evidence rule: "Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available."²⁶⁴ By applying the unavailability standard both to copies and excerpts, the Revised Model Act would apparently permit an excerpt to be introduced only if the original is unavailable, but would require the record to contain an entire document or book if the original document is available. Because the federal act contains no exclusionary rules, because it permits the reception of "any oral or documentary evidence," and because it permits reliance upon "reliable, probative, and substantial evidence," provisions expressly dealing with copies and excerpts as such were unnecessary.

7. *Conclusions.*—The type of evidence which should be admitted and acted upon by agencies will probably vary with the agency and the type of proceeding involved. For that reason, some discretion should be given the agencies and reviewing courts to accommodate evidence standards to particular proceedings. As suggested above, an across-the-board imposition of the judicial rules of evidence on all agencies would be unwise. An admonition to agencies to choose, when possible, judicially admissible evidence over evidence not so admissible for proof of those propositions for which judicial evidence is most appropriate (such as direct testimony over hearsay when the speaker is available) might be unobjectionable, provided: (1) that such admonition would not impose upon an agency any obligation to deny itself useful information, and (2) that a reviewing court would not interpret such a provision as authorizing reversals of agency action when an agency chose to make use of reliable, but judicially inadmissible, evidence. While the Revised Model Act recognizes agency need to act upon inadmissible evidence, its imposition of a "necessary" standard regarding the use of that evidence may stimulate litigation and may encourage court reversals of agency determinations which ought to be accepted as proper. In accusatory-type proceedings, however, the more stringent provisions of the Revised Act may be more desirable.²⁶⁵ Other parts of the Revised Act's

263. MODEL ACT § 9(2): "[D]ocumentary evidence may be received in the form of copies or excerpts, or by incorporation by reference."

264. REVISED MODEL ACT § 10(2).

265. In theory, evidence provisions designed for the function of the tribunal would be desirable. But the practical difficulties which might be encountered in creating

evidence provisions, such as the mandatory exclusion of "unduly repetitious" evidence, seem unwise,²⁶⁶ as does the original Model Act's possible incorporation of the "residuum" rule.

D. *Internal Separation of Functions and Communications Within the Agency Structure About Issues in Pending Adjudications.* 1. *In General.*—The problems suggested by the phrases "separation of functions" and "ex parte communications" are separate but, to a substantial extent, overlapping. Ex parte communications, as the words suggest, involve communications between the decision maker and others which are not routed through the record or otherwise made known to, and made subject to challenge by, the parties to the proceeding.²⁶⁷ Separation of functions, or the lack of it, describes the degree to which, within the agency structure, the officers who perform a judging function perform no adversary role and are insulated from officers who perform adversary roles.²⁶⁸ The federal act attempts to prevent officers engaged in "investigative or prosecuting functions"²⁶⁹ from participating in the decision-making in adjudications. Professor Davis has suggested that officers who are "advocates," whether or not they are "prosecutors," ought to be barred from participation in judging.²⁷⁰ In any event, one governing criterion suggesting a separation between those engaged in advocating and those

those provisions plus the disputes which would be engendered by unfamiliar language might make the Revised Act's approach more realistic.

266. To the extent that the mandatory exclusion of unduly repetitious evidence encourages disputes over substantively unimportant issues and creates a danger of reversal on judicial review, the provision is objectionable.

267. Ex parte communications are usually considered objectionable in a court proceeding when a judge learns facts from a source other than the record. The usual objection to the communication of such extra-record factual information to a judge is that the parties to the case do not have a chance to learn of such information or to rebut it as they would have had if it had been offered as evidence or otherwise had been communicated in the trial process. In short, judicial reliance upon information communicated ex parte takes the determination of the issue to which it relates out of the adversary process where factual determinations belong.

Different considerations govern ex parte communications of issues of law. Arguments addressed to the legal issues by the parties will be helpful to the judge, and good judges will suggest legal issues to the parties for argument when those issues may be important but have been missed by the parties. But relevant authorities used by the judge need not be confined to those cited by the parties in their briefs or arguments. The judge is deemed capable of ascertaining the "law" on his own, and he properly researches the relevant legal sources himself.

268. See text accompanying notes 278-80 *infra*.

269. APA § 5(c).

270. DAVIS § 13.07, at 218. Professor Davis would find that combination primarily objectionable which combines advocacy and judging. He appears to admit, however, that objection may still exist to a combination of impartial investigation with judging, since the combination may permit facts to be interpolated which were not introduced at a formal hearing. *Id.* at 217.

engaged in judging seems to be the notion that a psychological incompatibility²⁷¹ exists between the performance of the two functions in the same case.²⁷² The notion of separation overlaps the problem of ex parte communications to the extent that it is thought necessary or desirable to control communications between the decision-maker and officers involved in adversary positions.²⁷³

2. *The Federal Administrative Procedure Act.*—The dangers thought to inhere in a commingling of functions have been substantially reduced at the federal level through the enactment of the federal Administrative Procedure Act.²⁷⁴ That act deals with the separation-of-functions problem in connection with the two-tier adjudication procedure used (or available for use) in the federal system to narrow the issues among the parties and to allocate agency time efficiently.²⁷⁵ Under the federal system, hearing officers normally preside at the reception of evidence and issue an initial or recommended decision which is, or may be, reviewed by the agency.²⁷⁶ The separation-of-functions provisions have their greatest application at the hearing officer level in adjudications required by statute to be determined on the

271. See the discussion of the psychological incompatibility of investigation or advocacy with adjudication in the FINAL REPORT:

“Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator’s function may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. For this same reason, the advocate—the agency’s attorney who upheld a definite position adverse to the private parties at the hearing—cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one side on an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate’s view ought to be presented publicly and not privately to those who decide.

“These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity.” FINAL REPORT 56.

272. See text accompanying notes 396-405 *infra*. See also notes 397, 400 *infra*.

273. See text accompanying notes 378-416 *infra*.

274. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964).

275. See text accompanying notes 99-102 *supra* for a description of the two-tier procedure used for rules required by statute to be made on the record after opportunity for an agency hearing. Cf. text accompanying notes 415-19 *infra*.

276. APA § 8(a).

record after opportunity for an agency hearing. In such a proceeding, section 5(c) of the act forbids the hearing officer to consult any person or party on any "fact"²⁷⁷ in issue and completely isolates him from the prosecuting and investigative personnel of the agency: (1) he cannot himself have engaged in investigative or prosecuting functions in connection with the case before him or in a factually related case;²⁷⁸ (2) he cannot receive advice from personnel who have been so engaged about any aspect of the case, be it fact, law, policy, discretion, or anything else;²⁷⁹ (3) he cannot be subject to or responsible to any investigative or prosecuting personnel of the agency.²⁸⁰ Although the act expressly exempts the agency from section 5(c) provisions,²⁸¹ it nonetheless preserves a substantial amount of separation of functions at the agency level.²⁸²

Except as section 5(c) might be read to prevent hearing officers from consulting with impartial agency technical experts,²⁸³ the provisions of that section appear to be adapted to the structure of most federal agencies. Agencies which are large in terms of personnel and work load require delegations of functions and allocations of authority for efficient operation. Allocations of prosecuting, investigating and decision-making functions among different groups of agency personnel were made in large measure even before the passage of the act, partially for reasons of efficiency. The two-tier system of adjudication was also used prior to the enactment of the Administrative Procedure Act as a device for efficient allocation of agency time.

The agency and agency-member exemption from the provisions of section 5(c) is designed in part²⁸⁴ to permit the agency to coordinate

277. APA § 5(c): "[N]o such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate."

278. This follows from the prohibition of anyone engaged in the performance of such investigative or prosecuting functions in a case from participating in decision-making in that or a factually related case: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." APA § 5(c).

279. Advice from such sources is effectively cut off by the provision of APA § 5(c) quoted in note 278 *supra*.

280. APA § 5(c): "[N]or shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

281. APA § 5(c): "[N]or shall it [subsection 5(c)] be applicable in any manner to the agency or any member or members of the body comprising the agency."

282. See text accompanying notes 292-93 *infra*.

283. See DAVIS § 11.17.

284. Exemptions from the *ex parte* consultation provisions may be necessary if the agency is to use staff help in deciding.

enforcement and adjudicatory policies. Such coordination would sometimes require an agency to participate both in adjudication and in decisions to institute investigations, to issue complaints, or to bring cases to the stage of formal adjudication. Thus, although enforcement officers could, without consulting the agency,²⁸⁵ order investigations, issue complaints, and bring cases to the formal adjudication stage in routine situations which are well within agency-established guidelines, coordination of enforcement and adjudicatory activities at the fringes of established policy would involve the agency in several types of these activities.²⁸⁶ Insofar as decision-making regarding the institution of investigations, complaint issuance, and proceeding to the formal adjudication stage are deemed to constitute the performance of "investigative or prosecuting functions" as that phrase is used in section 5(c), the need for the agency exemption is apparent.

The agency exemption in section 5(c) follows generally the conclusions expressed by the Attorney General's Committee on Administrative Procedure,²⁸⁷ which endorsed a limited fusion of functions at the agency level to permit coordination of enforcement and adjudicatory policies. In its endorsement, however, the Committee limited itself²⁸⁸ to agency involvement in complaint-issuance decisions in which the agency acted upon information presented to it by others. In the words of the Committee: "Assuming that the agency heads simply pass on the sufficiency of material developed and presented to them by others, the Committee is satisfied that no such unfairness results."²⁸⁹ In adopting the federal Administrative Procedure Act, Congress took a similarly limited view about the degree to which agency involvement in investigation or prosecution is compatible with adjudicative duties. Although Congress exempted agency members from the provisions of section 5(c), it apparently did this to facilitate coordination between enforcement and adjudicatory policies rather than to indicate approval of active agency involvement in other aspects of prosecution or investigation. Thus, the Senate Report states that the agency exemption "is not to be taken as meaning that the top authority must reserve to itself both the prosecuting and deciding functions . . . [I]t may and should confine itself to determining policy and should delegate the actual supervision of investigations and initiation of cases to responsible subordinates."²⁹⁰ The House Report

285. FINAL REPORT 56.

286. FINAL REPORT 57.

287. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 44-45 (1950).

288. FINAL REPORT 57.

289. *Ibid.*

290. The Senate Report deals with the agency exemption as follows:

"A further word may be said as to the last exemption—of the agency itself or the

contains substantially the same statement.²⁹¹ Moreover, the agency exemption from the separation-of-functions provisions is not so broad as the literal language of the act might indicate. Professors Jaffe²⁹² and Davis²⁹³ have pointed out that, despite the exemption, agency consultation with prosecuting and investigating officers is effectively prevented by section 5(c). This is so because the agency exemption leaves intact the prohibition directed to every "officer, employee, or agent engaged in the performance of investigative or prosecuting functions" against participating or advising "in the decision, recommended decision or agency review." The agency exemption does, however, facilitate agency use of both technical experts²⁹⁴ and non-technical assistants in summarizing and analyzing the record,²⁹⁵ as long as they have not engaged in prosecuting or investigating the case.²⁹⁶

members of the board who comprise it. Such a provision is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases. There, too, the exemption is not to be taken as meaning that the top authority must reserve to itself both the prosecuting and deciding functions. To be sure it is ultimately responsible for all functions committed to it, but it may and should confine itself to determining policy and should delegate the actual supervision of investigations and initiation of cases to responsible subordinates." S. REP. NO. 752, 79th Cong., 1st Sess. (1945), LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 204 (1946).

291. The House Report contains the following discussion of the agency exemption:

"The last exemption—of the agency itself or the members of the board who comprise it—is required by the very nature of the administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases. There, too, the exemption is not to be taken as meaning that the top authority must reserve to itself both the prosecuting and deciding functions. It is ultimately responsible for all functions committed to it, but it may and should confine itself to determining policy and delegate the actual supervision of investigations and initiation of cases to responsible subordinate officers. Agencies, such heads of bureaus or departments, performing mainly executive functions should delegate to examiners or boards of examiners at least the initial decision of cases and should confine their own review to important issues of law or policy." H. REP. NO. 1980, 79th Cong., 2d Sess. (1946), LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 262-63 (1946).

292. Jaffe, *Basic Issues: An Analysis in Symposium—Hoover Commission and Task Force Reports on Legal Services and Procedures*, 30 N.Y.U.L. REV. 1273, 1280 (1955):

"It is true that the agency can continue to exercise initiating as well as judging functions: It can judge a case which it started (though normally the agency members do not participate in the initiation of specific cases, however much they may lay down general enforcement policies). But the APA very explicitly states that the investigating and prosecuting officers in a particular case shall not 'participate or advise in the decision,' and, as I interpret this provision, they can no more advise the agency than they can the trial examiner."

293. DAVIS § 11.08, at 71, § 11.21, at 128.

294. DAVIS § 11.08, at 84. See text accompanying note 331 *infra*.

295. Cf. DAVIS § 11.10, at 87, § 11.09, at 74. Compare *United States v. Morgan*, 298 U.S. 468 (1936).

296. Officers performing prosecuting and investigative functions in a case are barred

3. *The Model State Administrative Procedure Acts.*—The original Model State Administrative Procedure Act, whether intentionally or not,²⁹⁷ may have dealt with separation of functions problems as well as with ex parte communication problems in its provision making the record the exclusive basis for “factual information or evidence”²⁹⁸ and in its provision requiring that parties be afforded an opportunity to contest material officially noticed.²⁹⁹ Although the Model Act does not expressly forbid a prosecuting or investigative officer to perform an adjudicative function,³⁰⁰ it may effectively prevent such an officer from performing a judicial function in the same case in which he had been a prosecutor by the requirement that only factual information or evidence contained in the record may be considered in deciding a case.³⁰¹ The Model Act does, however, permit the decision-maker to engage in consultation (including consultation with officials engaged in prosecuting the case) about “nonfactual” information or arguments.³⁰²

The Revised Model Act's section 13³⁰³ follows the federal act's section 5 in forbidding discussion by the decision-maker with any person about an issue of fact.³⁰⁴ It is stronger than the federal

from communicating with the decision-maker, including the agency or agency member. See text accompanying notes 281-82 *supra*.

297. Compare Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 205-06 (1948).

298. MODEL ACT § 9(2).

299. MODEL ACT § 9(4).

300. Compare IND. ANN. STAT. § 63-3020 (1961) which provides that: “No agent or representative conducting a hearing shall perform any of the investigative or prosecuting functions of said agency in the case heard or to be heard by him or in a factually related case.”

The statute exempts the agency and the agency members plus initial license applications and proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers.

301. See text accompanying note 310 *infra*.

302. See text accompanying notes 324-41 *infra*.

303. REVISED MODEL ACT § 13: “Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member (1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants.”

304. Some limits on ex parte communications of factual information are impliedly contained in many administrative procedure statutes in provisions requiring that decisions in contested cases be based exclusively on the record. See text accompanying notes 267, 297-98 *supra*. Among the statutes which specifically deal with ex parte consultations are ALASKA STAT. § 44.62.630 (1962); HAWAII REV. LAWS § 6C-13 (Supp. 1965); IDAHO CODE ANN. § 67-5213 (Supp. 1965); IND. STAT. ANN. § 63-3020

act in that its prohibition extends to agency members (consulting with persons other than personal assistants and other agency members) as well as to agency employees.³⁰⁵ The agency exemptions in the numbered clauses of section 13³⁰⁶ are narrower in form than the blanket exemption accorded agency members from the separation-of-functions provisions of the federal act.

The Revised Model Act's provision (subject to limited exceptions in the case of agency members)³⁰⁷ that any agency member or employee assigned to render a decision or to make findings of fact in a contested case may not communicate with any person about an issue of fact, may prevent such agency member or employee from participating actively³⁰⁸ in the investigation or prosecution of that case. Such provisions would inhibit and might effectively prevent an agency employee or (despite the agency exemptions)³⁰⁹ an agency member who was assigned to render a decision from closely supervising the prosecution or investigation of that case because his communications about that case with other agency personnel would be restricted to "legal" issues. They would also prevent such agency member or employee from performing prosecuting or investigative tasks himself by preventing him from communicating with witnesses about factual issues.³¹⁰ Despite the omission in the Revised Model Act of an analogue to the federal act's express prohibition of a commingling of functions in one person, it may effect a similar prohibition—and one which applies to agency members as well as agency employees—through its *ex parte* consultation provisions. The requirements of sections 9(e)(2) and 9(g), that all evidence considered be in the record and that findings of fact be based exclusively on the evidence

(1961); OKLA. STAT. ANN. tit. 75, § 313 (1965); R.I. GEN. LAWS ANN. 42-35-13 (Supp. 1966); WYO. STAT. ANN. § 9-276.29 (Supp. 1965). See also FLA. STAT. ANN. § 120.28 (Supp. 1966). The Georgia statute, which closely follows the Revised Model Act in many other respects, omits the Revised Model Act's *ex parte* consultation provisions. GA. CODE ANN. tit. 3A (Supp. 1966). *Cf.* note 314 *infra*.

305. Consider the effect of this provision on agency use of technical experts. See text accompanying notes 331-38 *infra*.

306. See note 303 *supra*.

307. The exemptions are in the numbered clauses of § 13. See note 303 *supra*.

308. "Active" participation as used in text means participation beyond simply passing upon the sufficiency of material presented by others. The line between "active" and "passive" participation, however, is at best a hazy one.

309. The agency exceptions do not appear broad enough to permit active participation in investigation or prosecution unless "personal assistants" participate in those functions; and the act probably does not contemplate "personal assistants" so acting.

310. A "witness" would normally be thought of as presenting testimony relevant to a "factual" issue. Whether an expert witness testifying about "value" would be considered to be testifying about a "factual" issue, a "policy" issue, or a "legal" issue is not clear.

and on matters officially noticed, might similarly impede an officer from engaging in prosecuting or investigative activities in connection with a case which he is adjudicating.

Since the prohibition of *ex parte* communication is directed to "members or employees of an agency *assigned* to render a decision or to make findings of fact and conclusions of law in a contested case" (emphasis supplied), it is unclear what effect that prohibition would have upon communications made during an investigatory or other preliminary prosecution stage of a case prior to the assignment of an adjudicator. Literally, section 13 would permit an agency member or employee to engage in communication with anyone about any issue and then to decide the case as an adjudicator, so long as those communications were made prior to his assignment to adjudicate.³¹¹ It is not unrealistic to suggest that substantial investigation may often precede the assignment of an adjudicator. However, *ex parte* communication concerning those "fact" issues resembling evidentiary fact issues may be effectively precluded at all times by sections 9(e)(2)³¹² and 9(g).³¹³

The scope of the act's prohibition of *ex parte* discussion of issues of law³¹⁴ as they apply to discussions and exchanges within the agency structure is not clear. Instead of dealing with the problem by forbidding involvement in decision-making by officers performing prosecuting or investigative functions as does the federal act,³¹⁵ the Revised Model Act forbids *ex parte* discussion of issues of law with "any party or his representative." The effect of this prohibition on discussions of issues of law among agency personnel depends upon the definition of "party." The act defines "party" as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."³¹⁶ If the agency is

311. This conclusion follows from the use of the present tense in the word "assigned." *But cf.* the present tense phrase "engaged in" in § 5(c) of the federal act. Such a reading of the section would permit active participation in investigation and in compiling the prosecution's case by an adjudicator whose assignment to the adjudicatory task was delayed until after he had completed his investigative and prosecutory duties. Compare FINAL REPORT 56.

312. REVISED MODEL ACT § 9 (e): "The record in a contested case shall include: . . . (2) evidence received or considered."

313. REVISED MODEL ACT § 9(g): "Findings of fact shall be based exclusively on the evidence and on matters officially noticed."

314. The Hawaii version of the Revised Model Act omits the prohibition on *ex parte* communications about law issues with parties or their representatives. HAWAII REV. LAWS § 6C-13 (Supp. 1965).

315. APA § 5(c).

316. REVISED MODEL ACT § 1(5). That definition was taken almost verbatim from § 2(b) of the federal act. The context makes clear that "party" includes the agency in § 11. In § 12 the context suggests that "party" does not include the agency.

"named" as a party (which it usually would not be)³¹⁷ or if it is "admitted" as a party (which it usually would not be since the agency might see no need to admit itself), the prohibition on ex parte communication of issues of law would be directed toward the agency or any "representative of" the agency. The meaning of a "representative of" the agency in the context of intra-agency-structure discussion of issues involved in a pending adjudication is not clear. If the agency is not "named or admitted as a party," however, then the act seems to permit free discussion of issues of "law" within the agency structure. An interpretation of "party" would still be available which would treat agency officials who acted as investigators, prosecutors, or as "advocates" as "parties." Under that approach, the separation between the final decision-maker and those officials performing an investigative or prosecuting function would approximate that imposed by section 5(c) of the federal act, except that the Revised Act's separation might preclude contact prior to the institution of formal proceedings.³¹⁸

Section 9(e)(7)³¹⁹ requires the inclusion in the record of all staff memoranda or data submitted in connection with the consideration of a case. By itself that section would not require that the parties to a case have the opportunity to challenge the memoranda or data prior to appeal, since the provision does not clearly require that the staff memoranda or data be made known to the parties in time for them to contest the contents.³²⁰ Section 10(4)³²¹ eliminates this defect with respect to "noticed" staff memoranda or data, but the provision is ambiguous as to the staff memoranda which it covers. It is not clear

317. Most agency proceedings do not carry the name of the agency as part of the name of proceedings before it. *E.g.*, Application of Chance-Way Transp. Co. of Ducktown, Tenn., for Authority to Haul Feed and Newsprint from Ducktown, Tenn., to Memphis and Knoxville, Tenn. Pub. Serv. Comm'n Rep. 92 (1956). Professor Cooper believes that "an agency is normally a party to the proceeding it is conducting . . ." 1 COOPER, STATE ADMINISTRATIVE LAW 131 (1965).

318. The federal act's separation of agency members from prosecuting and investigating officials is limited to prohibiting the latter from participating in decision-making. APA § 5(c).

319. REVISED MODEL ACT § 9(e): "The record in a contested case shall include: . . . (7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case."

320. See comment to REVISED MODEL ACT § 9, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 214 (1961) indicating that "staff memoranda" which are required to be included in the record can be placed in the record too late to permit "evidence" to be offered in reply to them. Professor Bloomenthal thinks that this provision may contemplate making those memoranda part of the record only after the agency decision is rendered. See Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform or Regression?* 1963 DUKE L.J. 593, 617. *But see* REVISED MODEL ACT § 10(4).

321. See note 350 *infra*.

whether staff memoranda which deal with questions of "law" would come within the requirements of notice to the parties since such staff memoranda might not need the "official notice" exception to the rules of evidence in order to be considered by the agency decision-maker.³²² It is also unclear whether staff evaluations of so-called "basic" facts would fall in a "fact" category and thus be subject to the official notice provisions requiring that parties have opportunity to contest them, or whether they would fall in a "law" category where the restrictions of the official notice provisions might not apply.³²³

4. *The Fact-Law Distinction of the Federal Act and the Model Acts.*—The distinction made in the federal act and in the original Model Act between factual and nonfactual issues³²⁴ and the distinction in the Revised Model Act between factual and legal issues³²⁵ may create some difficulties in their application. Issues in an adjudication may not be easily separated into issues of "fact" and issues of "law" as those acts assume.³²⁶ Furthermore, a distinction between "fact" questions and "law" questions has certain judicial overtones that are not easily adaptable to some aspects of administrative activity.³²⁷ If

322. See Note, 17 VAND. L. REV. 638, 645 (1964). Judicial cognizance of "laws" has traditionally been described in terms of judicial notice. See, e.g., 9 WIGMORE, EVIDENCE § 2572 (1940). Cf. *Thornton v. Carrier*, 43 Tenn. App. 615, 311 S.W.2d 208 (1957).

323. See text accompanying notes 368-70 *infra*.

324. The federal act prohibits consultation by a deciding officer (other than a member of the agency) in an adjudication to which § 5(c) applies on "any fact in issue" with any person or party. By implication such consultation except with prosecuting and investigating officers is permitted on nonfactual issues. The Model Act's exclusiveness of the record provision relates to "factual information or evidence" and its official notice provision related to general, technical, or scientific "facts." MODEL ACT §§ 9(2), (4).

325. The Revised Model Act forbids communications between the officer assigned to render a decision "in connection with any issue of fact, with any person or party" and "in connection with any issue of law, with any party or his representative." The Revised Model Act thus opposes issues of fact to issues of law. The extent to which *ex parte* communication in connection with a policy evaluation of factual data is proper under the Revised Act is unclear. The Revised Act contains analogues to the Model Act's exclusiveness-of-the-record provisions and official notice provisions. REVISED MODEL ACT §§ 9(e)(2), 10(4). Like the Model Act, these provisions relate only to "evidence" and to "facts."

326. Cf. *O'Leary v. Brown-Pacific-Maxon, Inc.* 340 U.S. 504, 507-08 (1951).

327. Fact and law are terms that are frequently used to describe the respective questions that are decided by judges and juries. Determining the allocation of decision-making functions between judge and jury in an analogous context will not always indicate accurately the issues as to which extra-record consultation by an agency would be proper and those as to which such consultation would be improper. Again, the various meanings of fact and law are shown by observing that issues that might be deemed nonfactual in the sense that extra-record consultation on them by the agency would be proper nevertheless might not be issues of "law" in the sense that those issues would be reviewed by a court.

describable in "fact" and "law" terms at all, some issues in an administrative adjudication might be "mixed" questions,³²⁸ or questions of both fact and law.³²⁹ The federal act and the original Model Act impliedly recognize the unrealistic nature of a fact-law distinction³³⁰ in administrative processes by refraining from opposing "law" issues to "factual" issues; nevertheless they require the identification of "factual" issues.

In discussing the federal act, Professors Nathanson and Davis have emphasized the need for administrative decision-makers to have access to technical assistance within their organizations,³³¹ in order to facili-

328. *Bates & Guild Co. v. Payne*, 194 U.S. 106, 110 (1904).

329. *Cf. O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).

330. The distinctions made in the federal and two Model Acts would be justifiable analytically if it could be assumed that the "fact" category of issues is meant to include those issues with which parties would be well equipped to deal, and the nonfactual or "law" category of issues is meant to include those issues with which the parties would not be well equipped to deal. This distinction underlies the allocation of decision-making between judge and jury. Davis also distinguishes between "adjudicative facts" and "legislative facts." Davis' contention is that adjudicative facts are facts which pertain principally to the parties and consequently about which the parties are experts.

"Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

"Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts." DAVIS § 7.02, at 413.

The parties may have much to contribute with respect to the application of a general policy to particularized activities which they perform. In Davis' language such application could be described as involving facts about "the parties and their businesses and activities" although they might not necessarily answer the questions of "who did what, where, when, how, why, with what motive or intent." Consider, *e.g.*, questions pertaining to the determination of a rate base. The parties might be capable of making arguments addressed to the standard of valuation applicable to their particular assets, in addition to or apart from the "who, what, where, when, how, why, etc." of the physical events involving purchase and use of assets. *Cf. Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937).

331. DAVIS § 11.10. See also Bloomenthal, *supra* note 320, at 617; Fuchs, *The Model Act's Division of Administrative Proceedings Into Rule-Making and Contested Cases*, 33 IOWA L. REV. 210, 217 (1948).

tate that assistance, they have urged that section 5(c) of the federal act be interpreted to permit hearing officers to have access to technical experts employed by the agency who have not participated as advocates³³² in the cases in which their advice is sought. In rate-making and many other proceedings involving technical issues, this need is met by provisions of the federal act which make section 5(c) inapplicable to those proceedings;³³³ the exclusiveness-of-the-record provisions of section 7(d) would probably not interfere with the decision-maker's ability to solicit and to receive most forms of technical advice.³³⁴ A similar need of decision-makers to consult with technical experts probably exists in some types of proceedings on the state level, and that need can be accommodated within the terms of the Model Acts' "contested case" provisions only if the advice given by technical experts is deemed to be nonfactual. The exclusiveness-of-the-record provisions of the two acts should create no more impediment to that kind of advice than does section 7(d) of the federal act; but the ex parte consultations prohibitions of section 13 of the Revised Model Act are less easy to interpret in the same way. The exclusiveness-of-the-record provisions can be construed to refer only to "litigation facts"³³⁵ or to Davis' "adjudicative facts,"³³⁶ and not to bar the use of extra-record "non-litigation facts" or "legislative facts" by the decision maker; but section 13 prohibition opposes "facts" to "law," and implies that what is not a matter of "fact" is a matter of "law." Some types of technical advice could be correctly described as not involving litigation or adjudicative facts and perhaps as not involving "factual" matters at all, but they might not be easily describable as matters of law. A major defect of section 13, therefore, is its implication that no middle ground exists between matters of "fact" and matters of "law." Its drafters seem to have intended that the prohibition on factual communications be limited to those concerning "litigious" facts;³³⁷ accordingly, they may have contemplated that most "technical advice"

332. DAVIS § 11.17, at 108-09; Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 390 (1946).

333. Thus "rule making" proceedings are not subject to § 5(c), and rule making under the federal act includes proceedings approving or prescribing for the future of "rates, wages, corporate or financial structures or reorganizations thereof or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." APA § 2(c). Also excluded from the application of § 5(c) are adjudications determining "applications for initial licenses" and "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers." APA § 5(c).

334. See DAVIS § 11.09, at 80.

335. FINAL REPORT 72. Cf. 1 COOPER, *op. cit. supra* note 317, at 418.

336. DAVIS § 15.03.

337. See Comment to REVISED MODEL ACT § 13, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219 (1961).

communications would be allowed. Since the "litigious facts" phrase suggests that it comprehends only those facts which are properly subject to determination through a "litigious" or adversary process, it is possible that the Revised Model Act's drafters contemplated that the determination of which matters were properly the subject of ex parte consultation within the agency structure, and which matters were not, would be gradually worked out by the agencies and the courts. In this process, criteria relevant to reconciling felt needs of internal agency discussion about issues and the need to expose issues to adversary challenge could be drawn from administrative experience in the several agencies. But because section 13 is open to a more rigid interpretation, its enactment and application to technical proceedings might interfere with proper decision-making.

The free approach of the original Model Act to ex parte discussion of nonfactual issues between an agency decision-maker and investigating and prosecuting officers³³⁸ may reflect the conclusions of its drafters about the relative sizes of many state agencies, especially in the smaller states. They may have concluded that the smaller size of those agencies makes the internal separation imposed upon federal agencies generally impractical on the state level. Thus, the smaller an agency's size, the more practical becomes the involvement by the agency head in routine and everyday decision-making; it shrinks the extent of possible delegation and projects the power of the agency head closer to the daily tasks of subordinates, including subordinates involved in prosecution and investigation. In such circumstances, the exemption afforded by the federal act which permits agency members to coordinate investigative, enforcement and adjudicatory policies may have been thought insufficient. Prohibition of discussion of "nonfactual" or "legal" issues between agencies and their prosecuting and investigative staffs may have been thought to interfere unduly with free exchange within a small group—an exchange would be conducive to administrative efficiency. Or, the drafters may have thought it beyond their capacity to deal with the difficulties inherent in defining adequately the types of investigators, prosecutors, or advocates which should be separated from the decision-makers.³³⁹ Even the Revised Act, which is much more restrictive of administrative actions than

338. Cf. Stason, *supra* note 297.

339. Various types of staff involvement in rate-making and licensing issues have often given rise to different views as to how to treat the relations between the staff members involved and the agency decision-makers. Compare, e.g., 1 BENJAMIN REPORT 67-70, with REVISED MODEL ACT § 1(2). Compare *Wilson & Co. v. United States*, 335 F.2d 788, 789 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965), with DAVIS § 13.02 (Supp. 1965). See also, *Selected Reports of the Administrative Conference of the United States*, S. Doc. No. 24, 88th Cong., 1st Sess. 409-12 (1963).

the original act, does not clearly forbid ex parte contact between the final decision-maker and the agency's investigative, prosecuting, or advocating staff members.³⁴⁰ It does, however, limit ex parte contact between the final decision-maker and those officials when that contact takes the form of memoranda.³⁴¹

5. *Relevancy of "Accusatory" and "Technical" Nature of the Proceedings To Separation of Functions.*—Although section 5(c) of the federal act prohibits ex parte discussion of "factual" issues between hearing officers and others and although it prohibits any officers engaged in prosecuting or investigative functions in a particular case from participating in the decision-making or from advising the decision-maker in that case, many proceedings likely to involve technical issues are exempted from the application of those prohibitions, either because they are defined as rule-making or because they are specifically excluded from coverage of section 5(c).³⁴² These exemptions may be grounded on the assumption that consultation between hearing officers and staff experts is more necessary as the issues become more technical.³⁴³ But the exemptions not only permit discussions between hearing officers and "impartial" technical experts; they also remove statutory restrictions upon prosecuting and investigative officers participating in decision-making.³⁴⁴ It is possible that the latter exemption is designed in part to relieve agencies from maintaining double staffs, each duplicating, in large measure, the other's work—a situation which would occur if the prosecuting and investigative work in an agency-instituted proceeding would have to be performed by different staff members from those who advise the agency on its final disposition.³⁴⁵ The same considerations may in part underlie an exemption from 5(c) for initial licenses. Technical considerations may be involved in some license awards, and freeing administrative decision-making from the section's restrictions may facilitate both efficient disposition of cases and the close decision-maker staff consultation

340. *But see* text accompanying note 307 *supra* for an interpretation of the Revised Model Act which would insulate deciding officers from prosecuting or investigative officers.

341. REVISED MODEL ACT §§ 9(e)(7), 10(4).

342. See note 333 *supra*.

343. See Jaffe, *Basic Issues: An Analysis in Symposium—Hoover Commission and Task Force Reports on Legal Services and Procedures*, 30 N.Y.U.L. Rev. 1273, 1281 (1955).

344. *E.g.*, *Wilson & Co. v. United States*, *supra* note 339. Professor Davis would find some constitutional restrictions upon that procedure. DAVIS § 13.02 (Supp. 1965).

345. The cogency of an objection to duplication of staff work, of course, depends upon the amount of analysis and evaluation which various types of proceedings involve. The issues involved in a utility rate proceeding, for example, might involve a substantial amount of staff analysis and evaluation whereas the issues involved in the revocation of a liquor license might not involve a comparable amount of staff work.

appropriate to resolving some technical issues.

It will be noted, however, that proceedings involving license revocations and renewals of existing licenses fall within the provisions of section 5(c).³⁴⁶ The differing treatments of license grants and license revocations or renewals is probably due in large measure to the belief that a license revocation or a refusal to renew an existing license is likely to create a more substantial hardship to the licensee than is the denial of an initial license to an applicant. Accordingly, it was felt that the situations involving the greater hardship should be surrounded with procedural safeguards that might not be necessary when the hardship resulting from administrative action was less severe. Although generalizations are hazardous, it may be suggested that licenses often are revoked for violations of the law or for other unprofessional or unbecoming conduct on the part of licensees. In such instances, technical considerations may not be predominant; rather, the proceedings may be strongly accusatory³⁴⁷ in character, may involve the imposition of a substantial penalty, and may involve a moral condemnation of the licensee by the agency. In such accusatory proceedings (in many ways resembling criminal proceedings in a court of law), the desirability of insulating the decision-maker from the agency employees who have prepared the case against the licensee would be increased and would not be offset by the decision-maker's need for such advice on technical matters.

6. *Official Notice.* (a) *Scope.*—The concept of official notice is generally conceded to be broader in scope than judicial notice.³⁴⁸ The federal act gives agencies permission to engage in official notice³⁴⁹ but does not attempt to define the proper extent of the notice power. The Model Acts, however, after expressly granting permission to agencies to notice all facts which are judicially noticeable, make some effort to define the scope of the official notice power.³⁵⁰ The difference

346. APA §§ 2(d), 5(c). The licensing exemption of § 5(c) applies only to "determining applications for initial licenses."

347. See Jaffe, *supra* note 343, at 1281. Cf. 1 BENJAMIN REPORT 68-69.

348. This seems to follow from the statement in both model acts that permission is given by them to notice material "in addition" to "judicially cognizable facts."

349. APA § 7(d).

350. MODEL ACT § 9(4): "Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them."

REVISED MODEL ACT § 10(4): "[N]otice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the ma-

in wording between the original Model Act and the Revised Model Act is interesting. The original Model Act permitted agencies to notice "general, technical, or scientific facts within their specialized knowledge."³⁵¹ The Revised Model Act permits agencies to notice "generally recognized technical or scientific facts within the agency's specialized knowledge."³⁵² The Revised Act, by changing the word "general" from an adjective modifying "facts" to a component of the adverbial phrase "generally recognized" which modifies the adjectives "technical" and "scientific," may contain an implication that the scope for official notice is limited to those technical and scientific facts which are generally recognized. Whether this inference was intended is not clear.³⁵³ The somewhat loose drafting of this provision of the Revised Model Act is evidenced by the fact that the act contemplates that "staff memoranda or data" may constitute "material noticed,"³⁵⁴ yet it is difficult to conceive of a staff memorandum as constituting a "generally recognized" fact. Although it may also have been the intention of the drafters of the original Model Act to limit official notice to facts which are generally recognized, their phrasing was poorly chosen to accomplish that result. Of the three categories in which notice is permissible under the act, only one such category consists of "general" facts. While judicial notice has been limited at times to notice of facts that are generally recognized, there seems less occasion to require specialized agencies acting within their areas of competence to refrain from officially noticing facts whose existence is

terial noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."

Several state administrative procedure statutes lack official notice provisions. Among them are: ARK. STAT. ANN. tit. 5, ch. 7 (Supp. 1963); IND. STAT. ANN. tit. 63, ch. 30 (1961); ME. REV. STAT. ANN. tit 5, § 2405(5) (1964); OHIO REV. CODE ANN. § tit. 1, ch. 119 (Baldwin 1964); PA. STAT. ANN. tit. 71, § 1710 (1962); VA. CODE § 9-6.11(d) (1964); W. VA. CODE ANN. § 29A-5-2(d) (1966).

351. MODEL ACT § 9(4).

352. REVISED MODEL ACT § 10(4).

353. The change in wording seems to have escaped the Kentucky Legislative Research Commission which stated that "section 9(4) of the Model Act (1946) . . . is exactly like subsection (4) except that the Model Act provision combines the first two sentences in subsection (4)." KY. REP. No. 12, 83.

354. REVISED MODEL ACT § 10(4). The original Model Act provides for opportunity to contest "facts" noticed. The change in wording of this provision in the Revised Model Act which provides for opportunity to contest "material" noticed seems to be designed to permit challenge to staff memoranda. Thus a preliminary draft of the Revised Model Act made no mention of "staff memoranda" (or "data") in § 10(4) and provided for opportunity to challenge noticed "facts." See 13 AD. L. REV. 333 (1961). As pointed out in text, however, staff memoranda would not normally constitute either judicially cognizable facts or "generally recognized" technical or scientific facts to which notice is limited by the act.

less than generally recognized. Competence developed by an agency in a specialized field ought to enable it to make judgments about the existence of technical or scientific facts within that field, regardless of whether the facts are "generally recognized," when that judgment is subject to contest by the parties to the adjudications in which that notice is taken.³⁵⁵

(b) *Limitation of Notice to "Facts."*—The official notice provisions of all three acts concern notice of "facts." Reference to nonfactual elements is omitted, perhaps on the ground that only "facts" need the official notice exception to the rules of evidence.³⁵⁶ The meaning of "facts" in the context of administrative decision-making, however, is varied. Several types of "facts" can be identified and it is not clear where the "fact" category ends and the "law" category begins. This ambiguity of meaning affects the application of the requirement found in all three acts that the parties be afforded an opportunity to challenge noticed "facts." Professor Davis would permit official notice of any facts "except adjudicative facts that are specifically in dispute,"³⁵⁷ and would permit the parties to challenge some of the facts noticed. There is no reason why every "legislative fact" noticed should be subject to challenge—some may be too ephemeral or too indisputable to be profitably challenged. Accordingly, despite the express requirements of the federal act and the Model Acts that opportunity be afforded to challenge noticed facts, power to prohibit challenge where challenge would obviously be fruitless and wasteful ought to be read into those provisions.

The chameleonic meanings of the terms "fact" and "factual" are again revealed by the notion that "legislative facts" are a principal subject of official notice.³⁵⁸ For the term "fact" in the official notice provisions³⁵⁹ of the Model Acts thus is disclosed to carry a different meaning from the term "factual information or evidence" in the original Model Act's exclusiveness-of-the-record provision³⁶⁰—a provision, which, in the Davis terminology, probably refers principally to "adjudicative facts."³⁶¹ Moreover, as suggested in the preceding para-

355. Compare text accompanying notes 368-76 *infra*.

356. See note 322 *supra*.

357. DAVIS § 15.08, at 389. Although Professor Davis goes on to say that the parties should be then afforded an appropriate opportunity to meet the facts thus noticed, he later qualifies that statement by urging that "any request that seems completely futile or seems to be motivated by desire for delay or obstruction should be denied . . ." *Id.* § 15.09, at 396.

358. See, e.g., DAVIS § 15.10, at 402 discussing methods appropriate for contesting noticed "legislative facts."

359. MODEL ACT § 9(4); REVISED MODEL ACT § 10(4).

360. MODEL ACT § 9(2).

361. See text accompanying notes 335-36 *supra*.

graph, even among "legislative facts" which are used in decision-making, distinctions have to be made between those which are suitable for challenge by the parties and those which are not. Note also that the Revised Model Act's ex parte consultation provisions which are stated in terms of a dichotomy between "fact" and "law" probably should be construed to refer to a dichotomy between "adjudicative facts" and other information.³⁶² In the Davis terminology again, if that provision permits ex parte consultation about "legislative facts," must the official notice provisions requiring opportunity for challenge be applied to them? They probably ought to be applied whenever opportunity for challenge appears to possess a substantial potential for educating the decision-maker about his task.³⁶³ In this connection, the Revised Act's exclusiveness-of-the-record provision that "findings of fact shall be based exclusively on the evidence and on matters officially noticed"³⁶⁴ ought to be read as referring to findings of "adjudicative facts" and of those "legislative facts" which would be decided appropriately with the help of an adversary procedure.

(c) "*Evaluation*" of Evidence.—Both of the Model Acts give agencies permission to utilize their "experience, technical competence, and specialized knowledge" in the "evaluation" of evidence.³⁶⁵ To the extent that "evaluation" of evidence is opposed to "notice" of facts, the requirement that the parties be afforded an opportunity to contest noticed material may not apply to the "experience, technical competence, and specialized knowledge" used in that "evaluation." Evaluation of evidence would seem to be performed normally through the use of policy judgments based on factors which could be aptly described as "legislative facts" and through the use of "legislative facts" themselves.³⁶⁶ The use of "experience" comprehends drawing upon knowledge of "legislative facts" derived from that experience. Spe-

362. See text accompanying notes 336-37 *supra*.

363. Cf. Cohen, *Some Aspects of Maryland Administrative Law*, 24 MD. L. REV. 1, 13 (1964).

364. REVISED MODEL ACT § 9(g).

365. MODEL ACT § 9(4); REVISED MODEL ACT § 10(4). Of interest are the following statutes which are largely based on the original or Revised Model Acts and which conspicuously omit the provision found in those acts authorizing agencies to use their "experience, technical competence, and specialized knowledge in the evaluation of the evidence": HAWAII REV. LAWS § 6C-10(d) (Supp. 1965); W. VA. CODE ANN. § 29A-5-2(d) (1966); WIS. STAT. ANN. § 227.10(3) (1957); WYO. STAT. ANN. § 9-276.26(d) (Supp. 1965). These statutes, with the exception of the West Virginia statute, do contain official notice provisions. Other state administrative procedure statutes which contain official notice provisions but which do not include evaluation-of-evidence provisions analogous to those of the Model Acts include ALASKA STAT. § 44.62.480 (1962) and CAL. GOV'T CODE § 11515. Cf. N.D. CENT. CODE § 28-32-07 (1960).

366. Cf. DAVIS § 15.03, at 355; Bloomenthal, *supra* note 320, at 617.

cialized knowledge" suggests specialized knowledge of "legislative facts." But why the additional permission of the last sentence of the Model Acts' official-notice provisions to use "specialized knowledge" when the first sentence has already permitted the use of "specialized knowledge"?³⁶⁷ Perhaps because the last sentence is focused on the techniques of evaluation rather than on "fact" knowledge. Knowledge which can be described in terms of "legislative facts" shades imperceptibly into techniques, analytical devices, attitudes, and predispositions, so that at some point it cannot properly be described as factual, however much it continues to be a "knowledge" which is "legislative" in character.³⁶⁸ If, however, the first and last sentences of the notice provisions are dealing with different aspects of a decisional process, the positioning of the provision providing for opportunity to contest material noticed between the two sentences suggests its inapplicability to the process described in the last sentence.

The distinction which the Model Acts seek to make seems to be the practical one between, on the one hand, requiring opportunity to contest agency information which is, or may be, a substantial factor in the agency's determination and which is sufficiently crystallized into an identifiable form so that challenge to it is possible; and, on the other hand, refraining, in the interest of effective administrative decision-making, from permitting challenges every time an agency avails itself of information or techniques which are not in themselves substantial factors in the outcome of the case before it, which would not be likely to be challenged successfully were challenge allowed, or which can be better subjected to challenge at another point in the decisional process. This may be the import of the express provision in the Revised Model Act for opportunity by the parties to contest staff memoranda.³⁶⁹ Staff positions which are potentially substantial factors in an agency decision would very likely be embodied in memoranda. Because those memoranda are likely to present staff

367. MODEL ACT § 9(4); REVISED MODEL ACT § 10(4). Both are quoted in note 350 *supra*.

368. The use of "technical competence" suggests a lesser use of "fact" knowledge than either of the other two phrases.

369. REVISED MODEL ACT § 10(4). A literal reading of § 10(4) may suggest that the phrase authorizing the use of "experience, technical competence, and specialized knowledge" does not permit agencies to use the "experience, technical competence, and specialized knowledge" of their staffs except to the extent that written staff communications are routed through the record. This appears to be Professor Davis' reading of § 10(4). DAVIS § 1.04, at 28 (Supp. 1965). But if most of an agency's "experience, technical competence, and specialized knowledge" lies in the agency's staff, warrant may exist for interpreting § 10(4) to permit use of that agency resource without subjecting every incidence of that use to exposure to adversary challenge or even, possibly, to exposure on the record. See Bloomenthal, *supra* note 320, at 618.

views in their most coherently reasoned form, challenge of those views will be facilitated. In short, the Model Acts' official notice and evaluation provisions ought to be construed, not in an overly literal way, but in accordance with their probable purpose. The evaluation provisions, whether or not they call into play a type of "factual" knowledge, ought not to constitute an exception to the general obligation of the agencies to afford an opportunity to the parties to challenge information obtained from extra-record sources whenever that challenge appears likely to educate the decision-makers and whenever affording that challenge will not impede reasonably efficient decision-making.³⁷⁰

(d) *Effect of the Official Notice Provision on Agency-Staff Relations.*—The official notice provisions in the Model Acts are intended to cover not only material noticed by the agency head or other adjudicating officer on his own initiative or at the suggestion of a party, but also material supplied to them by staff members. As discussed in the preceding paragraphs, the acts are designed to ensure that the official notice device is not used by staff members to circumvent adversary challenge of material brought to the attention of the agency head or adjudicating officer when adversary challenge would be appropriate. A proper interpretation of these provisions, however, suggests that some types of staff advice should not be subject to an opportunity to contest, while other types of staff help and advice should be subjected to challenge but not necessarily at the time that it is first given or in the form in which it is first given. Still other types of staff advice should be subjected to immediate adversary challenge. The substance of staff memoranda which deal with the merits of a particular case and which have been prepared in advance of hearing should normally be subjected to adversary challenge; staff members should not be allowed to conceal policy positions which they have formulated until after the conclusion of the hearing and then raise them for the first time *ex parte* to the decision-maker.³⁷¹ On the other hand, "non-advocating" staff members should be allowed to render appropriate forms of advice, especially technical advice, after the conclusion of the hearing without necessarily creating a need for a new hearing.³⁷²

The Revised Act does make allowance for the submission of memoranda of advice to the decision-maker by "personal assistants," and, by implication, such memoranda are not required to be subject

370. See text accompanying note 371 *infra*.

371. See text accompanying note 414 *infra*. Cf. *Selected Reports of the Administrative Conference of the United States*, S. Doc. No. 24, 88th Cong., 1st Sess. 410 (1963).

372. See text accompanying notes 331-33 *supra*.

to challenge by the parties.³⁷³ It thus imposes a form of separation of functions on the agency staff by prohibiting staff other than "personal assistants" from submitting memoranda to the decision-maker without routing them through the record. The act seems to be drawn on the assumption that the major arguments which ought to be adjudicated at an administrative hearing would be formulated by "regular" staff members (as distinct from the "personal assistants" staff) and that an evaluation of arguments and analyses formulated by regular staff members and subjected to adversary challenge would be performed by agency members with the help of their "personal assistants." This procedure would partially obviate any real or imagined problem of staff members withholding arguments in the administrative hearing to await *ex parte* presentation after the hearing terminates, since all memoranda from the "regular" staff are required to be in the record.³⁷⁴ Its major defect, however, is the unnecessary isolation of the decision-maker from impartial technical advice of agency-employed experts. The extent to which that objection is real depends upon whether section 13 is interpreted to permit the presentation of that type of advice to the agency or other decision-maker despite the prohibition phrased in terms of "fact" questions.³⁷⁵ It also depends upon whether permission to use that kind of advice may be implied from the express permission to use "experience, technical competence and specialized knowledge" in the evaluation of evidence.³⁷⁶

7. *Reflections on Some Aspects of Internal Separation of Functions and Communications Within the Agency Structure About Issues in Pending Cases.*³⁷⁷

(a) *Investigations.*—The primary basis³⁷⁸ for the federal act's imposition of a separation-of-functions structure³⁷⁹ on federal agencies is the supposed incompatibility of "investigative and prosecuting" functions with a "judging" function.³⁸⁰ But an "investigative" function is an ambiguous description. Professor Davis has suggested that some types of investigation are not incompatible with impartiality.³⁸¹ Thus,

373. REVISED MODEL ACT § 13(2).

374. REVISED MODEL ACT § 9(e)(7).

375. See text accompanying notes 335-38 *supra*.

376. See text accompanying notes 365-70 *supra*.

377. The material in the present section, text accompanying notes 377-416 *infra*, is a highly tentative expression of my present views for whatever light it may shed on statements that I have made elsewhere in the report.

378. Efficient allocation of agency manpower would itself impose a form of separation-of-functions upon many federal agencies. See text accompanying notes 283-84 *supra*.

379. See APA § 5(c). Cf. APA §§ 7-8.

380. See FINAL REPORT 56.

381. DAVIS § 13.07, at 217.

to delegate to an officer the task of ascertaining or developing all the relevant facts connected with an issue is to delegate to him an "investigative" task; if he is conscientious, however, he will not necessarily be predisposed to decide an issue adversely to a private party. As a result of his investigation, he may have a view as to the merits of the question which he was investigating. It is possible, therefore, that an independent "investigation" may be compatible with original impartiality and also compatible with a view of the merits obtainable only as a result of impartial evaluation of the information and factors uncovered. As a sole method for arriving at a decision, it may be objectionable to the extent that the check of adversary challenge is absent, and to that extent *ex parte* investigation may involve a greater chance of error than a procedure involving an adversary process.³⁸²

If a hearing is held after an *ex parte* factual investigation, the original investigator theoretically could be open-minded about new evidence and issues which were developed at the hearing. But he probably would not be open-minded about those points of evidence and other factors which would be developed at the hearing which he had uncovered in his prior investigation and had previously considered and evaluated.³⁸³ To the extent that we are prepared, therefore, to insist that a decision be made on the record at a hearing, an investigator who has previously developed the facts on his own is not likely to be an impartial adjudicator.³⁸⁴ Because he is likely to have made up his mind about the issues which are to be litigated at the hearing, he will tend to read into his evaluation of the evidence of record the conclusions and the information which he has previously uncovered on his own. But if we were to view the hearing, not as the sole basis for decision, but merely as a component of a total decisional process in which an opportunity is offered to rebut or explain evidence or information impartially uncovered by an investigator, then we would not necessarily say that a decision by an investigator-adjudicator lacked impartiality. This latter procedure might be considered objectionable, however, because not everything that was uncovered in the original investigation would have been subject to challenge in the hearing; therefore, some information may have been used in the decision which was not fully trustworthy. Accordingly, a procedure which combines investigation with a hearing in the manner described above may be objectionable to the extent

382. That is, if the conclusions of the investigator would be corrected by subjecting them to challenge, then the absence of that challenge would permit defective conclusions to be retained.

383. FINAL REPORT 56.

384. That is, his "partiality" will be determined by what he has learned from his investigation which has not been refuted at the hearing.

that information obtained in the investigation which is not exposed to challenge in the hearing is the type of information which could best be evaluated with the check of a hearing. To that extent the investigative process should be separated from the decisional process in such a way that the decision-maker learns about the information uncovered in an investigation by means of a hearing where it is exposed to challenge. Our society generally has taken the view that a hearing as a sole basis for decision is the best way of deciding issues that turn on the credibility of witnesses testifying as to the truth or falsity of the occurrence of physical events.³⁸⁵

For other types of issues, however, a hearing as the sole basis for decision may not constitute the best means of decision, and in these instances less need may exist to separate the investigative from the decisional function. Indeed, for some issues, a combination of an investigation and a hearing may constitute the best type of decision-making process. This is generally conceded to be the case in various types of rule making³⁸⁶ and in connection with "law" issues even in adjudications.³⁸⁷ On some "mixed" questions of fact and law, policy questions, and evaluations of evidence and other data, an *ex parte* investigation or analysis combined with a check by hearing on the results of such investigations or analysis³⁸⁸ may be the most appropriate procedure. A hearing should, of course, resolve the "adjudicative facts" which may be in dispute.³⁸⁹ Again, an adjudicative hearing which is followed³⁹⁰ by an *ex parte* process in which the decision-maker and his staff develop and analyze the issues may be objectionable because the post-hearing development raised and determined critical factors, concerning which the parties would have had much to contribute. The type of issues developed apart from the hearing process and the likelihood that the parties could contribute to their resolution probably should determine the propriety of reopening a hearing when subsequent extra-record development of new issues has occurred.³⁹¹

The extent to which an investigative process should be separated

385. Cf. DAVIS § 7.05.

386. See, *e.g.*, APA § 4.

387. See, *e.g.*, REVISED MODEL ACT § 13, and Comment thereto, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219 (1961).

388. Cf. text accompanying note 84 *supra*.

389. DAVIS § 13.07, at 217.

390. The development and analyses of issues by staff members ought, as far as possible, to be done prior to the hearing, so that that development and those analyses could be exposed to challenge by the parties.

391. Compare DAVIS § 15.10, at 403 recommending reopening a hearing for cross-examination and rebuttal evidence when "critical" disputed adjudicative facts have been uncovered by the decision-maker subsequent to the hearing.

from a decisional process by a hearing to examine the results of an investigation would also depend upon the ability of the hearing process to convey the information which was uncovered by the investigation. Thus, for example, a decision-maker less competent than his investigators in technical matters would not be capable of understanding the issues in a proceeding from a hearing. He would probably need either extensive study on his own or the assistance of technical experts. Whether it would be feasible in a rate proceeding, for example, to have different technical experts advise such a decision-maker about issues developed at the hearing from those experts who prepared the pre-hearing administrative position might depend upon the number of experts required and the total amount of their time which would be consumed in the pre- and post-hearing phases of the rate proceeding.³⁹² It might also depend in part upon the consistency of approach and viewpoint of pre- and post-hearing advisers.³⁹³ Finally, the degree to which an adjudication is an integral part of a continuing control exercised by an administrative body (consider, for example, rate-making) as opposed to the degree to which an adjudication may be a relatively unusual intervention by an administrative body to punish deviations from expected patterns of behavior (consider, for example, professional license revocation) may also influence the degree to which the investigational stage of an agency proceeding should be separated from a decisional phase.³⁹⁴ If the information uncovered in an investigation is needed to evaluate correctly the evidence and issues developed at a hearing—especially where the investigational results could not profitably be challenged—the most practical arrangement may be for the hearing to be conducted and the decision to be made by the original investigator. If, however, the information uncovered in the investigation can be effectively communicated to the decision-maker by the investigators in a hearing procedure, then no substantial loss in the information available to the decision-maker may result from his insulation from the investigator. In fact, the insulation might possibly be an improvement because information which is conveyed to the decision-maker through the hearing process is necessarily exposed to challenge by the parties. If the information is of a type which could not profitably be challenged, however, running it through the hearing may merely be wasteful. For example, general principles of rate-making and the results of general studies normally could not be challenged in a hearing

392. Cf. FINAL REPORT 57.

393. Cf. FINAL REPORT 58; *Report by the Advisory Panel on Labor-Management Relations Law to the Senate Committee on Labor and Public Welfare*, S. Doc. No. 81, 86th Cong., 2d Sess. 4 (1960).

394. 1 BENJAMIN REPORT 67-68.

with any chance of success. There may, however, be some benefit in exposing parties to those general principles, values, or conclusions which are important in an agency determination and of which the parties may be unaware. Thus, the parties' attention may be focused on those matters with the result that, although they cannot challenge the general principles or values or conclusions involved, they will be better prepared to challenge the particular application of those matters to themselves.³⁹⁵

Finally, note that an agency may have a planning function and a duty to develop policies and principles. And in some cases it may be difficult to distinguish between policies and principles which are developed prior to a particular adjudicative proceeding and those that are developed in connection with the adjudication itself. If it is appropriate for an agency head and members of his staff to develop policies and principles, apart from adjudications, through close consultation with each other, why is it not appropriate for the agency head and members of his staff to act in the same manner in conjunction with an adjudication?³⁹⁶ A fair answer would seem to suggest that it is altogether appropriate for those policies and principles to be developed in close agency head-staff consultation in conjunction with a pending adjudication, except to the extent that the particular staff members with whom the agency head consults have had their viewpoints distorted by an adversary mentality engendered by the role that they see themselves playing in a pending hearing.³⁹⁷ Just as in formalized rule-making, however, the results of the agency head-staff conclusions should normally be presented to the parties concerned so that those results can be challenged or criticized or so that differentiations can be pointed out.³⁹⁸ If the agency head and his staff can

395. Cf. *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

396. Most people would agree that an agency head should be able to properly work out principles and policies with his staff in connection with deciding an adjudication. Cf. note 377 *supra*. Difficulties arise when the new policies are worked out with staff members who are thought to be "advocates." See, e.g., DAVIS § 13.05, at 201-02, commenting on Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 420-21 (1941). Moreover, even when the staff members involved are not "advocates," it may be desirable, as is suggested in text, for important approaches to be subjected to criticism by the parties when the parties would be likely to have meaningful criticism to offer; and an important indication of when the parties may have something meaningful to offer to an approach or a policy may be the degree to which the approach or policy has a particularized application to those parties.

397. FINAL REPORT 56: "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." A staff member who buried himself in "both sides" of a case obviously would not be barred from participating in decision-making on the grounds contained in the quoted sentence.

398. See, e.g., APA § 4.

maintain a non-adversary mentality, the results of such a process should be both correct and fair.

(b) *Problems Posed by an Adversary Mentality.*—Note that when the views of staff members have crystallized in memoranda,³⁹⁹ although those staff members were originally impartial, their analyses may have led them to conclusions which they view as correct and which they desire to see implemented. In such instances, those staff members cannot be expected to approach a subsequent hearing on those issues impartially; they might approach the general subject of regulation impartially in the sense that they are not precommitted on issues except as their own analyses may have suggested a proper resolution of them.⁴⁰⁰ In theory, staff members could be impartial with respect to the whole decisional process, including their own original investigation and analyses as well as the hearing in which those investigations and analyses were challenged. An open-minded staff member could approach a hearing with the intent to learn from the hearing and to make corrections or modifications of his prior conclusions in light of the material brought out rather than to support his own prior conclusions at all costs.

The very process of reducing conclusions previously arrived at to writing, however, may have a tendency to produce a commitment to a defense of those conclusions—a commitment which would interfere with the desire to achieve an impartial determination. To the extent that such a tendency exists, a staff analyst who has undertaken an investigation or analysis becomes something of a partisan. While there is merit in the suggestion of the Administrative Conference⁴⁰¹ to bring members of an agency's staff into rate proceedings at an early date so that staff thinking will be exposed to challenge by the parties, the countervailing factor exists of creating an adversary mentality in those staff members which will make them less amenable to persuasion by arguments and analyses developed at the hearing. Moreover, forcing a crystallization of a "staff position" early in the proceeding may have a tendency to mold the staff's thinking beyond its clear conviction. Again, making "the staff" a party seems to force the staff members involved into an adversary role where they will take advocates' positions rather than positions of complete impartial-

399. Cf. REVISED MODEL ACT §§ 9(e)(7), 10(4).

400. See text accompanying note 371-75 *supra*. This is a difficulty with Professor Davis' statement that "the identifying badge" of an advocate "is the will to win." DAVIS § 13.07, at 218. To be used properly as an "identifying badge" the will to win must be in relation to an issue which can properly be decided only from an adversary procedure. But then the analysis becomes circular.

401. Recommendation No. 19, ¶ 2 of the Administrative Conference of the United States, in Fuchs, *The Administrative Conference of the United States*, 15 AD. L. REV. 6, 34-35 (1963).

ity, grounded on the overall responsibility of the agency to both the public and the subject of regulation.⁴⁰² Staff members can be used in the preparation of an adversary position which is publicly presented to the agency, or they can be used to insure full development of the issues. While the latter activity may not necessarily be inconsistent with participation in the decisional process,⁴⁰³ it would probably be unwise for staff members engaged in the former activity to participate in making the final decision.

In summary, it seems that especially in technical proceedings the agency head should not be prevented from using staff assistance in analyzing and evaluating the record,⁴⁰⁴ but to the extent possible, the major conclusions which staff members have developed for application in the proceeding should be exposed to challenge by the parties. A desirable objective would be to discourage the development of an adversary mentality on the part of those staff members who participate in rendering a decision. When one or more members of the staff have developed such a mentality, the agency head should, to the extent possible, avoid *ex parte* consultation with them on issues involved in the adjudication; if such discussion is necessary, he should be aware of, and attempt to discount, the distorting effect of an adversary mentality on their judgment.⁴⁰⁵

The provisions of the Revised Model Act requiring exposure of staff memoranda to the parties⁴⁰⁶ would, for the most part, constitute desirable features if they were limited to staff memoranda prepared prior to a hearing for the purpose of advising the decision-maker on the resolution of the merits of that case. Memoranda dealing with strategy and perhaps memoranda concerned with policy in other cases should not be subject to mandatory disclosure requirements. Moreover, statutory disclosure requirements could avoid many perplexing problems of application as well as a hostile agency reception by requiring disclosure of the principal recommendations contained in the staff memoranda, together with supporting reasons and analyses, rather than the actual staff memoranda themselves. Such a provision would avoid the forced disclosure of strategy recommendations which were embodied in a memorandum containing recommendations for decisions on substantive issues. The Revised Model Act's insulation of the decision-maker from "every person or party" in connection with

402. *Cf. Selected Reports of the Administrative Conference of the United States*, S. Doc. No. 24, 88th Cong., 1st Sess. 409-10 (1963).

403. *Ibid.*

404. See text accompanying notes 331-47 *supra*. *Cf.* text accompanying note 65 *supra*.

405. *Cf.* text accompanying notes 401-03 *supra*.

406. REVISED MODEL ACT §§ 9(e)(7), 10(4).

the discussion of factual issues⁴⁰⁷ seems unwarranted, especially in technical proceedings. In technical proceedings, the decision-maker would need the assistance of experts,⁴⁰⁸ and the basic dangers resulting from the use of that assistance would seem to be (1) the possible insulation from challenge by the affected parties of the advice given by such experts and (2) the danger that such advice was colored by an adversary bias. The first point is ameliorated to some extent by the provision that all staff memoranda be included in the record and be subject to challenge by the parties; the second point could be met in part by discouraging an adversary mentality in the staff members. Further attempts to meet these dangers could consist in attempts by the agency to bring to the attention of the parties to an adjudication the substance of and basis for staff advice which might be determinative of the outcome of the proceeding, and in a wariness of accepting advice from staff members who may, as a result of their activities in conjunction with a pending adjudication, have developed adversary biases.

8. *Recommendations.*—The provisions of the Revised Model Act should not be applied to any technical-type agency proceedings involving rates, carrier licenses, and the like unless, as a result of the experienced judgment of the agency concerned, those provisions could be adopted without substantially and adversely affecting its work. Even were such a judgment to be made, a period of experimentation should precede statutory enactment of those provisions. I would generally favor disclosure to parties who stand to be adversely affected by them of substance of staff memoranda prepared prior to an adjudicatory hearing, provided that the memoranda pertain to issues in that hearing, that they have been or will be submitted to the final decision-maker in that adjudication, and that the parties appear capable of making meaningful criticisms or suggestions about the substance of the memoranda.⁴⁰⁹ A blanket requirement of disclosure to the parties of all agency staff memoranda, however, as is provided by the Revised Model Act,⁴¹⁰ presents the danger that memoranda involving strategy or evidence questions will be subject to disclosure,⁴¹¹ when actually only memoranda bearing upon the substantive issues in dispute (such as economic surveys and analyses) ought to be subjected to adversary scrutiny.⁴¹² Finally, post-hearing staff memoranda evaluating and

407. REVISED MODEL ACT § 13.

408. See text accompanying notes 331-47 *supra*.

409. Cf. text accompanying notes 223-26 *supra*.

410. REVISED MODEL ACT §§ 9(e)(7), 10(4).

411. Compare Freedom of Information Act §§ 3(e)(5),(7), 80 Stat. 250 (1966).

412. Even economic surveys and analyses which have application to cases other than the one in which discovery is sought have a claim to secrecy. See, *e.g.*, Sperry & Hutchinson Co., FTC Okt. No. 8671, April 15, 1966.

analyzing evidence and arguments made at an adversary hearing should not be subjected to exposure to the parties.⁴¹³ Only if new and important arguments or approaches are developed after the hearing should post-hearing staff analyses be exposed to the parties for criticism and challenge.⁴¹⁴ I would favor insulation of prosecutors and investigators from decision-makers in "accusatory" type⁴¹⁵ proceedings involving alleged violation of statutes or agency rules, but I would not impose such insulation upon initial license denials involving drug or product certification⁴¹⁶ or in other proceedings where compliance involves technical or scientific analyses of a product.

E. *Decision-Maker's Familiarity with the Evidence and Issues.*—One of the supposed dangers of so-called "institutional decisions" is that no one person or sub-group within the agency structure may feel a responsibility for rendering the final agency decision; consequently, the final decision may not be the considered opinion of any particular individual in the agency structure.⁴¹⁷ On the other hand, decision-making may be thought to be so dispersed that no one decision-maker would have a grasp of all factors relevant to the final decision issued in the agency's name. These situations would be aggravated whenever the persons who in effect decide cases or whose opinions influence the decisions of cases have not read the appropriate parts of the records or are not adequately familiar with the arguments of the parties.⁴¹⁸

The federal act attempts to deal with this problem in connection with adjudications and with "rule-making" procedures which are "required by statute to be made on the record after opportunity for an agency hearing." In effect the act commands familiarity with the record by providing in section 7 that "no sanction shall be imposed

413. Cf. Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799, 808-09 (1965).

414. See text accompanying notes 390-91 *supra*.

415. See text accompanying note 341 *supra*.

416. Cf. text accompanying notes 621-56 *infra*.

417. Another objection often raised against so-called institutional methods of decision-making is the inability to present arguments, on a face-to-face basis, to the person or persons whose determinations may be decisive in the ultimate administrative decision.

418. Certainly, the determination of issues in an adjudication ought to be made by persons who are familiar with the arguments of the parties. Whether the agency head or other official who makes the final decision ought to be required himself to read the cited portions of the record instead of relying on summaries prepared by subordinates or using his own judgment as to how much of the record must be read for an informed decision ought to depend, in large measure, upon the type of issues involved, the relevance of record material to the proper decision of those issues, whether a prior decision or recommendation has been made, whether the final decision is being made with or without arguments on an earlier decision, whether the final decision is favorable or unfavorable to the private parties involved, and whether the final decision mitigates the decision of a subordinate. See also note 433 *infra*.

or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party.” The ambiguity of this command has previously been referred to.⁴¹⁹ Section 8 attempts to facilitate the final decision-maker’s familiarity with the principal issues in dispute by narrowing those issues through a two-tier system of decision-making.⁴²⁰ Similarly, both Model Acts have utilized a two-tier system for decision-making in contested cases whenever a majority of the officials of the agency who are to render the final decision have not heard or read the evidence.⁴²¹ In such a case, the original Model Act provides⁴²² that a decision adverse to a party cannot be rendered until a “proposal for decision, including findings of fact and conclusions of law,” is served on the parties and an opportunity is given to each party adversely affected to file exceptions and present arguments to a “majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.”⁴²³ It appears that the comma in the last quotation indicates that the adjective clause requiring consideration of the record modifies “majority” rather than “officials.” The Model Act further requires that every decision in a contested case adverse to a party be in writing and “accompanied by findings of fact and conclusions of law” and that findings of fact “consist of a concise statement of the conclusions upon each contested issue of fact.” The Model Act is less strict than the federal act by its failure to require that the “proposal for decision” be prepared by a person who is familiar with the record,⁴²⁴ and by its failure to require

419. The implication of language would be that the “consideration” is to be performed by the person imposing the sanction or issuing the rule or order. Compare APA § 4(b); “after consideration of all relevant matter presented, the agency shall . . .” The § 8(c) language quoted in text is incorporated in ORE. REV. STAT. § 183.450(1) (1965) and HAWAII REV. LAWS § 6C-10(a) (Supp. 1965).

420. In rule-making or initial license proceedings where the agency makes the initial decision without having presided at the reception of evidence, a recommended decision by an independent hearing officer who has presided at the reception of evidence may be replaced either by a tentative decision issued by the agency or a recommended decision by any of the agency’s “responsible officers.” In such proceedings, the recommended or tentative decision may be omitted if “the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.” APA § 8(a).

421. MODEL ACT § 10; REVISED MODEL ACT § 11. The Revised Model Act refers to a reading of the “record” rather than to a reading of the “evidence.”

422. MODEL ACT § 10.

423. Compare WASH. REV. CODE § 34.04.110 (1965) which limits such argument to written argument unless the agency, in its discretion, permits oral argument. Opportunity for both oral and written argument is specifically required by WIS. STAT. ANN. § 227.12 (Supp. 1967).

424. *But see* note 420 *supra* for exceptions to the federal act’s requirement that the initial or recommended decision be prepared by a person who has presided at the reception of evidence.

opportunity for the presentation of argument to the person who is to prepare the proposal for decision.⁴²⁵ The Model Act does not require "reasons"⁴²⁶ to be included in either the proposal for decision or in the final decision; nor does it require that the person preparing the proposal for decision possess any degree of independence or be one who has not been engaged in prosecuting or investigative functions.⁴²⁷ Such a requirement, however, while perhaps desirable in most license revocation proceedings, would not necessarily be the optimum procedure for proceedings of a less accusatory nature or for proceedings in which policy issues are the critical determinants of the ultimate decision.

The Revised Model Act has modified somewhat the provisions of the original Model Act. The Revised Act requires that an opportunity be afforded to present briefs and oral arguments not merely to a majority of the officials who are to render the decision, but to "the officials"⁴²⁸ who are to render that decision. The Revised Act requires that the proposal for decision be "prepared by the person who conducted the hearing or one who has read the record,"⁴²⁹ and it requires that the proposal for decision include "reasons" as well as findings of fact and conclusions of law. It does not require "reasons" in the final decision, however.⁴³⁰ The Revised Act omits the Model Act's command that agency officials "personally consider the whole record or such portions thereof as may be cited by the parties."⁴³¹

425. APA § 8(b).

426. APA § 8(b) provides that all initial, recommended and tentative decisions shall include a statement of findings and conclusions "as well as the reasons or basis therefor," upon all the material issues of fact, law, or discretion presented on the record.

427. The structure of the federal act is such that in adjudications required by statute to be determined on the record after opportunity for an agency hearing, the initial or recommended decision would be prepared by an official who was not engaged in investigative or prosecuting functions in the case in which he made the decision. That restriction would not apply in rule-making proceedings. See note 420 *supra*.

428. The Michigan version of the original Model Act sets the proposal-for-decision mechanism into operation if "the officials" who are to decide have not heard or read the evidence but provides for argument only to "a majority" of those officials. MICH. STAT. ANN. § 3.560(21.6) (1961). Cf. WIS. STAT. ANN. § 227.12 (Supp. 1967). The phrases are reversed in the Revised Model Act § 11. In accord with the Revised Model Act's ordering of the phrases is the Oregon statute which predates the Revised Act. ORE. REV. STAT. § 183.460 (1965).

429. This provision is omitted from the version of the Revised Model Act adopted in Hawaii. HAWAII REV. LAWS § 6C-11 (Supp. 1965). The older Wisconsin statute contains such a provision, however. Compare WIS. STAT. ANN. § 227.12 (1957) with WIS. STAT. ANN. § 227.12 (Supp. 1967).

430. Compare APA § 8(b).

431. Accord, e.g., MASS. ANN. LAWS ch. 30A, § 11(7) (1966); MINN. STAT. ANN. § 15.0421 (Supp. 1966); WIS. STAT. ANN. § 227.12 (Supp. 1967). The Hawaii version of the Revised Model Act contains such a provision however. HAWAII REV. LAWS § 6C-11 (Supp. 1965).

To the extent that this omission reflects a judgment that enforcing the Model Act's command by subjecting the agency head to cross-examination on his thought processes—as, incidentally, may be provided for in the Michigan Act⁴³²—that judgment is probably wise. Decision-making officers ought to recognize their responsibility to be familiar with the arguments and contentions of the parties affected; hence, a legal command to perform that responsibility may not be very useful.⁴³³

F. *Agency Opinions.*—In addition to facilitating judicial review of administrative action,⁴³⁴ the careful and conscientious preparation of opinions may assist administrative decision-makers in giving full consideration to all relevant issues before them and in relating their decisions to eurrent agency policies and affected social values currently being. Accordingly, it is desirable—both for the latter reasons and for review purposes—that agencies not only state so-called findings of fact and conclusions of law, but also disclose how they reached those findings and conclusions;⁴³⁵ in other words, the agencies should demonstrate “rational bases” for their actions. Thus, the Revised Model Act requires that “findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”⁴³⁶ The federal act goes somewhat further in this regard, and requires “the reasons or basis” for both findings and conclusions.⁴³⁷ The Tennessee statute⁴³⁸ which requires all “state boards and commissions” to support their rulings by “findings on all questions of law, fact or mixed questions of law and fact” seems to require findings both of ultimate facts and of underlying or

432. MICH. STAT. ANN. § 3.560(21.8)(5) (1961)(depositions addressed to members of the agency to determine whether they followed the procedures required by law).

433. A provision commanding consideration of the record probably should be merely precatory, and its focus should be addressed more to familiarity with the arguments and contentions of the parties rather than to a reading of specific portions of the record.

434. See text accompanying note 490 *infra*.

435. A requirement of a “rational basis” for administrative action was approved in *Tennessee Cartage Co. v. Pharr*, 184 Tenn. 414, 418, 199 S.W.2d 119, 120 (1947), and in *Blue Ridge Transp. Co. v. Pentecost*, 208 Tenn. 94, 100-01, 343 S.W.2d 903, 906 (1961).

436. REVISED MODEL ACT § 12. Compare REVISED MODEL ACT § 11.

437. APA § 8(b).

438. TENN. CODE ANN. § 4-506 (1955): “All state boards and commissions, upon written request by any party to the hearing, shall be required to support their rulings by written opinion or decision adjudicating the issues presented, supported by their findings on all questions of law, fact or mixed questions of law and fact.”

Some other Tennessee statutes make provision for “findings”: TENN. CODE ANN. § 43-519 (1964) (Plant Pest Act); TENN. CODE ANN. § 44-2307 (1964) (Livestock Sales Law). Cf. the similar requirements for “findings of fact” and “conclusions of law” in a now repealed provision of the Commercial Feed Law of 1963. TENN. CODE ANN. § 44-1107 (1964), repealed, TENN. CODE ANN. § 44-1107 (Supp. 1966).

basic facts supporting the ultimate facts. A liberal construction of that statute would require agencies to disclose the reasons supporting their findings or conclusions. In a few cases, however, the Tennessee courts have not required sufficient disclosures from agencies of the reasons supporting their decisions.⁴³⁹ To the extent that a court would itself supply the reasons supporting the rationality of agency action, which

439. *State ex rel. Morris v. Nashville*, 207 Tenn. 672, 343 S.W.2d 847 (1961) (refusing mandamus of city officials on the grounds that in denying a trailer permit they did not act "arbitrarily, unreasonably or capriciously"):

"[I]f there are reasons under the existing laws whereby they [the city of Nashville, its Superintendent of the Bureau of Building and Inspections and the Chief Building Inspector of Nashville] could refuse to grant this permit then even though they gave the wrong reason why they didn't do it, they must still be upheld in their refusal to grant the permit if there is a lawful regulation on which their refusal could be based." *Id.* at 677, 343 S.W.2d at 849.

"We have shown, clearly to our satisfaction, by what has been said heretofore that there is a very reasonable basis wherein the officers might and should to their satisfaction deny this permit. There being a satisfactory reason, as shown by what we have pointed out that various courts have held under related situations of why this permit should not be granted, then the court should not lend its power to compel these officers to grant these permits. There has been absolutely no showing of any unreasonable or arbitrary or capricious action on their part in doing so. The fact is by reading their statements made before the zoning board (*their reasons were wrong, we think*) *they clearly show that they were not denying these things arbitrarily or capriciously but out of a feeling somewhere back in their minds that they knew under the circumstances here this was a violation of some regulation and was wrong and should not be permitted and they were not going to lend their official act to permitting such action.* *Id.* at 681-82, 343 S.W.2d at 851. (Emphasis added.)

Compare *Louisville & N.R.R. v. Fowler*, 197 Tenn. 266, 271 S.W.2d 188 (1954):

"The Commission did not undertake to assign all of its reasons for its action nor did this Court make any such attempt. . . . It is clear that the Commission's statement about the matter is correct. Be that as it may, however, the Commission did not assign this as the sole reason and very clearly indicated that there may be other good reasons appearing from the record and this Court attempted to point out that the evidence does show other reasons." *Id.* at 277-78, 271 S.W.2d at 194.

Cf. Dunlap v. Dixie Greyhound Lines, 178 Tenn. 532, 545, 160 S.W.2d 413, 417 (1942), and *Tennessee Cartage Co. v. Pharr*, 184 Tenn. 414, 421, 199 S.W.2d 119, 122 (1947), where the court "assumed" that the then Railroad and Public Utilities Commission gave "reasonable consideration" to certain factors required to be considered although, the Commission had not stated that it had so considered them.

In a case involving review of a Public Service Commission action, the Tennessee Supreme Court has stated that every sworn state officer is presumed to be following the applicable statutes "regularly and correctly in good faith" and that "such presumption will stand until overcome by satisfactory evidence to the contrary." *Bluo Ridge Transp. Co. v. Pentecost*, 208 Tenn. 94, 98, 343 S.W.2d 903, 905 (1961). Some danger exists, however, that in indulging in a presumption of the validity of administrative action, the court may itself be engaged in trying to find the justification or rational basis of agency action which the agency itself should have supplied. Action without justifying reasons will not be less arbitrary, however, if a person other than the actor supplies reasons that would justify the action only if the actor had acted on the basis of those reasons. Compare, in this regard, the opinion of Mr. Justice Frankfurter, dissenting, in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1944), in which he condemned judicial affirmation of agency rate-setting action on the basis of its "end result" rather than by reasoned statement of its action from the agency.

the agency itself failed to supply, the court would normally be performing an agency function. When the reasons supplied would have supported, but would not have compelled, agency action, only the agency should supply them. Thus, some agency action might be rational, that is, not arbitrary, or within the scope of an agency's authority, if performed for some reasons; yet it might be irrational, arbitrary, or without the scope of an agency's authority if it were performed for other reasons.⁴⁴⁰

The volume of cases with which any given decision-maker must deal may affect his ability to prepare extensive discussions of the reasons for his decision.⁴⁴¹ Moreover, it is possible that a requirement of extensive written opinions would use time which decision-makers could employ more profitably in other agency tasks. In such cases, it seems appropriate to gauge the depth to which a given decision ought to disclose underlying reasoning by the "obviousness" of the decision felt by the decision-maker and by the hardship which the affected private party will feel as a result of that decision. In addition, the depth of an administrative opinion might properly be affected by the likelihood of judicial review and the general importance of the question being decided. Taking account of all of these factors, I would favor a general statutory directive requiring agencies to disclose underlying and rational bases for their decisions in adjudications on the assumption that such a directive would be regarded as a flexible

440. See Frankfurter, dissenting in *FPC v. Hope Natural Gas Co.*, *supra* note 439.

441. Section 12 of the Revised Model Act requires the separate statement of findings of fact and of conclusions of law, and both that act and the federal act require a ruling upon each proposed finding submitted to the agency. REVISED MODEL ACT § 12; APA § 8(b). The federal act also requires a ruling upon each proposed conclusion and exception to administrative decisions prior to the final agency decision. Although the required separate statement and required rulings may be in part designed to promote thoughtful agency action and to facilitate court review, conscientious agency determination and exposition cannot be legislated. To the extent that these acts focus an agency's attention upon responsibility for its action and for a reasoned explanation of that action without imposing an undue burden upon it they are unobjectionable; but to the extent that those acts would interfere with efficient administration by any agency, they ought not to be imposed upon it. The agency head himself, however, might escape some of that additional burden through a greater use of hearing officers or through the utilization of "personal assistants." Cf. REVISED MODEL ACT § 13(2). (Attempts to shift substantial amounts of decision-making from the agency head to hearing officers should be approached with caution, however, since such attempts might result in decisions which are less considered and fair than under present arrangements, where, for example, the commissioner of agriculture attempts to be involved in all proceedings in which a license revocation will be involved. Interview with Tennessee Commissioner of Agriculture, June 24, 1964.)

Separate statements of fact and law determinations by agencies, however, might encourage greater judicial review of those determinations labelled as "law" conclusions, and perhaps ultimately would encourage the development of verbally more sophisticated approaches to allocations of functions between courts and agencies than exist at the present time.

standard and that the agencies would feel an obligation to disclose their bases for decisions in as much depth as would be warranted by the factors discussed above. I would further provide that a written opinion could be waived by the parties to an adjudication.

G. *Miscellaneous Matters*. 1. *Notice of Procedural Protections*.— Besides notifying parties of the commencement of a proceeding and of the issues in dispute, notice of the commencement of proceedings may also inform parties of their procedural rights. Imposing such a function on the notice may serve a useful purpose with respect to parties who may not be fully conscious of their rights in agency proceedings. In this connection, for example, Hawaii requires⁴⁴² that the notice of the commencement of proceedings inform the party upon whom the notice is served of his right to retain counsel. The Georgia statute⁴⁴³ and the recommendations of the Kentucky Legislative Research Commission⁴⁴⁴ require that the notice inform the party upon whom it is served of his right to subpoena witness and documents. The Kentucky recommendations would also require the notice of proceedings to disclose the existence of "any relevant staff memoranda or data which is not made confidential or privileged by statute."⁴⁴⁵

2. *Right to Counsel*.—The federal act confers⁴⁴⁶ a right to counsel upon parties and witnesses appearing before an agency under compulsion. Although a right to counsel is not expressly granted in either of the Model Acts, a number of the state acts grant some rights to counsel.⁴⁴⁷

3. *Subpoenas*. (a) *In General*.—Although it is not uncommon for Tennessee statutes to vest a subpoena power in agencies, some statutes do not give private parties the right to use the agency subpoena power.⁴⁴⁸ To the extent that an agency will not use its subpoena power for the benefit of a private party opposing the agency in an adjudication, there is an imbalance in the procedural rights of the parties to the proceeding—an imbalance which might not be con-

442. HAWAII REV. LAWS § 6C-9(b)(5) (Supp. 1965).

443. GA. CODE ANN. § 3A-114(a)(2)(E) (Supp. 1966).

444. KY. REP. NO. 12, 68.

445. *Ibid.*

446. APA § 6(a).

447. *E.g.*, IND. ANN. STAT. § 63-3022 (1961). In Hawaii the notice issued in connection with the commencement of a contested case must inform the person upon whom notice is served of his right to retain counsel. HAWAII REV. LAWS § 6C-9(b)(5) (Supp. 1965).

448. See TENN. CODE ANN. § 56-1207(d) (1955); TENN. CODE ANN. § 67-5501 (Supp. 1966).

ductive to fair adjudication.⁴⁴⁹ Although some of the more recent Tennessee statutes⁴⁵⁰ which establish procedures for particular proceedings give private parties the benefit of the agency subpoena power, other Tennessee statutes⁴⁵¹ do not. The Model Acts lack provisions dealing with subpoenas; however, the federal act⁴⁵² and many state acts⁴⁵³ contain subpoena provisions and confer upon private parties the right to use the agency's subpoena powers. The subpoena provisions of the new Oklahoma Act, which provide for the mandatory issuance of such subpoenas at the request of a private party⁴⁵⁴ have been described by Professor Merrill⁴⁵⁵ as precluding:

the sometimes employed procedure of requiring the applicant for subpoena to make a showing of relevance. . . . The possibility of oppressive exercise of this privilege, not likely to be of frequent occasion in practice, may be dealt with on the basis of the general grant of power to conduct a hearing, which means a hearing free from abusive tactics.

Despite the implication read into the Oklahoma statute by Professor Merrill, however, it might be wise expressly to vest the agency with the power to control subpoena requests in order to prevent abuse.

(b) *Subpoenas Against the Agency.*—To the extent that the Revised

449. Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform or Regression?*, 1963 DUKE L.J. 593, at 608-09.

450. *E.g.*, TENN. CODE ANN. §§ 43-519, 43-614 (1964).

451. *E.g.*, TENN. CODE ANN. § 56-1207(d) (1955); TENN. CODE ANN. § 67-5501 (Supp. 1966).

452. APA § 6(c).

453. Although neither of the Model Acts contain subpoena provisions, a substantial number of state administrative procedure statutes include such provisions. These statutes usually grant agencies power to subpoena both witnesses and documents and provide that such power shall be exercisable for the benefit of private parties as well as for the benefit of the agencies. Such statutes include ALASKA STAT. § 44.62.430 (1962); ARK. STAT. ANN. §§ 5-707(d), 5-708(b), 5-710 (1962); CAL. GOV'T CODE § 11510 (1961); COLO. REV. STAT. ANN. § 3-16-4(5) (1963); GA. CODE ANN. § 3A-114(a)(7), (8) (Supp. 1966); IND. ANN. STAT. §§ 63-3007, 63-3021 (1961); ME. REV. STAT. ANN. tit. 5, §§ 2401(4), 2406 (1964); MASS. ANN. LAWS ch. 30A, §§ 12(1)-(5) (1966); MO. ANN. STAT. § 536.077 (Supp. 1966); NEB. REV. STAT. § 84-914(2) (Supp. 1965); N.M. STAT. ANN. § 67-26-8 (1961); N.D. CENT. CODE §§ 28-32-09, 28-32-10 (1960); OHIO REV. CODE ANN. § 119.09 (Baldwin 1964); OKLA. STAT. ANN. tit. 75, § 315 (1965); ORE. REV. STAT. § 183.440 (1965); VA. CODE ANN. § 9-6.10(d) (1964); WASH. REV. CODE § 34.04.09(2) (1964); WYO. STAT. ANN. §§ 9-276.25(c), (d), (e) (Supp. 1965). See FLA. STAT. ANN. § 120.25(2) (Supp. 1966). See also text accompanying notes 443-44 *supra*; N.Y. CIV. PRAC. ACT § 2302 (Supp. 1966). While most of such statutes provide for enforcement of subpoenas by a court upon application of the agency, a few such statutes provided that the party for whose benefit the subpoena was issued may itself seek court enforcement of the subpoena. GA. CODE ANN. § 3A-114(a)(7) (Supp. 1966); MASS. ANN. LAWS ch. 30A, § 12(5) (1966); ME. REV. STAT. ANN. tit. 5, § 2406(1) (1964); N.D. CENT. CODE § 28-32-10 (1960).

454. OKLA. STAT. ANN. tit. 75, § 315 (1965). See note 453 *supra*.

455. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 31 (1964).

Model Act requires that intra-agency memoranda be made available for public inspection,⁴⁵⁶ those memoranda probably would be subject to the subpoena power. Assuming that the subpoena power would be available for such purposes,⁴⁵⁷ the Kentucky Legislative Research Commission recommended that notice of "any relevant staff memoranda or data which is not made confidential or privileged by statute" be contained in the notice of the institution of proceedings.⁴⁵⁸ The extent to which a "work product" exemption⁴⁵⁹ from the subpoena or other disclosure requirements would be read into versions of the Revised Model Act which vest subpoena powers in private parties is not clear. Strategy papers and some types of internal communications ought to be protected from disclosure, but major investigational reports, economic evaluations, and analyses which have been prepared for a particular adjudication and which are going to be used in the decision of that case should be exposed to the scrutiny of the parties prior to the formal hearing.⁴⁶⁰

(c) *Enforcement of Subpoenas.*—Some doubt was expressed⁴⁶¹ at one time about the enforceability of subpoenas issued by Tennessee agencies which had been given the power to "compel"⁴⁶² the attendance of witnesses, but had not been told by the Tennessee Legislature of the procedures by which that compulsion could be effected. To the extent that this doubt continues to exist, the legislature obviously has the power to remove it. It has been suggested⁴⁶³ that the enforcement of a subpoena should require a court proceeding; the federal and many state acts so provide. I am not prepared to say whether in any instances enforcement power in the agencies is desirable.

The most effective grant to private parties of the right to subpoena power would include the right to seek enforcement of a subpoena order in court and the right to take an interlocutory appeal of an agency denial of a request for the issuance of a subpoena. Illustrative of the different approaches taken by the states are the Kentucky Legislative Research Commission draft statute, which vested private parties with the power to seek court enforcement of agency subpoena

456. REVISED MODEL ACT § 2(a)(3).

457. KY. REP. No. 12, 68.

458. *Ibid.*

459. *Hickman v. Taylor*, 329 U.S. 495 (1947); Bloomenthal, *supra* note 449, at 609.

460. See text accompanying notes 225-26 *supra*.

461. Samuels, *Power of Administrative Agencies to Compel Testimony in Tennessee*, 16 TENN. L. REV. 928, 931 (1941).

462. According to Samuels, *ibid.*, the Board of Accountancy doubted its power to enforce a subpoena, although it was given the power to "compel" the attendance of witnesses, a power which it retains under substantially the same statutory language. TENN. CODE ANN. § 62-138 (Supp. 1966).

463. Bloomenthal, *supra* note 449, at 609.

orders, and the new Oklahoma statute which provides that court enforcement of a subpoena issued for the benefit of a private party "may" be sought by the agency involved.⁴⁶⁴ Whether an appeal may be taken from an Oklahoma agency's refusal to seek court enforcement of a mandatorily-issued agency subpoena is not clear.

H. *Disqualification for Bias*.—The federal act contains provisions dealing with the disqualification of a presiding officer for "personal bias."⁴⁶⁵ It does not, however, provide that the agency itself may be disqualified for bias; and the so-called "rule of necessity" has been invoked to help defeat an attempt to disqualify an agency on such grounds.⁴⁶⁶ Neither the Model Act nor the Revised Model Act advert to the problem of bias. A few of the state statutes contain bias provisions;⁴⁶⁷ for the most part, however, they are poorly drafted and may lend themselves to constructions under which an agency or presiding officer may be disqualified for innocuous prejudgments of policy.⁴⁶⁸

V. INVESTIGATIONS

Neither of the Model Acts expressly adverts to investigations. Although some of the legislative history of section 6(b)⁴⁶⁹ of the federal act indicates that that section was "designed to preclude

464. See note 453 *supra*.

465. The federal act provides: "Any such [presiding] officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." APA § 7(a).

The phrase "or disqualification" describing the affidavit to be filed in connection with a disqualification motion seems to indicate that personal bias is not the sole ground upon which a presiding officer's removal can be based.

466. The "rule of necessity" would provide that a partial adjudicator could properly adjudicate when no available substitute exists. *Cf. Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589 (7th Cir. 1945), *aff'd*, 333 U.S. 683 (1948).

467. COLO. REV. STAT. ANN. § 3-16-4(3) (1963); FLA. STAT. ANN. § 120.09 (Supp. 1966); OKLA. STAT. ANN. tit. 75, § 316 (1965). *Cf. the following statutes requiring hearings to be conducted in an "impartial" manner: ALASKA STAT. § 44.62.630 (1962); CAL. GOV'T CODE § 11512; W. VA. CODE ANN. § 29A-5-1(d) (1966).* The Colorado provision is modeled upon APA § 7(a) and, accordingly, limits disqualification principally to personal bias. See note 465 *supra*.

468. The types of policy prejudgment which would be objectionable include those in which an adjudicator, for reasons which are insufficient, closes his mind to the potentially persuasive arguments of a private party.

469. Section 6(b) of the federal act provides: "No process, requirements of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain, or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a non-public investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony."

'fishing expeditions' and investigations beyond the jurisdiction or authority of an agency,⁴⁷⁰ section 6(b) merely limits agency processes, report requirements, inspections, and other investigative acts or demands to those "authorized by law" and provides for the retention or procurement of copies or transcripts of data and evidence submitted under compulsion in an investigation. A modification of section 6(b) proposed by the American Bar Association⁴⁷¹ would have tightened some of the section's language and would have added a provision authorizing an injunction to restrain the investigatory power of an agency which was exercised "clearly beyond the constitutional or statutory jurisdiction or authority of the agency." The failure of that Association to propose a more restrictive provision may indicate the difficulty involved in containing an investigatory power without hindering its proper use. A few statutes⁴⁷² have attempted to provide some safeguards for persons who are investigated by agencies. The North Dakota statute,⁴⁷³ for example, requires that before an agency may make a "decision" (presumably a disposition adversely affecting those rights or privileges whose administration falls under the North Dakota licensing act) upon the basis of an investigation of a person, the agency must specify the issues pertinent to its decision and must afford a hearing upon those issues. The federal act and both Model Acts would require the same procedure.

It will be noted that certain types of "investigations" may psychologically disqualify the investigating officers from conducting impartial adjudicatory hearings concerned with the results of those investigations. Consequently, it may be desirable that those investigations which engender a prosecutor mentality in investigators—especially those involving issues of disputed "adjudicative facts"—be conducted, to the extent possible, by persons other than the officers who may later adjudicate proceedings based upon the investigations.⁴⁷⁴

470. S. REP. NO. 752, 79th Cong., 1st Sess. (1945), LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 205 (1946).

471. S. 1070, 86th Cong., 1st Sess. (1959); S. 1887, 87th Cong., 1st Sess. (1961).

472. See, e.g., IND. ANN. STAT. § 63-3005 (1961); N.D. CENT. CODE § 28-32-08 (1960). Cf. IND. ANN. STAT. § 63-3025 (1961).

473. N.D. CENT. CODE § 28-32-08 (1960):

"Specifications of any issues to be furnished by agency.—Whenever an administrative agency, pursuant to authority conferred upon it by law, shall institute an investigation upon its own motion or without the filing of a specified complaint, or shall hold any hearing or make any independent investigation upon the claim or request of any person, no decision shall be made by the agency until all parties in interest shall have been furnished with a written specification of the issues which are to be considered and determined, nor until an opportunity shall have been afforded to such persons to present evidence and to be heard upon the practices so specified. Provided, however, that the commissioners of the workmen's compensation bureau may make awards without the giving of the notice herein provided for."

474. See text accompanying notes 339-408 *supra*.

VI. SETTLEMENTS AND INFORMAL NEGOTIATIONS

Both the federal act and the two Model Acts recognize the advantages of negotiated settlements.⁴⁷⁵ Settlement negotiations may appropriately be described in some circumstances as a form of informal adjudication⁴⁷⁶ and may sometimes serve as an inexpensive and efficient means for determining questions arising in connection with an agency's enforcement of statutes committed to its charge. Although basic policy determinations may rarely be properly negotiable, the means of implementing agency policy as applied to particular factual situations may frequently be subject to negotiation. Furthermore, negotiation may be the most efficient means of achieving compliance with an agency's basic policies. While negotiations may also serve a useful purpose in connection with the disposition of a case whose outcome would depend upon a determination of "basic facts" or "adjudicative facts," the question arises as to whether an officer who has been involved to a substantial degree in negotiations about such factual issues can, if negotiations reach an impasse, become an impartial adjudicator of those issues. The agency head who—especially in the smaller agencies⁴⁷⁷ and in connection with important cases—may find it easy to become involved in both settlement negotiations and adjudication ought to avoid involvement in both types of activity when that avoidance would be consonant with his responsibility to further the statutory purposes committed to his charge.

VII. LICENSES

Both the federal act and the Revised Model Act contain sections which deal specifically with licenses.⁴⁷⁸ Both acts contain provisions which may in effect provide that a license shall not be withdrawn until the licensee has had a chance to comply with all lawful requirements for its retention. Such a provision may be useful when the standards for maintaining a license have changed or when the licensee, through inadvertence or excusable ignorance, has failed to comply with existing requirements. However, preventing withdrawal of a license until the licensee is given a second chance may encourage noncompliance with the requirements for maintaining the license. The federal act adverts to this problem and excepts cases of "willfulness." Also, were Tennessee to enact a statute similar in any respect to the second-chance provisions of the Revised Act, the statute should probably clarify whether, and

475. APA § 5(b); MODEL ACT § 8; REVISED MODEL ACT § 9(d).

476. 1 BENJAMIN REPORT 56.

477. Compare text accompanying notes 338-41 *supra*.

478. APA § 9(b); REVISED MODEL ACT § 14.

the extent to which, the issuance of a license to a competitor of a pre-existing licensee constitutes a partial withdrawal of a preexisting license, which would bring such statutory provisions into play so that the pre-existing licensee would be given a chance to forestall a second license by providing himself the service potential of his prospective competitor. A Tennessee statutory provision embodying the second-chance approach with respect to most⁴⁷⁹ public utilities failing to meet the "reasonable needs" of the public is contained in section 65-417.⁴⁸⁰

VIII. JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN TENNESSEE

A. *In General.*—Judicial control of administrative action can take many forms, including actions for declaratory judgments,⁴⁸¹ injunction suits,⁴⁸² mandamus proceedings,⁴⁸³ and petitions for writs of cer-

479. Although TENN. CODE ANN. § 65-417 (1955) by its terms is applicable to every "public utility" and "public utility" is defined to include all "common carriers," TENN. CODE ANN. § 65-40 (1955), § 65-417 has been construed not to apply to motor carriers because of the inconsistent licensing provisions governing the latter. *Tennessee-Carolina Transp., Inc. v. Peutecost*, 211 Tenn. 72, 362 S.W.2d 461 (1962). The litigation which occurred in the cited case would have been unnecessary if the legislature had amended TENN. CODE ANN. § 65-417 (1955) at the time it had enacted TENN. CODE ANN. § 65-1507 (Supp. 1966); and the occurrence of the litigation indicates the care which probably ought to be exercised in enacting licensing or other procedural provisions which have a general application.

480. TENN. CODE ANN. § 65-417 (1955).

481. See notes 192, 198 *supra*.

482. An injunction seems to be available, at least in some instances, to correct administrative action which is so procedurally defective as to be considered "void." *Smoky Mountain Co. v. Lattimore*, 119 Tenn. 620, 105 S.W. 1028 (1907). And in those instances, an administrative proceeding can be attacked collaterally. *State Bd. of Medical Examiners v. Friedman*, 150 Tenn. 152, 263 S.W. 75 (1923). Because some injunctions might involve courts in matters which are intended for the initial determinations of administrative officials, however, an injunction may be unavailable when an administrator appears to have authority, in the first instance, to develop policy, decide facts, or even to construe the statute under which the challenged action is made or may occur. *North British & Mercantile Co. v. Craig*, 106 Tenn. 621, 638-44, 62 S.W. 155, 159-60 (1901). A fortiori, an injunction may be denied when the administrative construction of the statute has not yet been made, and it is unclear whether the action feared by the plaintiff has yet been decided upon by the administrative officials in whose hands the administration of the statute involved has been placed. *Cf. General Sec. Co. v. Williams*, 161 Tenn. 50, 29 S.W.2d 662 (1930) (declaratory judgment refused). When an administrative body charged with the enforcement of a statute threatens action against a person, the administrative construction of the statute is at least at that point partially clarified, but even so, a court may refuse to grant an injunction when an administrative forum is available in which the issue may be litigated. *Cf. Georgia Indus. Realty Co. v. Chattanooga*, 163 Tenn. 435, 441, 43 S.W.2d 490, 492 (1931). If the administrative proceeding is presently pending or being tried before an administrative tribunal, a court would probably be even more reluctant to grant an injunction. *Cf. note 197 supra*.

483. *State Bd. of Medical Examiners v. Friedman*, 150 Tenn. 152, 166-67, 263 S.W. 75, 79 (1924) (dictum).

tiorari.⁴⁸⁴ Whether or not certiorari is the most important form of judicial control over administrative activity, it is one of the most commonly used forms of judicial review. The most interesting and obvious judicial developments have occurred on certiorari, and it is, accordingly, primarily upon certiorari that the discussion of the following pages centers.

Two types of review by certiorari are used by the Tennessee courts: the so-called "common law" certiorari,⁴⁸⁵ which supposedly brings up for review only that agency action in "excess" of jurisdiction, fraud-

484. Besides the "common law" and statutory certiorari provisions contained in TENN. CODE ANN. §§ 27-801, 27-802 (1955), § 27-901 provides that: "Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have said order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter."

Chapter 9 of title 27, of which § 27-901 is a part, outlines the procedural steps involved in obtaining review and provides for the grant of a supersedeas to stay the action of the board or commission pending review. TENN. CODE ANN. § 27-906 (1955). Section 27-911 governs the court hearing on review of the board or commission action, and provides:

"At the expiration of ninety (90) days from the filing of said transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue. The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce; provided, that all proof shall be taken and filed within seventy-five (75) days from the date upon which the transcript was filed, and said period for taking depositions shall not be extended by the court without application made in writing, under oath, showing good cause for the extension or continuance. The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record. In making such findings of fact the chancellor shall weigh the evidence and determine the facts by the preponderance of the proof."

The last sentence of § 27-911 was added in 1951. Even without that last sentence, however, it would appear that the section contemplated de novo court review. Lacey, *Judicial Review of Administrative Action in Tennessee—Scope of Review*, 23 TENN. L. REV. 349, 350 (1954). However, shortly after the adoption of the provisions which are now in chapter 9 of title 27, the Tennessee Supreme Court held that those provisions did not abolish the distinction between common law and statutory certiorari, but specified the procedures for review only. *W. J. Savage Co. v. Knoxville*, 167 Tenn. 642, 72 S.W.2d 1057 (1933), *cert. denied*, 292 U.S. 623 (1934); *Anderson v. Memphis*, 167 Tenn. 648, 72 S.W.2d 1059 (1934). Although the 1951 amendment to § 27-901 seems to indicate a legislative determination that in some classes of proceedings before "boards and commissions," the courts should inquire into the judgment of the board or commission to a greater extent than under the common law writ, the Tennessee Supreme Court has held that the amendment cannot constitutionally be applied to an "administrative" or "legislative" agency decision. *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*, 195 Tenn. 593, 261 S.W.2d 233 (1953).

485. Strictly speaking "common-law" certiorari does not exist. All certiorari is based on constitutional or statutory provisions. The so-called common law certiorari authorized by § 27-801, however, can only with difficulty be applied to a tribunal or board exercising non-judicial functions since it expressly applies only to a tribunal, board or officer exercising "judicial" functions. "Common-law" certiorari review of nonjudicial action must be based on the constitution only.

ulent action and "illegal" action,⁴⁸⁶ and the so-called "statutory" certiorari,⁴⁸⁷ which brings up the entire agency action for "de novo" review in court.⁴⁸⁸ Although the latter form is described as a statutory writ, in the past the courts have found the availability of the "statutory" writ to be constitutionally required in some circumstances.⁴⁸⁹ By a similar incongruity of language, the "common law" writ is provided for by statute, and its availability to review most types of agency action appears to be a constitutional requirement.⁴⁹⁰

B. *Constitutional Aspects of Statutory Certiorari Review.*—In 1904, the Tennessee Supreme Court ruled⁴⁹¹ that the provisions of article I, section 17 of the Tennessee Constitution⁴⁹² required that all "judicial" or "quasi-judicial" action performed by bodies other than courts must be subject to de novo review in court.⁴⁹³ The scope of the present constitutional requirement of trial de novo, however, appears to be more restricted.⁴⁹⁴ The court has indicated that rights which are subject to legislative modification (as most "rights" are) can be subjected by the legislature to the regulatory powers of administrative agencies and that these agencies can modify or abolish those rights in proceedings which are not subject to judicial trial de novo.⁴⁹⁵

486. *E.g.*, Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n, *supra* note 484.

487. The writ authorized in TENN. CODE ANN. § 27-802 (1955) is generally referred to as "statutory" certiorari.

488. *E.g.*, Mayor of Jackson v. Thomas, 44 Tenn. App. 176, 313 S.W.2d 468 (1957).

489. Staples v. Brown, 113 Tenn. 639, 85 S.W. 254 (1904). See text accompanying notes 491-95 *infra*.

490. Staples v. Brown, *supra* note 489; Mayor of Jackson v. Thomas, *supra* note 488. See also note 485 *supra*.

491. Staples v. Brown, *supra* note 489.

492. "§ 17. Open courts—Redress of injuries—Suits against the State.—That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." TENN. CONST. art. I, § 17.

493. Staples v. Brown, *supra* note 489 at 643-44, 85 S.W. at 255.

494. Compare Lacey, *supra* note 484, at 358.

495. Compare Nashville v. Martin, 156 Tenn. 443, 3 S.W.2d 164 (1928) where the court ruled that a policeman who was discharged for cause by the Nashville Civil Service Commission was not entitled to de novo review of the discharge action because the policeman had suffered no legally cognizable "injury." The court reasoned that the discharge authority of the Civil Service Commission had been made a part of the policeman's terms of employment, or in other words, that the non-reviewability of discharge action by the commission surrounded the bundle of rights that the plaintiff obtained when he accepted the position of a policeman. Compare McKee v. Board of Elections, 173 Tenn. 276, 116 S.W.2d 1033 (1938) where the court held that a Commissioner of Elections who had taken office prior to the enactment of a 1937 statute which vested "final" removal power in the Board of Elections had a "property right" in his office including, apparently, the type of removal procedure attached to it at the time he assumed office. The court reasoned that he could not retrospectively be deprived of de novo review in removal proceedings during that term, but as to those

It appears, therefore, that when agencies exercise "judicial" functions over "rights" which are not constitutionally granted their proceedings can be made subject to de novo court review or to review by the common law writ only as the legislature chooses.

C. Constitutional Aspects of Common-Law Certiorari Review.—The Tennessee courts have held that the separation-of-powers provisions contained in sections 1 and 2 of article II of the Tennessee Constitution⁴⁹⁶ would be violated if they became involved, in proceedings which were "legislative" or "administrative," to a greater degree than is entailed in review by common-law certiorari.⁴⁹⁷ On that basis *Hoover Motor Express Co. v. Railroad & Public Service Commission*,⁴⁹⁸ decided by the Tennessee Supreme Court in 1953, held that a 1951 statute authorizing review of actions of "boards and commissions"⁴⁹⁹ on a "preponderance of the proof"⁵⁰⁰ standard could not be applied to review of a Public Service Commission action granting a certificate of convenience and necessity to a motor truck freight carrier. The court stated that to construe the statute to allow review of such action would render it unconstitutional. In 1961 the Tennessee Supreme Court, after making an unnecessarily broad characterization

persons who succeeded to such office after the 1937 statute took effect, the court indicated that the Board of Elections' removal power would be "final" and not subject to de novo review. The utilization by the court of the word "injury" in art. 1, § 17, of the Tennessee Constitution to circumscribe the reviewability of "judicial" type action would appear to have broad implications. To the extent that the court would be willing to pursue this pattern of analysis generally, the legislature would be free to prohibit de novo review of "judicial" agency action affecting any substantive right to the extent that such right is subject to legislative modification. Compare Boone, *An Examination of the Tennessee Law of Administrative Procedure*, 1 VAND. L. REV. 339, 371-74 (1948); Lacey, *supra* note 484, at 358. Lacey's statement that "logically, if the doctrine of *Staples* is correct, the legislature could not constitutionally so limit review where the agency was exercising a judicial function. . . ." would appear correct only in situations in which agency action affected substantive rights which were constitutionally guaranteed. Since the number of rights that are not subject to legislative modification are minimal, the legislature would appear to have wide discretion to limit de novo review of agency action.

496. "§ 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

"§ 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." TENN. CONST. art. II, §§ 1, 2.

497. *City of Whitwell v. Fowler*, 208 Tenn. 80, 343 S.W.2d 897 (1961); *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*, *supra* note 484.

498. *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*, *supra* note 484.

499. Chapter 9 of title 27 of TENN. CODE ANN. contains provisions dealing with judicial review of actions of "boards and commissions." See the criticism of the restricted coverage of that phrase in another context in text accompanying notes 113-14 *supra*.

500. The statute involved in *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*, *supra* note 484, was the 1951 amendment to the provision which is now TENN. CODE ANN. § 27-911 (1955). See note 484 *supra*.

of all functions of the Public Service Commission as being "solely administrative or legislative," held unconstitutional⁵⁰¹ a 1953 statute⁵⁰² which provided for judicial reversal of Public Service Commission decisions when those decisions were "unsupported by the preponderance of the proof in view of the entire record before the commission."

Within thirteen months of this invalidation, the Tennessee Supreme Court in *Fentress County Beer Board v. Cravens*⁵⁰³ upheld a statute which made beer-licensing-board decisions (including decisions on initial licenses) reviewable by statutory certiorari. In *Fentress* the board's concessions enabled the court to dispose of the case in a relatively simple context. The board conceded that the applicant's character was unobjectionable and that the permit had been denied solely because the board was "opposed to the sale of beer and would not issue a permit to anyone."⁵⁰⁴ In the initial review, the chancellor had found that the application "complied with all the requirements of the law." The court construed the statute as requiring the issuance⁵⁰⁵ of a beer permit upon compliance with the statutory conditions governing the issuance of permits to sell beer, and accordingly, affirmed the chancellor's direction to the board to issue the permit. The court did not discuss the question of whether the issuance of the permit would offend the statutory conditions,⁵⁰⁶ including non-interference "with the public health, safety and morals," beyond a cursory mentioning of the chancellor's finding that the application met "the requirements of the law." In a more recent decision⁵⁰⁷ involving the same provision for statutory certiorari, the court addressed itself to the satisfaction of those conditions and ordered the chancellor to determine compli-

501. *City of Whitwell v. Fowler*, *supra* note 497. It would appear that some functions of the Public Service Commission might appropriately be accorded a broader review than under the common law writ, such as a license or permit revocation for cause, and that even under the judicial-nonjudicial labeling approach of the courts, some such functions might appropriately be deemed to be "judicial."

502. TENN. CODE ANN. § 65-229(d) (1955).

503. 209 Tenn. 679, 356 S.W.2d 260 (1962).

504. 209 Tenn. at 681, 356 S.W.2d at 261.

505. *Accord*, *Ewin v. Richardson*, 399 S.W.2d 318 (Tenn. 1966). Compare *De Caro v. City of Collierville*, 213 Tenn. 254, 257-58, 373 S.W.2d 466, 468 (1963) where the Court applied TENN. CODE ANN. § 57-208 (Supp. 1966). See note 507 *infra*.

506. TENN. CODE ANN. § 57-205 (Supp. 1966).

507. *Case v. Carney*, 213 Tenn. 597, 376 S.W.2d 492 (1964). The permit in question in *Case v. Carney* was regulated by TENN. CODE ANN. § 57-208 (1955 & Supp. 1966) (governing incorporated cities and towns) rather than by TENN. CODE ANN. § 57-205 (1955 & Supp. 1966) which applied to the county government involved in the *Fentress* case. Section 57-208, however, incorporates by reference the statutory standards contained in § 57-205, and further authorizes cities and towns to adopt additional restrictions upon the issuance of beer permits. A Nashville ordinance adopted pursuant to the permission contained in § 57-208 contained the conditions of non-interference with "public health, safety and morals" also contained in § 57-205.

ance with the statutory conditions, including non-interference with "the public health, safety and morals."

Because both the decisions involving review of Public Service Commission orders and the decisions of beer licensing boards involve the courts in review of licensing bodies, suggestions have been made that the court's actions were inconsistent.⁵⁰⁸ Certainly license issuance activity would not normally be considered "judicial" or "quasi-judicial" action generally considered prerequisite for court review by statutory certiorari. But the decisions prohibiting review of Public Service Commission actions appear to be justified on the ground that the courts are not equipped to examine the types of economically-based determinations made by the Public Service Commission. The decision involving the beer boards, although similarly involving a licensing body, may be reconciled with the decisions reviewing Public Service Commission licensing determinations on the ground that the beer board actions do not involve the types of technical factors with which courts are not equipped to deal and may involve judgments closer to those based on traditional values with which courts are generally familiar. Apart from the dislocation that might be engendered, a move by the supreme court away from rigid adherence to the legislative-judicial or administrative-judicial dichotomy towards a more flexible approach to court-agency relations based on function and relative competence would be desirable.

D. *Constitutional Requirements for Judicial "Independent Judgment" upon Certain "Legislative" Agency Action.*—Shortly after the Hoover case had apparently narrowed the scope of judicial review constitutionally permitted over the "legislative" action of an administrative body, the Tennessee Supreme Court, on rehearing, in *Southern Continental Telephone Co. v. Railroad & Public Service Commission*,⁵⁰⁹ held that a court, in reviewing a rate order of a public utility challenged as confiscatory, is required by the fourteenth amendment of the United States Constitution to exercise its "independent judgment" as to the facts upon which the confiscation issue turn. This holding was reaffirmed in *Southern Bell Telephone & Telegraph Co. v. Tennessee Public Service Commission*⁵¹⁰ where the court grounded the judicial duty to exercise independent judgment not only upon the United States Constitution but also upon article I, section 8 of the Tennessee

508. Sanford, *Administrative Law—1962 Tennessee Survey*, 16 VAND. L. REV. 623, 624 (1963). See also Stason, *Administrative Law—1964 Tennessee Survey*, 18 VAND. L. REV. 1047, 1050-51 (1965).

509. 199 Tenn. 122, 285 S.W.2d 115 (1955).

510. 202 Tenn. 465, 304 S.W.2d 640 (1957).

Constitution.⁵¹¹ In requiring an independent judicial judgment on facts related to a confiscation issue, however, the court in the *Southern Continental* case restricted review to the evidence introduced before the Commission and indicated that a utility attacking the Commission's rate order would bear the burden of overcoming "a strong presumption" in favor of the Commission's ruling.⁵¹² In the *Southern Bell* case, although the court approved the chancellor's order for additional evidence to be taken before the Commission, it reiterated, in dictum, that a rate order carried a "presumption of validity" based upon the Commission's supposedly "expert judgment."⁵¹³

E. Scope of Review of Agency Factual Determinations in Common-Law Certiorari Proceedings.—In the 1947 case of *Tennessee Cartage Co. v. Pharr*,⁵¹⁴ the Tennessee Supreme Court reaffirmed earlier judicial pronouncements that agency factual determinations would be upheld if supported by "any material evidence;" and it further equated the "material evidence" test applied by Tennessee courts to the "substantial evidence" test applied by the federal courts in reviewing federal administrative action.⁵¹⁵ The federal decisions⁵¹⁶ which were cited in the *Tennessee Cartage Co.* case as illustrative of the "substantial evidence" test were decided prior to the enactment of the federal Administrative Procedure Act⁵¹⁷ and prior to the amplification by the United States Supreme Court of that act's requirement for judicial review upon the "whole record" in *Universal Camera Corp. v. NLRB*.⁵¹⁸ Therefore, it appears that the "substantial evidence" test endorsed in *Tennessee Cartage Co.* was the pre-Administrative Procedure Act review conducted by the federal courts. Although the review conducted by the federal courts during the pre-Administrative Procedure Act period was probably not uniform,⁵¹⁹ it appears likely that the federal test was understood by the *Tennessee Cartage Co.* court as

511. "§ 8. No man to be disturbed but by law. That no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." TENN. CONST. art. I, § 8.

512. 199 Tenn. at 126, 285 S.W.2d at 117.

513. 202 Tenn. at 486, 304 S.W.2d at 649.

514. 184 Tenn. 414, 199 S.W.2d 119 (1947).

515. 184 Tenn. at 419, 199 S.W.2d at 121.

516. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *Washington, Va. & Md. Coach v. NLRB*, 301 U.S. 142 (1938); *Mississippi Valley Barge L. Co. v. United States*, 292 U.S. 282 (1934).

517. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964).

518. 340 U.S. 474 (1951). Under the federal act, the Court said, "The substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488.

519. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

requiring that an agency's factual determinations be upheld whenever there existed any evidence to support them, regardless of the kind or amount of evidence supporting the other side.⁵²⁰ The court of appeals opinion in *Tennessee Central Ry. v. Pharr* expressly stated that it had examined only evidence in support of the agency determination under review.⁵²¹ The Supreme Court suggested this in *Tennessee Cartage Co.* and in other opinions.⁵²² Moreover, *Tennessee Cartage Co.* equated the test applicable in reviewing an agency's factual determinations to the test used by an appellate court in reviewing both a jury verdict and factual findings by a trial judge in a non-jury case.⁵²³ It appears that an appellate court, in reviewing jury verdicts, would look only to evidence in support of the jury determination.⁵²⁴

In addition to the question of whether the reviewing court will look to only one side of the record in assessing the sufficiency of the evidence before an agency, there is the further question of how much evidence, whether viewed in isolation or upon the "whole record," is sufficient to sustain agency action on court review. The *Tennessee Cartage Co.* court furnished some basis for evaluating the scope of review of an agency's factual determinations by indicating that the

520. Justice Frankfurter felt that the belief was justified that the review requirement under the Wagner Act had been so interpreted by the United States Supreme Court. 340 U.S. at 477-78.

521. *Tennessee Cent. Ry. v. Pharr*, 29 Tenn. App. 531, 198 S.W.2d 289 (1946).

522. Thus in *Tennessee Cartage Co.*, in upholding a determination of the Railroad and Public Utilities Commission because it was supported by "substantial or material evidence" the court described only the evidence in support of the Commission determination although contrary evidence was in the record. Compare *Hoover Motor Express Co. v. Taylor*, 185 Tenn. 88, 94-95, 203 S.W.2d 366, 369 (1947).

"We think there is evidence of a material and convincing character to support the Chancellor's decree [dismissing petition for certiorari from the Railroad and Public Utilities Commission]. . . .

"It is only fair to say that there is considerable evidence in the transcript which supports the contention of the protestants that the present service is adequate, competent, and satisfactory.

". . . The Chancellor, after giving full consideration to the evidence, said, 'Unquestionably, there is material evidence in the record to support the finding of the Commission.' He cited the case of *Dunlap et al. v. Dixie Greyhound Lines* . . . holding that 'the Court may not substitute its judgment for that of the Commission.' In following this decision, he was eminently correct."

See *Evers v. Hollman*, 196 Tenn. 364, 372, 268 S.W.2d 97, 101 (1954): "It [the Circuit Court under a writ of common law certiorari] may review the evidence solely, for the purpose, and to the extent, of determining whether any of it that is material supports the action of the Beer Board." Cf. *Gulf, M. & O.R.R. v. Railroad & Pub. Util. Comm'n*, 38 Tenn. App. 212, 219, 271 S.W.2d 23, 26 (1954) stating that a court was not authorized to effect "a cancellation of the [Railroad and Public Utilities] Commission's order on the ground that, although there was material substantial evidence to support the Commission's findings, the evidence strongly preponderated against it."

523. 184 Tenn. at 418-19, 199 S.W.2d at 121.

524. *Anderson-Gregory Co. v. Lea*, 370 S.W.2d, 934, 945 (Tenn. Ct. App. 1963); *Methodist Hosp. v. Ball*, 362 S.W.2d 475, 480 (Tenn. Ct. App. 1961).

evidence required was that amount which would support a jury verdict or a factual finding by a trial judge in a non-jury case. In this connection the court quoted from an earlier Tennessee Supreme Court opinion⁵²⁵ to the effect that "more than a 'scintilla' [of evidence] is required." Subsequent decisions have adverted to the "scintilla" phrase in ruling that the evidence before an agency was sufficient to support its findings.⁵²⁶ The "more-than-a-scintilla" language had been used earlier to describe the scope of review over administrative findings exercised by the federal courts during the pre-Administrative Procedure Act period,⁵²⁷ a scope of review that, as evidenced in some federal Supreme Court and lower court decisions, was enlarged in emphasis by that act⁵²⁸ even when considered apart from the act's whole-record approach. During the 1950's one commentator upon Tennessee administrative procedure gave some attention to the qualifying word "any" in the "any material evidence" phrase.⁵²⁹ He felt, perhaps incorrectly, that the Tennessee Supreme Court was narrowing the scope of review. Certainly, to the extent that the word "any" is given a literal meaning by the courts, the Tennessee test would not be a quantum-type test.⁵³⁰

In summary, it appears that the *Tennessee Cartage Co.* equation of the scope of review over agency action used by the Tennessee courts with that used by the federal courts has not been true since at least 1951 when the review provisions of the federal Administrative Proce-

525. *Brenizer v. Nashville, C. & St. L. Ry.*, 156 Tenn. 479, 484, 3 S.W.2d 1053, 1054, 8 S.W.2d 1099 (1928).

526. *Hoover Motor Express Co. v. Taylor*, *supra* note 522, at 93-94, 203 S.W.2d at 368 reaffirmed *Tennessee Cartage Co.* both in its adoption of a "substantial evidence" test and in its statement that more than a scintilla of evidence was required to sustain the validity of an agency factual determination. In *Blue Ridge Transp. Co. v. Pentecost*, 208 Tenn. 94, 99, 343 S.W.2d 903, 906 (1961) the court, in upholding an action of the Public Service Commission, stated that the evidence before that agency was "far more than a mere scintilla of evidence."

527. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

528. *Universal Camera Corp. v. NLRB*, *supra* note 519, at 490.

529. See Seligman, *Administrative Law—1959 Tennessee Survey*, 12 VAND. L. REV. 1057, 1060 (1959) who contrasts "any material evidence" with "substantial and material evidence." The inference contained in the Seligman article seems to be that "substantial and material evidence" was the *Tennessee Cartage Co.* test and that the court in recent opinions has weakened that test by using the "any material evidence" phrase. Seligman was also troubled by the court's giving "every reasonable presumption in favor of the lawfulness" of an order of the Tennessee Public Service Commission in *Blue Ridge Transp. Co. v. Hammer*, 203 Tenn. 393, 396, 313 S.W.2d, 431, 433 (1958).

530. Compare *Hoover Motor Express Co. v. Taylor*, *supra* note 522, at 92, 203 S.W.2d at 368 where the court stated that the question for decision was whether there was "in the record that quantum of evidence necessary to base a finding by the Chancellor that there was material or substantial evidence in the cause to warrant the Commission granting the certificates applied for." See also *Putnam County Beer Bd. v. Speck*, 184 Tenn. 616, 621, 201 S.W.2d 991, 993 (1947) (contrasting "no evidence" with "any material evidence").

ture Act were construed by the United States Supreme Court.⁵³¹ Since the Tennessee courts have continued to cite *Tennessee Cartage Co.* without advertent to the effect of the changed scope of federal review,⁵³² and since the commentators have failed to point out the relevancy of the new scope of federal review to a proper understanding of *Tennessee Cartage Co.*, some confusion about a reviewing court's function may exist in Tennessee. This confusion concerns the reviewing court's use of a one-sided-record approach and the degree to which it scrutinizes the evidence supporting agency action. Whether the scope of review exercised by Tennessee courts over administrative actions has narrowed since the *Tennessee Cartage Co.* case, the broadened scope of federal review may magnify whatever narrowing may have occurred.

F. *Statutory Interpretation as a "Fact" Question.*—An agency is called upon to apply statutory terms to given factual situations. In so doing, it is giving meaning to statutory terms which previously may have been vague or ambiguous; consequently, the agency is in effect "interpreting" the statute in its application to the problem at hand.⁵³³ This action has at times been described as a decision of a question of fact to which the any-material-evidence rule applies.⁵³⁴ Utilization of the question-of-fact terminology would appear to be a shorthand method of saying that the decision concerning the application of a broad statutory term to a given factual situation properly belongs to the agency rather than to the courts.⁵³⁵ To the extent that a broad application is not thereby imparted to the statutory term, the question-of-fact terminology suggests that the decision is of major significance only to the immediate parties, and that in the colloquial sense no "legal rule" applicable to third persons has emerged from the decision. A number of Tennessee cases have properly allocated policy decision-making in routine cases to the agencies concerned through the use of "fact" terminology.⁵³⁶ It may be relevant to point out, however, that a

531. *Universal Camera Corp. v. NLRB*, *supra* note 519.

532. In none of the following cases which reviewed agency action and which have cited *Tennessee Cartage Co.* has the changed scope of federal review been adverted to: *Blue Ridge Transp. Co. v. Pentecost*, *supra* note 526; *Continental Tenn. Lines, Inc. v. Fowler*, 199 Tenn. 365, 287 S.W.2d 22 (1956); *Hoover Motor Express Co. v. Taylor*, *supra* note 522; *Roberts v. Brown*, 43 Tenn. App. 567, 310 S.W.2d 197 (1957); *Gulf, M. & O.R.R. v. Railroad & Pub. Util. Comm'n*, *supra* note 522.

533. Cf. Sanders, *Administrative Law—1955 Tennessee Survey*, 8 VAND. L. REV. 940, 948-49 (1955).

534. See note 536 *infra*.

535. Cf. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507-08 (1951); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *NLRB v. Hearst Publications, Inc.*, *supra* note 516, at 130-31.

536. *Miller v. Wiley*, 190 Tenn. 498, 230 S.W.2d 979 (1950); *Ezell v. Hake*, 184 Tenn. 319, 198 S.W.2d 809 (1947); *Reese v. Hake*, 184 Tenn. 423, 199 S.W.2d 569

limited review is more appropriate in connection with those agencies in which policy development occurs in non-accusatory contexts.

IX. SELECTED TENNESSEE AGENCIES

A. *The Regulatory Boards.*—The several regulatory boards⁵³⁷ which exercise general supervision over certain trades and professions and which possess powers over licensing, license revocation, and license suspension are governed by diverse procedures. That diversity may be intentional, but in some instances it appears not to be planned.

Some of these statutes contemplate license revocation or suspension hearings on complaints made to a board by private parties,⁵³⁸ while

(1947). *But see* Adams v. American Lava Corp., 188 Tenn. 69, 216 S.W.2d 728 (1948); Clinton v. Hake, 185 Tenn. 476, 206 S.W.2d 889 (1947). *Cf.* Milne Chair Co. v. Hake, 190 Tenn. 395, 230 S.W.2d 393 (1950). In the *Clinton* and *Adams* cases the question of whether the then unemployment compensation statute specifically provided for coverage of strikers (after a four-week waiting period) was presented to the Tennessee Supreme Court. Although those decisions did decide the broad question as to whether the statute specifically included strikers in its coverage, the court evaded some of its responsibility for deciding a major policy question by holding that the Board of Review for unemployment compensation cases could decide each case on its "facts" as to whether the strikers involved were or were not available for work and hence whether they were or were not eligible for compensation. *Cf.* Sanders, *supra* note 533, at 950, commenting on Louisville & N.R.R. v. Fowler, 197 Tenn. 266, 271 S.W.2d 188 (1954).

537. The regulatory boards here considered are the state board of accountancy, TENN. CODE ANN. tit. 62, ch. 1; the state board of examiners for architects and engineers, TENN. CODE ANN. tit. 62, ch. 2; the board of barber examiners, TENN. CODE ANN. tit. 62, ch. 3; the state board of cosmetology, TENN. CODE ANN. tit. 62, ch. 4; the board of funeral directors and embalmers of Tennessee, TENN. CODE ANN. tit. 62, ch. 5; the state board for licensing general contractors, TENN. CODE ANN. tit. 62, ch. 6; the Tennessee real estate commission, TENN. CODE ANN. tit. 62, ch. 13; the state board of examiners for registered professional sanitarians, TENN. CODE ANN. tit. 62, ch. 17; the state licensing board for the healing arts, TENN. CODE ANN. tit. 63, ch. 1; the board of registration in chiropody, TENN. CODE ANN. tit. 63, ch. 3; the state board of chiropractic examiners, TENN. CODE ANN. tit. 63, ch. 4; the state board of dental examiners, TENN. CODE ANN. tit. 63, ch. 5; the state board of medical examiners, TENN. CODE ANN. tit. 63, ch. 6; the Tennessee board of nursing, TENN. CODE ANN. tit. 63, ch. 7; the state board of optometry, TENN. CODE ANN. tit. 63, ch. 8; the state board of osteopathic examination and registration, TENN. CODE ANN. tit. 63, ch. 9; the state board of pharmacy, TENN. CODE ANN. tit. 63, ch. 10; the state board of examiners in psychology, TENN. CODE ANN. tit. 63, ch. 11; the state board of veterinary medical examiners, TENN. CODE ANN. tit. 63, ch. 12; the Tennessee board of dispensing opticians, TENN. CODE ANN. tit. 63, ch. 14.

538. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 62-618 (1955) (state board for licensing general contractors), 62-1324 (1955) (real estate commission), 63-417 (1955) (state board of chiropractic examiners), 63-724 (1955) (Tennessee board of nursing), 63-1020 (Supp. 1966) (state board of pharmacy), 63-1220 (Supp. 1966) (state board of veterinary medical examiners). TENN. CODE ANN. § 62-1705 (Supp. 1966) contemplates a complaint by the state board of examiners for registered sanitarians upon a sworn accusation of a private party.

others contemplate hearings only when the board itself is the complainant⁵³⁹ (although the board may be prompted to act at the request of a private party). Some of the statutes which contemplate proceedings upon private party complaints have embodied procedures designed to safeguard the rights of the accused. Thus, provisions are made in some statutes for sworn complaints,⁵⁴⁰ for action on a complaint within three months,⁵⁴¹ and for the suppression of a complaint without a hearing if the board finds it frivolous.⁵⁴²

Notice provisions, as might be expected, vary a great deal with various boards,⁵⁴³ but no great harm would seem to result from this diversity. Additional examples of diversity can be illustrated through other statutory provisions. For example, some statutes require that witnesses at a hearing be sworn,⁵⁴⁴ and others do not. Some of the statutes⁵⁴⁵ give private parties the right to appear by counsel in

539. TENN. CODE ANN. §§ 62-323 (1955) (board of barber examiners), 62-429 (1955) (board of cosmetology), 62-525 (1955) (board of funeral directors and embalmers), 63-124 (1955) (state licensing board for the healing arts), 63-323 (1955) (board of registration in chiropody), 63-555 (Supp. 1966) (state board of dental examiners), 63-620 (state board of medical examiners), 63-1119 (Supp. 1966) (state board of examiners in psychology), 63-823 (1955) (Tennessee board of optometry), 63-912 (Supp. 1966) (state board of osteopathic examination), 63-1410 (Supp. 1966) (Tennessee board of dispensing opticians). The statutory provisions which pertain to accountants seem to contemplate complaints to the administrative committee of the board of accountancy, TENN. CODE ANN. § 62-125 (Supp. 1966), with formal revocation proceedings conducted by the board, apparently on the complaint of the board upon the recommendation of the administrative committee. TENN. CODE ANN. §§ 62-125, 62-138 (Supp. 1966).

540. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 62-1324 (1955) (real estate commission), 62-1705 (Supp. 1966) (state board of examiners for registered professional sanitarians), 63-724 (1955) (Tennessee board of nursing), 63-1220 (Supp. 1966) (state board of veterinary medical examiners).

541. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 63-724 (1955) (Tennessee board of nursing), 63-1220 (Supp. 1966) (state board of veterinary medical examiners) (3 month period may be extended to one year by board). Cf. TENN. CODE ANN. § 63-417 (1955) which requires a hearing before the board of registration in chiropody within 20 days from a preliminary license suspension.

542. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 62-1324 (1955) (real estate commission) (complaint suppression authorized if complaint fails to "make out a prima facie case"), 63-724 (1955) (Tennessee board of nursing), 63-1220 (Supp. 1966) (state board of veterinary medical examiners).

543. The variation is principally in terms of the period of time required for notice. It would be desirable to give notice of procedural rights in a notice and to state the charges with some degree of specificity. See text accompanying note 442 *supra*. See also text accompanying notes 201-08, *supra*.

544. TENN. CODE ANN. § 62-1705 (Supp. 1966) (state board of examiners for registered professional sanitarians).

545. TENN. CODE ANN. §§ 62-138 (Supp. 1966) (board of accountancy), 62-215 (1955) (state board of examiners for architects and engineers), 62-618 (1955) (state board for licensing general contractors), 62-1326 (1955) (real estate commission), 62-1705 (Supp. 1966) (state board of examiners for registered professional sanitarians),

license revocation proceedings, but others⁵⁴⁶ do not. Some⁵⁴⁷ statutes expressly give private parties the right to cross-examine witnesses while others⁵⁴⁸ do not. Only a few⁵⁴⁹ statutes expressly confer upon private parties the right to introduce evidence, and only a few statutes expressly require a record to be made of license revocation proceedings.⁵⁵⁰

63-124 (1955) (state licensing board for the healing arts), 63-417 (1955) (state board of chiropractic examiners), 63-555 (Supp. 1966) (state board of dental examiners), 63-620 (1955) (state board of medical examiners), 63-724 (1955) (Tennessee board of nursing), 63-823 (1955) (Tennessee board of optometry), 63-912 (Supp. 1966) (state board of osteopathic examination), 63-1220 (Supp. 1966) (state board of veterinary medical examiners), 63-1410 (Supp. 1966) (Tennessee board of dispensing opticians).

546. TENN. CODE ANN. §§ 62-323 (1955) (board of barber examiners), 62-429 (1955) (board of cosmetology), 62-525 (1955) (board of funeral directors and embalmers), 63-323 (1955) (board of registration in chiropody), 63-1020 (Supp. 1966) (state board of examiners in psychology).

547. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 62-1705 (Supp. 1966) (state board of examiners for registered professional sanitarians), 63-417 (1955) (state board of chiropractic examiners), 63-724 (1955) (Tennessee board of nursing), 63-1220 (Supp. 1966) (state board of veterinary medical examiners). In hearings before the board of accountancy, an accused is given the right to "make such defense as may be proper." TENN. CODE ANN. § 62-138 (Supp. 1966). It is not clear whether such a right would include a right to cross examine.

548. TENN. CODE ANN. §§ 62-429 (1955) (board of cosmetology), 62-525 (1955) (board of funeral directors and enbalmers), 62-618 (1955) (state board for licensing general contractors), 62-1326 (1955) (real estate commission), 63-124 (1955) (state licensing board for the healing arts), 63-321 (1955) (board of registration in chiropody), 63-555 (Supp. 1966) (state board of dental examiners), 63-620 (1955) (state board of medical examiners), 63-823 (1955) (Tennessee state board of optometry), 63-912 (Supp. 1966), (state board of osteopathic examination), 63-1020 (Supp. 1966) (state board of pharmacy), 63-1119 (Supp. 1966) (state board of examiners in psychology), 63-1410 (Supp. 1966) (Tennessee board of dispensing opticians).

549. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 62-618 (1955) (state board for licensing general contractors), 62-1326 (1955) (real estate commission). 63-724 (1955) (Tennessee board of nursing), 63-1220 (Supp. 1966) (state board of veterinary medical examiners), 62-1705 (Supp. 1966) (state board of examiners for registered professional sanitarians) (witnesses only; no express provision for non-testimonial evidence), 63-417 (1955) (state board of chiropractic examiners) (witnesses only; no express provision for non-testimonial evidence). The provision for court enforcement of subpoenas issued at the request of a private party to a license revocation hearing before the board of barber examiners, TENN. CODE ANN. § 62-323 (1955), seems to contemplate that a private party may introduce evidence before that board in such a hearing. What is contemplated by the provision that an accused may "make such defense as may be proper" in a license revocation hearing before the board of accountancy is unclear. TENN. CODE ANN. § 62-138 (Supp. 1966).

550. TENN. CODE ANN. §§ 62-525 (1955) (board of funeral directors and embalmers) (stenographic record), 62-1705 (Supp. 1966) (state board of examiners for registered sanitarians) (record), 63-417 (1955) (state board of chiropractic examiners). Cf. TENN. CODE ANN. § 63-533 (Supp. 1966) ("The proceedings of the board of dental examiners shall be recorded and shall constitute a public record.")

Although most⁵⁵¹ of the regulatory boards have subpoena power,⁵⁵² only in hearings before the board of barber examiners⁵⁵³ and the state board of examiners for registered professional sanitarians⁵⁵⁴ is a private party expressly given the benefit of the subpoena power as a matter of right. The reason for treating these particular hearings differently from hearings before other boards (such as the board of cosmetology⁵⁵⁵) is not immediately apparent. While the subpoena power granted to such boards often varies in scope, the variations are apparently not always intentional. Thus, for example, while most regulatory boards⁵⁵⁶ have the power to subpoena both witnesses and documents, the board of examiners for architects and engineers, the Tennessee Real Estate Commission, and the state board of examiners for registered professional sanitarians are expressly granted only the power to subpoena witnesses.⁵⁵⁷ The statutes which vest subpoena power in the boards do not always expressly provide a method for

551. The following boards apparently have no subpoena power: the board of funeral directors and embalmers, *cf.* TENN. CODE ANN. § 62-525 (1955); the state board for licensing general contractors, *cf.* TENN. CODE ANN. § 62-618 (1955); the board of registration in chiropody, *cf.* TENN. CODE ANN. § 63-323 (1955); the state board of chiropractic examiners, *cf.* TENN. CODE ANN. §§ 63-417, 63-420 (1955); the Tennessee board of nursing, *cf.* TENN. CODE ANN. §§ 63-724, 63-726, 63-727 (1955); the state board of psychologists, *cf.* TENN. CODE ANN. § 63-1119 (Sup. 1966); the state board of veterinary medical examiners, *cf.* TENN. CODE ANN. § 63-1220 (Supp. 1966); and the Tennessee board of dispensing opticians, *cf.* TENN. CODE ANN. § 63-1410 (Supp. 1966). The state board of osteopathic examiners which formerly did not have the subpoena power now possesses that power. TENN. CODE ANN. § 63-912 (Supp. 1966).

552. TENN. CODE ANN. §§ 62-138 (Supp. 1966) (board of accountancy), 62-204 (1955) (board of examiners for architects and engineers), 62-323 (1955) (board of barber examiners), 62-429 (1955) (board of cosmetology), 62-1326 (1955) (real estate commission), 62-1705 (Supp. 1966) (state board of examiners for registered professional sanitarians), 63-124 (1955) (state licensing board for the healing arts), 63-555 (Supp. 1966) (state board of dental examiners), 63-620 (1955) (state board of medical examiners), 63-823 (1955) (Tennessee state board of optometry), 63-912 (Supp. 1966) (state board of pharmacy). The state board of osteopathic examiners appears to have been given the subpoena power in 1963.

553. TENN. CODE ANN. § 62-323 (1955). The provisions vesting the real estate commission with the subpoena power seem to contemplate the issuance of subpoenas for parties other than the commission, but the statute does not appear to make the issuance of such subpoenas mandatory. TENN. CODE ANN. § 62-1326 (1955).

554. TENN. CODE ANN. § 62-1705 (Supp. 1966).

555. TENN. CODE ANN. § 62-429 (1955).

556. TENN. CODE ANN. §§ 62-323 (1955) (board of barber examiners) ("relevant books and papers"), 62-429 (1955) (board of cosmetology) ("books, records and papers"). Those statutes which refer to a power to "issue subpoenas, and enforce the attendance of witnesses" are unclear as to whether the subpoena power is limited to witnesses only. See TENN. CODE ANN. §§ 63-124 (1955) (state licensing board for the healing arts), 63-555 (Supp. 1966) (state board of dental examiners), 63-620 (1955) (state board of medical examiners), 63-823 (1955) (Tennessee state board of optometry), 63-912 (Supp. 1966) (state board of osteopathic examination).

557. TENN. CODE ANN. §§ 62-204 (1955), 62-1326 (1955), 62-1705 (Supp. 1966).

the enforcement of the subpoenas,⁵⁵⁸ some of them provide for court enforcement,⁵⁵⁹ others vest the boards with attachment powers to enforce subpoenas,⁵⁶⁰ and still others give the boards themselves the contempt power.⁵⁶¹ It will be observed that an enforcement power vested in the courts may be more consonant with the purpose of sharing the benefit of the subpoena power with private litigants.⁵⁶²

All of these boards pose the question of whether a commingling of the functions of investigation and adjudication, which is permitted to occur by statute, is either necessary or desirable.⁵⁶³ Apparently, alone among the regulatory boards, the board of accountancy is given, by statute, an executive committee which is vested with at least some investigative functions.⁵⁶⁴ To the extent that the committee is used to perform the principal investigative tasks, the commingling of investigative and adjudicating functions in the board of accountancy may be alleviated.⁵⁶⁵ Proper administration of the other boards would

558. TENN. CODE ANN. § 63-1020 (state board of pharmacy).

559. TENN. CODE ANN. §§ 62-323 (1955) (board of barber examiners), 62-555 (Supp. 1966) (state board of dental examiners), 63-912 (Supp. 1966) (state board of osteopathic examination). The state board of dental examiners previously possessed the contempt power. See note 561 *infra*.

560. TENN. CODE ANN. §§ 63-124 (1955) (state licensing board for the healing arts), 63-620 (1955) (state board of medical examiners), 63-823 (1955) (Tennessee state board of optometry), 63-912 (1955 & Supp. 1966) (state board of osteopathic examination).

561. TENN. CODE ANN. §§ 62-124 (1955) (state licensing board for the healing arts), 63-620 (1955) (state board of medical examiners), 63-823 (1955) (Tennessee state board of optometry). The state board of dental examiners formerly possessed the contempt power to enforce obedience to its subpoenas, Acts 1935, ch. 126 § 9, but the subpoena enforcement power has since been vested in the courts. TENN. CODE ANN. § 63-555 (Supp. 1966).

562. See text accompanying notes 463-64 *supra*. Compare the Massachusetts procedure which vests every party with the right to the issuance in the name of the agency of subpoenas which may be issued by a notary public, a justice of the peace, or the agency. The agency may modify or revoke such subpoenas upon petition of the persons subpoenaed. Enforcement of an unrevoked subpoena is done by a court upon application of the agency or the person upon whose request the subpoena was issued. MASS. ANN. LAWS ch. 30A, § 12 (1966).

563. See text accompanying notes 377-416 *supra*.

564. TENN. CODE ANN. § 62-125 (Supp. 1966).

565. The administrative committee itself is authorized to "receive and investigate complaints and to initiate and conduct investigations or hearings" concerning the conduct of public accountants and violations of chapter 1 of title 62 of TENN. CODE ANN. In any such case the committee is then required to "make recommendations and forward its report to the board" which is required to "review the findings of the committee" and "may accept, modify or reject the recommendations of the committee." The statute provides that any license applicant or any public accountant "who is aggrieved by any action taken by an administrative committee . . . may appeal to the board in accordance with rules and regulations to be prescribed by the board." The procedure may contemplate a *de novo* proceeding before the board with respect to the results of the administrative committee proceeding; on such assumption, the commingling of investigative and adjudicatory powers in the committee would be alleviated and the board itself would be separated from the investigative function. It is appropriate here

avoid the commingling of judging with inconsistent duties, however. For example, "impartial" investigative techniques might be used, or prosecutorial type investigations might be allocated to non-board members.

None of the statutes governing the procedures of the regulatory boards requires that the members of a board voting for the revocation of a license be present at a hearing or that they read the record of a hearing. These statutes usually provide that a quorum must be present in order for the board to act,⁵⁶⁶ and many statutes⁵⁶⁷ further provide that a license can be revoked only upon the concurrence of a specified number of votes (usually a majority of a fully-staffed board). Although this procedure may have an objective similar to the Revised Model Act's requirement⁵⁶⁸ that (in the absence of the proposal-for-decision-and-briefs-and-oral-argument procedure) a majority of the officials who are to render the final decision must have either heard the case or read the record, neither the Tennessee regulatory board procedure nor the Revised Model Act procedure seems to possess that degree of protection to which an accused should be entitled.⁵⁶⁹ It

to note that the procedures for a de novo hearing before the board apart from a license revocation proceeding are not described in the statute. It is also appropriate to point out the desirability of making the report and recommendations of the administrative committee available to the license applicant or public accountant concerned before the hearing before the board. Cf. *Mazza v. Cavicchia*, 15 N.J. 498, 105 A.2d 545 (1954). The desirability increases as the work of the administrative committee combines in an objectionable way investigating and judging activities. See text accompanying notes 377-416 *supra*.

566. TENN. CODE ANN. §§ 62-120 (Supp. 1966) (board of accountancy), 62-205 (1955) (state board of examiners for architects and engineers), 62-302 (1955) (board of barber examiners), 62-607 (1955) (state board for licensing general contractors), 62-1306 (1955) (Tennessee real estate commission), 63-533 (Supp. 1966) (state board of dental examiners), 63-603 (1955) (state board of medical examiners), 63-705 (1955) (Tennessee board of nursing), 63-808 (1955) (Tennessee state board of optometry), 63-902 (1955) (state board of osteopathic examination), 63-1104 (1955) (state board of examiners in psychology), 63-1203 (1955) (state board of veterinary medical examiners), 63-1401 (Supp. 1966) (Tennessee board of dispensing opticians).

567. TENN. CODE ANN. §§ 62-215 (1955) (state board of examiners for architects and engineers), 62-618 (1955), (state board for licensing general contractors), 62-1326 (1955) (Tennessee real estate commission), 63-724 (1955) (Tennessee board of nursing), 63-1119 (Supp. 1966) (state board of examiners in psychology. Cf. TENN. CODE ANN. §§ 63-303, 63-321 (1955) (board of registration in chiropody). A unanimous vote sustaining charges made against a chiropractor is required for the revocation of a license by the state board of chiropractic examiners. TENN. CODE ANN. § 63-417 (1955). A vote of 4/5ths of the entire state board of osteopathic examination was required for revocation of a license issued by that board under the now repealed TENN. CODE ANN. § 63-912 (1955). Compare TENN. CODE ANN. § 63-912 (Sup. 1966).

568. REVISED MODEL ACT § 11. See text accompanying notes 420-33 *supra*.

569. Many of the Tennessee statutes are so phrased as to permit a quorum to be present at a hearing, and to permit a differently composed quorum to revoke a license. Such a result could occur also under the Revised Model Act. A licensee would seem

seems desirable that all officials who are to render a decision be present at a hearing; absentee officials should be disqualified from voting adversely to the accused. Whether an official should be qualified to vote by merely reading the record probably ought to depend upon the extent to which a case turns upon an issue of demeanor evidence.⁵⁷⁰

At least three of the regulatory board statutes⁵⁷¹ expressly provide for the rendition of legal services to the respective boards by the office of the attorney general. The statutes⁵⁷² governing the board of accountancy and the board of osteopathic examination make provision for such legal services in connection with license revocation hearings, and the statute⁵⁷³ governing the real estate commission provides for such services generally "in connection with the affairs of the commission." Apart from statute, however, it appears that the attorney general's office is frequently involved in the actions of the regulatory boards.⁵⁷⁴ For example, when "questions of law" arise in connection with a revocation proceeding, it appears to be the practice for the boards to consult with the attorney general's office upon those questions.⁵⁷⁵ Some care should be taken to prevent the attorney general's representative from developing an adversary mentality which could affect his determination of whether an accused's activities constitute a "law" violation.

to receive a better guarantee of fair treatment from the New Mexico Uniform Licensing Act which provides as follows:

"Decision.—After a hearing has been completed the members of the board shall proceed to consider the case and as soon as practicable shall render their decision, provided that the decision shall be rendered by the board at a meeting where a majority of the members are present and participating in the decision. *All members who were not present throughout the hearing must thoroughly familiarize themselves with the entire record including all evidence taken at the hearing before participating in the decision.* In any case the decision must be rendered within sixty [60] days after the hearing." N.M. STAT. ANN. § 67-26-13 (1961) (Emphasis added.)

To the extent that the license revocation question turned on an issue of credibility, however, it might be better to prohibit adverse votes from board members who were not present at the hearing whether they read the record or not.

570. Cf. *NLRB v. Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951), stating that "those parts of the evidence which are lost in print become especially pregnant" and indicating that those who had no access to such "lost" evidence "should have hesitated to assume" that such lost evidence would not be controlling. *Id.* at 431. Accordingly, the court reversed the NLRB for reversing a trial examiner's fact findings because the NLRB did not have access to the demeanor evidence of the witnesses which could not be embodied in the printed record read by the NLRB.

571. TENN. CODE ANN. §§ 62-138 (Supp. 1966) (state board of accountancy), 63-912 (Supp. 1966) (state board of osteopathic examination), 62-1304 (1955) (Tennessee real estate commission).

572. TENN. CODE ANN. §§ 62-138, 63-1001 (Supp. 1966).

573. TENN. CODE ANN. § 62-1304 (1955).

574. Interview with Tennessee Attorney General, June 25, 1964.

575. *Ibid.*

B. *Commissioner of Revenue.*—The commissioner of revenue has general supervision over the state's collection of revenue. The state's share of real property taxes is collected primarily by local (county and municipal) officials. In the collection of these taxes, the commissioner's function is supervisory with respect to the local officials. The commissioner, however, has primary responsibility for the collection of certain other taxes, including the gift tax,⁵⁷⁶ the inheritance tax,⁵⁷⁷ the tax on income from stocks and bonds,⁵⁷⁸ the excise tax on corporate earnings,⁵⁷⁹ the corporate franchise tax,⁵⁸⁰ the sales tax,⁵⁸¹ the tobacco tax,⁵⁸² the gasoline tax,⁵⁸³ the motor vehicle fuel use tax,⁵⁸⁴ the tax on dealers in petroleum products,⁵⁸⁵ and certain other privilege taxes.⁵⁸⁶ In administering the taxes for which the commissioner has direct responsibility, his office usually audits reports which are filed with him. He is usually authorized to investigate further any matter he desires.⁵⁸⁷ Often this authorization embodies a power of subpoena over the taxpayers,⁵⁸⁸ their books and records,⁵⁸⁹ and sometimes other witnesses.⁵⁹⁰

The statutory procedures for the collection of the various taxes vary considerably. Under most of the statutes governing tax collection, the commissioner is authorized to issue distress warrants or otherwise to execute upon a taxpayer's property to collect the amount of taxes

576. TENN. CODE ANN. tit. 67, ch. 25.

577. TENN. CODE ANN. tit. 30, ch. 16.

578. TENN. CODE ANN. tit. 67, ch. 26.

579. TENN. CODE ANN. tit. 67, ch. 27.

580. TENN. CODE ANN. tit. 67, ch. 29.

581. TENN. CODE ANN. tit. 67, ch. 30.

582. TENN. CODE ANN. tit. 67, ch. 31.

583. TENN. CODE ANN. tit. 67, ch. 32.

584. TENN. CODE ANN. tit. 67, ch. 38.

585. TENN. CODE ANN. tit. 67, ch. 35.

586. TENN. CODE ANN. §§ 67-4315 through 67-4323 (1955, Supp. 1966).

587. *E.g.*, TENN. CODE ANN. §§ 67-2509, 67-2517 (1955) (gift tax), 67-2619 through 67-2626 (Supp. 1966) (tax on income from stocks and bonds), 67-3030, 67-3031 (1955) (sales tax), 67-3222 (1955) (gasoline tax), 67-3817 (Supp. 1966), 67-3829 (1955) (motor vehicle fuel use tax), 67-4321, 67-4322 (1955) (general revenue law).

588. *E.g.*, TENN. CODE ANN. §§ 67-2509, 67-2517 (1955) (gift tax), 67-2619 (Supp. 1966) (tax on income from stocks and bonds), 67-3030 (1955) (sales tax), 67-3829 (1955) (motor vehicle fuel use tax), 67-4321 (1955) (general revenue law).

589. *E.g.*, TENN. CODE ANN. §§ 67-2509, 67-2517 (1955) (gift tax), 67-2623 (Supp. 1966) (tax on income from stocks and bonds), 67-2714 (1955) (excise tax on corporate earnings), 67-2923 (1955) (corporate franchise tax), 67-3030 (1955) (sales tax), 67-3829 (Supp. 1966) (motor vehicle fuel use tax). *Cf.* TENN. CODE ANN. § 67-3502 (1955) (access to books and records of manufacturers and refiners of petroleum products), 67-311 (Supp. 1966) (access to books and papers of tobacco dealers), 67-3721 (1955) (access to records of dealers and refund permit holders in connection with gasoline tax).

590. *E.g.*, TENN. CODE ANN. §§ 67-2509 (1955) (gift tax), 67-3829 (1955) (motor vehicle fuel use tax), 67-4321 (1955) (general revenue law).

administratively determined to be due.⁵⁹¹ The taxpayer is given the right to pay the tax "under protest" and then to institute a suit for refund in court within thirty days after such protest payment.⁵⁹² The suit-for-refund provisions of the tax statutes are analogous to the provisions of the federal statutes which provide for taxpayers' refund suits in the federal district courts.⁵⁹³ The suit-for-refund provisions provide the taxpayer with the opportunity to have his case tried before an adjudicating body which is independent from the commissioner; hence, he can expect an impartial decision at least with respect to the so-called "basic" facts in issue.

The administrative determination of the taxes due is important not only because of its relation to the issuance of distress warrant collection procedures but also because of its connection with the judicial decision in a suit for refund.⁵⁹⁴ The statute governing the excise tax on corporate earnings provides⁵⁹⁵ that "in all matters requiring the exercise of judgment and discretion as to what may or may not be net earnings, the judgment and opinion of . . . [the] commissioner shall be final and conclusive" except for the suit-for-refund procedure. In such a suit, the commissioner's determination will be upheld, however, unless he used an "obviously arbitrary" method of determining earnings or abused his discretion.⁵⁹⁶ The statute governing the administration of the gasoline tax provides⁵⁹⁷ that an administrative determination of taxes owed may be made upon failure to file a required report "or to pay the taxes due" and that the commissioner's determination "shall be deemed prima facie correct and the burden of proof shall be upon the distributor or dealer to prove its incorrectness in any action growing out of matters and things contained therein." In a somewhat similar vein, the statute governing the administration of the sales tax provides⁵⁹⁸ that an administrative determination made "in the event any dealer fails to make a report and pay the tax . . . or . . . makes a grossly incorrect report, or a report that is false and

591. TENN. CODE ANN. §§ 67-2201 (1955) (generally), 67-2520 (1955) (gift tax), 67-2718 (Supp. 1966) (excise tax on corporate earnings), 67-2929 (Supp. 1966) (corporate franchise tax), 67-3033 (Supp. 1966) (sales tax), 67-3224 (1955) (gasoline tax), 67-4324 (1955) (general revenue).

592. TENN. CODE ANN. §§ 67-2303 through 67-2310 (1955) (generally), 67-2524 (1955) (gift tax), 67-2629 (Supp. 1966) (tax on income from stocks and bonds), 67-2930 (1955) (corporate franchise tax), 67-3033 (Supp. 1966) (sales tax).

593. 28 U.S.C. § 1346 (1964).

594. In addition to the administrative determinations referred to in text compare the now repealed provisions of TENN. CODE ANN. §§ 67-2619 through 67-2630 (1955) providing for a full administrative hearing prior to such a determination of tax liability.

595. TENN. CODE ANN. § 67-2715 (1955).

596. *Southern Coal Co. v. McCannless*, 183 Tenn. 457, 192 S.W.2d 1003 (1946).

597. TENN. CODE ANN. §§ 67-3222, 67-3223 (1955).

598. TENN. CODE ANN. § 67-3031 (1955).

fraudulent" shall be "prima facie correct and the burden to show the contrary shall rest upon the dealer." The extent to which the prima facie correctness of the commissioner's determination can affect the administration of the sales tax, however, may be less than in the case of the gasoline tax.⁵⁹⁹

The payment of the sales tax,⁶⁰⁰ the tobacco tax,⁶⁰¹ the gasoline tax,⁶⁰² and the motor vehicle fuel use tax⁶⁰³ is enforced by the commissioner through his power to revoke licenses or permits to do business for failure to file returns or pay taxes due. In the case of the sales tax and the gasoline tax, license revocation is additional to the distress warrant method of collection. To the extent that the license revocation procedures preserve the taxpayer's remedy of paying an asserted tax under protest and suing for refund, the taxpayer is given the opportunity of having a dispute concerning the amount of taxes owed tried before an independent body. The statutes do not always make it clear, however, that the suit for refund is preserved as an effective remedy. Since the taxpayer's suit for refund generally cannot be filed before the commissioner (or other tax collecting official) has instituted proceedings against the taxpayer's property, the commissioner seems to have the power of forestalling a refund suit. Where taxes are collected pursuant to the license system, the commissioner possibly could revoke the license or permit of the taxpayer for nonpayment of taxes before proceeding with the issuance of a distress warrant. For example, section 67-3222 of the Tennessee Code Annotated provides that upon the failure of a taxpayer to pay the amount of gasoline taxes "due," it is the commissioner's duty to revoke his permit and then to proceed against the taxpayer by distress warrant. It is possible that the threat of a revocation, which would precede court review of taxes due, would effectively coerce the taxpayer to forego the court test nominally given by the statutes.⁶⁰⁴

Where license revocation proceedings are based upon a failure to pay the amount of taxes deemed by the commissioner to be due,

599. TENN. CODE ANN. § 67-3029 (Supp. 1966), provides for such prima facie correctness of the commissioner's sales tax estimate upon the satisfaction of any one of three conditions, each of which probably ought to be read in the context of the others in order to determine its proper meaning. See text accompanying note 598. The wording of the analogous gasoline tax provision, TENN. CODE ANN. § 67-3222 (1955) differs and may be exposed to an interpretation that a prima facie correct administrative determination can be made where an amount of tax is paid which is officially determined to be incorrect. Cf. TENN. CODE ANN. § 67-2927 (1955).

600. TENN. CODE ANN. § 67-3041 (Supp. 1966).

601. TENN. CODE ANN. § 67-3117 (Supp. 1966).

602. TENN. CODE ANN. § 67-3311 (1955).

603. TENN. CODE ANN. § 67-3822 (Supp. 1966).

604. Cf. *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942).

some procedure ought to be provided in which the amount of taxes allegedly due could be challenged⁶⁰⁵ apart from the coercive method of a license revocation proceeding. Where such proceedings depend upon the resolution of a question of "fact" which can best be determined by a judgment about the credibility of witnesses as determined by personal observation, the power of the commissioner to revise the factual determination of a hearing officer perhaps ought to be curtailed.⁶⁰⁶ Before the commissioner reverses a fact finding of a hearing officer favorable to a private party, the commissioner should have read the relevant portions of the record.⁶⁰⁷ Reading the record is probably contemplated by the statutes which refer to a revision by the commissioner "upon review of the record."⁶⁰⁸ It would perhaps be advisable, for purposes of review by the commissioner, to include in the record the briefs of the parties as well as testimony.⁶⁰⁹ In relatively simple proceedings, argument before the commissioner in addition to argument before a hearing officer probably would be unnecessary if it can be assumed that the commissioner will read relevant portions of the record and that the parties have said everything they have to say before the hearing officer. However, when an administrative hearing centers around the "evaluation" of the facts brought out in a hearing, the commissioner ought to be cautious about revising the hearing officer's evaluation if it depends upon an issue not argued before the hearing officer.⁶¹⁰

It appears to be the practice in the revenue department to refer "questions of law" to the attorney general for decision.⁶¹¹ Although the attorney general is required by statute to give to state officials "when called on, any legal advice required in the discharge of their official duties"⁶¹² and "to give to the officers of the state, when called on, written legal opinions on all matters submitted by them in the discharge of their official duties,"⁶¹³ it would appear that these statutory provisions were drafted without license revocation proceedings or

605. The procedure presently used seems to be informal discussions with revenue department personnel. Such a procedure would seem to be a good one, although some thought might appropriately be given to structuring those discussions in such a way that the time of higher echelon personnel of the department is not consumed needlessly. See text accompanying notes 620-21 *infra*. This procedure, however, does not provide for a determination of taxes due by a body outside of the department.

606. *Cf.* text accompanying note 385 *supra*.

607. *Cf.* text accompanying notes 417-33 *supra*.

608. TENN. CODE ANN. §§ 67-3041 (Supp. 1966) (sales tax), 67-3123 (Supp. 1966) (tobacco tax).

609. The suggestion is that the commissioner's review of the record should include familiarity with the contentions of the parties, preferably as made by the parties.

610. *Cf.* text accompanying note 370 *supra*.

611. Interview with Tennessee Commissioner of Revenue, June 15, 1964.

612. TENN. CODE ANN. § 8-609(2) (1955).

613. TENN. CODE ANN. § 8-609(6) (1955).

other adjudications in mind. The resolution of a "question of law" frequently depends upon the facts to which the law is applied, and in some instances may even depend upon the manner in which the question is phrased. For these reasons, it may not be inappropriate to permit private parties to submit briefs to the attorney general with respect to the resolution of the "question of law," or at least to require that the briefs which are submitted to an agency in connection with such a question be transmitted to the attorney general's office. To the extent that an important question is determined to be a "question of law" which is resolved by the attorney general, parties ought to be made aware of that determination and ought to be permitted to submit briefs upon such question.

The relation of the attorney general to the commissioner of revenue poses further questions about the development of the revenue department "policy." In the language of the Tennessee revenue administrators, no middle area between "fact" and "law" exists in which policy is developed. To the extent that there is an attempt to maintain such an exclusive dichotomy in practice, the attorney general, through his determinations of "questions of law" and through his approval of revenue rules and regulations, is shaping many of the policies of the revenue department.⁶¹⁴ Some consideration should be given to whether such administration is desirable. Although a tax specialist in the attorney general's office may promote informed decisions upon "legal" questions, power over major tax policy decisions is placed outside of the commissioner of revenue's office. Moreover, the separation of an important policy formulator from the department of revenue detracts somewhat from the justification for the existing commingling of investigating and adjudicating functions within the department.⁶¹⁵

A further word about the relation of the attorney general to the department of revenue is necessary. The revenue department feels that it must be guided by the opinions of the attorney general upon questions of law.⁶¹⁶ The department keeps numerous unpublished opinions of the attorney general on file for the purpose of guiding its staff in the administration of the revenue statutes. In connection with the sales tax alone, there are over one thousand opinions of the attorney general on file with the department.⁶¹⁷ These opinions appear to be "unpublished laws" in the objectionable sense of that

614. This depends, of course, upon the scope which "questions of law" are given in practice.

615. The coordination of policies between enforcement officials and adjudicating officials is a prime reason for permitting a commingling of enforcement and adjudicating functions in one agency. See text accompanying notes 284-96 *supra*.

616. Interview with Tennessee Commissioner of Revenue, June 15, 1964.

617. *Ibid.*

term.⁶¹⁸ The commissioner has refrained from publishing these opinions because of lack of funds, but he feels that such publication, by enlightening the public about the policies followed by the department, would save administrative expense in the long run. Presently, the department is obliged to deal with taxpayers individually about questions which are fully explained in the attorney general's opinions.⁶¹⁹

Finally, it should be noted that the commissioner feels⁶²⁰ that more of a hearing ought to be provided with respect to the revocation of a license to do business. He believes that a licensee would feel better about a revocation proceeding if it were conducted by a person independent of the department which was prosecuting him. The commissioner also tends to be sympathetic toward the idea of a tax court or other form of external separation of functions, although he indicated that the department has not made a full study of the idea and would not speculate concerning ultimate approval of such a procedural arrangement. Again, however, he is of the opinion that a taxpayer would feel better about tax rulings if there were some way in which he could appeal outside the department without going to the expense of a tax refund suit.

The commissioner has indicated that some administrative reform of his department would be advisable, especially reform designed to promote more efficient handling of the numerous tax questions that come before his department. As an example, it appears that thirty to forty gasoline tax violations occur each month. Questions of tax assessment are usually handled by time-consuming informal negotiations with the divisional directors of the department. These violations and negotiations should be handled expeditiously, without consuming undue time on the part of higher-eschelon personnel. The publication of the attorney general's opinions, department policies, and an appellate structure of review might serve a useful purpose in conserving the time of these officers. Possibly consideration should be given to an authorization enabling the department to establish its own internal tax assessment procedures, including appellate review staffs.

C. *Commissioner of Agriculture (partial survey)*.⁶²¹—The commissioner of agriculture supervises generally the implementation of various

618. See text accompanying notes 163-69 *supra*.

619. Interview with the Tennessee Commissioner of Revenue, June 15, 1964.

620. The statements in text which expressly describe the commissioner's feelings with respect to matters connected with the administration of the revenue department are based upon an interview with the commissioner on June 15, 1964.

621. The survey of the administrative activities of the Commissioner of Agriculture is limited to titles 43 and 44 of TENN. CODE ANN.

product regulation statutes⁶²² and other agricultural regulatory statutes.⁶²³ Product regulation is administered by the commissioner through a process of inspection and sampling in connection with seeds, commercial fertilizers, economic poisons, and commercial feed.⁶²⁴ Important in connection with product regulation is insurance that product sampling and analysis is properly done. Disputes over the commissioner's analysis appear to occur only infrequently; but when they do occur, the commissioner will attempt to run a sample through a second analysis if the party affected has arrived at a different analysis.⁶²⁵ Although the older statutes do not provide for a portion of a product sample to be supplied to a manufacturer,⁶²⁶ it would seem to be a relatively simple matter for the commissioner to direct that duplicate product samples be supplied to any manufacturer from whom one is taken. Sampling and analysis may have serious adverse effects upon a manufacturer; for example, the requirements in the commercial fertilizer regulatory statutes and in the Tennessee Commercial Feed Law provide for refunds for defective products or payments to the state in lieu of refunds.⁶²⁷ In such situations, checks on the sampling and analysis of the department should be available. Independent analysis by the party affected—the surest way to find an error in the department analysis—ought to be permitted as a check on official analysis. Also, in both refund and license-revocation proceedings, the state officials who collect samples probably should be subject to cross-examination in an administrative hearing.⁶²⁸

Under a number of statutes the commissioner is authorized to seize offending products. Specifically, he is authorized to seize defective agricultural and vegetable seeds and to hold them until the defect is cured.⁶²⁹ Assuming that such a seizure is reviewable, the statutes are silent about the effect to be given an official analysis upon that

622. *E.g.*, Tennessee Insecticide, Fungicide and Rodenticide Law, TENN. CODE ANN. tit. 43, ch. 7; TENN. CODE ANN. tit. 43, ch. 9 (agricultural seeds); TENN. CODE ANN. tit. 43, ch. 10 (vegetable seeds); TENN. CODE ANN. tit. 43, ch. 11 (commercial fertilizers); TENN. CODE ANN. tit. 44, ch. 11 (Tennessee Commercial Feed Law).

623. See generally TENN. CODE ANN. tits. 43, 44 (1955).

624. TENN. CODE ANN. tit. 43, ch. 9 (agricultural seeds), tit. 43, ch. 10 (vegetable seeds), tit. 43, ch. 11 (commercial fertilizer), tit. 43, ch. 7 (economic poisons), tit. 44, ch. 11 (commercial feed).

625. Interview with Tennessee Commissioner of Agriculture, June 24, 1964.

626. The Commercial Feed Law of 1963, however, provides for forwarding a portion of the sample in question to the manufacturer or distributor concerned. TENN. CODE ANN. § 44-1110(d) (1964).

627. TENN. CODE ANN. §§ 43-1103, 44-1111 (1964).

628. Compare APA § 7(c) MODEL ACT § 9(3), REVISED MODEL ACT § 10(3). Cross examination of the laboratory analysts perhaps ought to be allowed in the absence of a check in the form of a second test.

629. TENN. CODE ANN. §§ 43-915, 43-1009 (1964).

review. The commissioner is also authorized⁶³⁰ to issue a "stop sale, use, or removal" order with respect to offending economic poisons; such a seizure is made judicially reviewable upon a prayer by the owner or custodian of the poison "for a judgment as to the justification of said order."⁶³¹ The commissioner is also empowered to seize non-complying poisons on complaint to a court which must order the poison to be condemned if it finds the poison to be in violation of the act.⁶³² In the case of a condemnation or a "stop sale, use, or removal" order, a court would probably find an unchallenged state chemist's analysis to be adequate grounds for the former⁶³³ and a sufficient "justification"⁶³⁴ for the latter; but it is unclear whether the court would admit evidence challenging the state chemist's analysis and whether the court would itself resolve a conflict between experts, in deciding if a violation had occurred. Unless it would give rise to a serious enforcement problem, the court ought to permit the state chemist who made the analysis to be subjected at least to the check of cross-examination.⁶³⁵ Some question may also exist about the efficacy of court review of "withdrawal from distribution" orders which the commissioner is authorized⁶³⁶ to issue under the Tennessee Commercial Feed Law of 1963. A failure to eliminate the defective condition of the feed specified in the order within thirty days from its issuance empowers the commissioner to sell the allegedly defective feed at public sale and to pay the proceeds of the sale into the state treasury.⁶³⁷ Although administrative review might be able to occur within thirty days, it is not clear that court review could occur within that time. Unless court review can occur before the sale, it is unclear what remedy the court can provide to a person whom it determines to have been wrongfully injured by an administrative order.⁶³⁸ The statute, by expressly forbidding a supersedeas or stay of a permit revocation order, may impliedly permit the issuance of a supersedeas in connection with a "stop sale, use, or removal" order upon application for certiorari review; some benefit might occur from an express prohibition of a sale until review procedures have been exhausted or, in the alterna-

630. TENN. CODE ANN. § 43-710 (1964).

631. *Ibid.*

632. TENN. CODE ANN. § 43-711 (1964).

633. TENN. CODE ANN. § 43-711 (1964) does not expressly provide a method for ascertaining whether an economic poison is "in violation" of the law.

634. TENN. CODE ANN. § 43-710 (1964).

635. See note 628 *supra*.

636. TENN. CODE ANN. § 44-1111 (1964).

637. *Ibid.*

638. The difficulty would seem to arise from the fact that the money would already have been paid into the state treasury in most instances.

tive, from a provision creating a right of reimbursement at least in the amount collected from a sale later determined to be wrongful.⁶³⁹

Under the Tennessee Insecticide, Fungicide and Rodenticide Law⁶⁴⁰ registration of economic poisons with the commissioner is necessary before they can be sold lawfully within the state.⁶⁴¹ Registration of a poison must be granted "if it appears to the commissioner that the composition of the article is such as to warrant the proposed claims" and if the article, labeling, and other material submitted to the commissioner comply with the act.⁶⁴² Embodying a "second chance" provision analogous in some ways to the "second chance" licensing provision of the Revised Model Act,⁶⁴³ the law provides that, if the commissioner determines that the article, labeling, or material do not so comply, he is required to notify the registrant of the manner in which the article is defective so that the registrant will have the opportunity to make the necessary corrections.⁶⁴⁴ The commissioner is authorized to refuse to register or to cancel an existing registration; upon satisfactory proof that the registrant has been guilty of fraudulent and deceptive practices in the evasions or attempted evasions of the provisions of this chapter or any rules and regulations promulgated thereunder; provided, that no registration shall be revoked or refused until the registrant shall have been given a hearing by the commissioner. Although the criteria for a refusal to register do not correspond to the criteria governing approval of registration,⁶⁴⁵ the principal problem posed by the statute is whether the procedures incident to a hearing in connection with a refusal to register or a revocation of an existing registration should be specified in the statute.⁶⁴⁶ Although it will be observed that the "second chance" provision of the statute appears to govern only applications for registration and not registration revocation procedures, the difference in procedures was probably intentional.⁶⁴⁷

639. The latter procedure would not differ in effect from the "escrow" procedures used in connection with public utility rate litigation.

640. TENN. CODE ANN. tit. 43, ch. 7.

641. TENN. CODE ANN. §§ 43-703, 43-706 (1964).

642. TENN. CODE ANN. § 43-706(d) (1964).

643. Revised Model Act § 14(c). See text accompanying notes 406-08 *supra*.

644. TENN. CODE ANN. § 43-706(e) (1964).

645. Compare TENN. CODE ANN. § 43-706(f) (1964) (quoted in text) with TENN. CODE ANN. § 43-706(d) (1964).

646. The complexity of the issues which might be involved in a hearing under the Tennessee Insecticide, Fungicide and Rodenticide Law might make it difficult to specify in detail by statute all the procedures involved in such a hearing.

647. It would appear that "the second chance" provision is designed principally for use in connection with good faith differences between the registrant and the commissioner. The statute appears to be drafted on the premise that such differences will arise only prior to registration and that a defective product after registration is probably due to the result of negligence or bad faith on the part of the registrant.

Detailed statutory procedures surround license revocation and suspension proceedings under the pest control licensing statute.⁶⁴⁸ These procedures provide for representation of the licensee by counsel, for the use of the subpoena power for the benefit of the licensee, and for the stenographic recording of the proceedings. Although the pest control statute does not expressly provide for the introduction of evidence by the licensee,⁶⁴⁹ this permission would seem to be implied from the fact that the subpoena power is made available to the licensee. The subpoena power under the pest control statute, however, is limited to the subpoena of witnesses.⁶⁵⁰ No provision in that statute deals expressly with the availability of cross-examination, and it appears to authorize a hearing only if the licensee requests one within ten days from an initial license revocation or suspension order.⁶⁵¹ In this connection it would seem highly desirable that the requirement of affirmative action by the licensee within the ten day period be expressly stated in the enforcement order served upon him.⁶⁵² No provision is made for a hearing officer, as is done in some other statutes, in connection with pest control license revocation.⁶⁵³ No hearing is expressly required before the revocation of a license under the Tennessee Garbage Feeding Law.⁶⁵⁴ The only statutory provision governing the administrative hearing required in connection with a livestock sale license revocation is one providing that the licensee shall be entitled to be represented by counsel.⁶⁵⁵ The statutes governing milk tester and sampler license revocation make no express provision for a hearing or for any procedures which would govern a hearing.⁶⁵⁶

X. CONCLUSIONS

In compiling this report the salient factors which have presented themselves are the difficulties of definition which in here in any at-

648. TENN. CODE ANN. § 43-614 (1964). See also the review of enforcement orders under the Tennessee Plant Pest Act of 1955, TENN. CODE ANN., tit. 43, ch. 5. That act, besides providing in detail for various aspects of a hearing also provides for review of enforcement orders before a Board of Review composed of the Commissioner of Agriculture, the Director of Entomology and Plant Pathology and one other member appointed by the Governor. To the extent of the non-department member of the Board, such review procedure embodies a limited separation of functions.

649. TENN. CODE ANN. § 43-614 (1964).

650. *Ibid.*

651. TENN. CODE ANN. § 43-614 (1964). See also TENN. CODE ANN. § 43-519 (1964).

652. See text accompanying notes 442-45 *supra*.

653. TENN. CODE ANN. § 43-614 (1964).

654. TENN. CODE ANN. § 44-1006 (1964).

655. TENN. CODE ANN. § 44-2306 (1964). The statute also provides for a ten-day notice.

656. TENN. CODE ANN. § 44-2002. (1964).

tempt to codify administrative practice on a generalized basis. The problems facing the various agencies are not so unique that they cannot be discussed meaningfully in procedural language, but the mixture of factors and policy considerations which make some procedures appropriate for some proceedings, may with slight alterations, call for different procedures. For example, it is relatively easy to speak, as I have done in this report, of an "accusatory" proceeding.⁶⁵⁷ It is not so easy, however, to define such a proceeding in language which would appropriately establish generalized procedures for all cases falling within a given definition. Generally speaking, an accusatory proceeding would seem to be one in which a penalty is sought to be imposed for wrongful conduct. Many license revocation statutes seem to contemplate such an accusatory proceeding when they provide for revocation of a license or permit, after hearing, for a violation of law or of an agency rule; but the overlap in some types of revocation proceedings between the factors relevant to misconduct and those relevant to lack of qualifications may prevent any workable differentiation between the two types of revocation proceedings. Moreover, when an alleged lack of qualifications is based upon a claim of misconduct, the revocation proceeding would seem to include elements of both a penalty proceeding and one in which punishment is only incidental to a principal purpose of protecting the public. A proceeding taking cognizance of the failure of licensed goods to conform to safety or product standards would be in form a license revocation proceeding based upon a law or rule violation; and if fault is involved, it may involve misconduct. But the procedure appropriate to establish such a violation may not be the same as that appropriate to revoke a professional's license for misconduct in the practice of his profession. It might be possible for a statute to establish procedures for an accusatory proceeding, but application of that procedural framework ought to be made by painstaking reference to individual statutes, rather than by an attempt to describe in general language the types of proceedings to which such a procedure should refer.⁶⁵⁸ In regard to accusatory proceedings, I have criticized the commingling of functions in the activities of the professional licensing boards, but my objections are theoretical and are not based upon complaints of prejudice or unfairness by persons whose licenses have been suspended or revoked by those boards.

My reading of some of the Tennessee Supreme Court decisions involving review of non-judicial decisions of some administrative

657. See text accompanying notes 248, 265, 342-47 *supra*.

658. Otherwise, the difficulties of definition alluded to will force unwanted applications and will, at the very least, stimulate unnecessary litigation.

agencies indicates that some improvement could be made. For example, the court could require the agencies to give reasons for their decisions and could be more specific in defining the relationships between courts and agencies. It could restrict the use of the "material evidence" phrase to descriptions of evidence and avoid its use as a shorthand expression for general approval of agency action. But improvement in decisional language cannot be legislated; it must come from an increasing awareness by the courts of their roles in administrative processes.

Criticism has been made at times of the narrow scope of review accorded to non-judicial administrative action.⁶⁵⁹ But as Dean Stason has recently warned,⁶⁶⁰ it is not necessarily advisable to increase the scope of judicial review over matters that may perhaps be better performed by competent administrators. Again, the degree of judicial review over varying types of agency action ought to be based, in part, upon the relative degrees of competence of courts and agencies. Thus, the degree of judicial review should perhaps vary from agency to agency. For example, if the competence of the Tennessee judiciary is substantially beneath that of the Public Service Commissioners in some matters with which the Commission deals, then court review of those matters ought to be minimal, as it now is. Even if improvement is needed in regard to review of some Public Service Commission decisions, it is peculiarly difficult for legislation which must be phrased in general terms and in abstract language to accomplish that result. Indeed, as Mr. Justice Frankfurter has reminded us,⁶⁶¹ the subtleties of varying degrees of judicial review cannot be put into language. Moreover, room ought to be allowed for variation in the scope of judicial review even within the area of a single agency's activities when, for example, the hardship or potential injustice resulting from a particular agency action calls for more penetrating judicial scrutiny.⁶⁶² The scope of judicial review spelled out in consti-

659. See text accompanying notes 529-30 *supra*.

660. Stason, *Administrative Law—1964 Tennessee Survey*, 18 VAND. L. REV. 1047, 1052 (1965).

661. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (commenting on statutory review standards): "Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms."

662. See Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 920 (1966):

"Each of us studying a series of cases will conclude that courts in certain situations—some unique, some typical—require either more or less evidence than what we would generally consider to be 'substantial' . . . Rules and principles have tremendously important functions; but if they are taken to exclude a judge's appreciation of the

tutional terms, as it has been by the Tennessee Supreme Court, is not particularly amenable to statutory modification. It seems to me that legislative tampering with the categories of administrative action which the court has created in enunciating its review standards,⁶⁶³ would be especially unwise. Thus, while "judicial," "legislative," and "administrative" action may not be clearly definable at the fringes, the court probably has a general understanding of the meanings which it attributes to each category. Moreover, since these categories have been given constitutional significance, they may not be easily changed, and changes—give the difficulties of definition and the history of judicial action based upon those categories—would probably create more difficulties than they would solve.

I do not mean to sound entirely negative. Some changes may produce some good. The safest way to proceed with statutory reform would be to isolate those areas in which change would seem to cause the least disruption of present methods of administrative action but which would appear to result in more than a theoretical improvement in procedure. For example, some good might come from legislative authorization for the publication of opinions of the Attorney General which presently play such a large part in administrative activity. Little disruption (but probably little positive improvement) would result from standardizing procedures before the professional licensing boards. Perhaps even across-the-board provisions for all agency adjudications providing for subpoena practices, right to counsel, sworn witnesses, opportunities for cross-examination, and opportunities for submitting rebuttal evidence would serve a standardization purpose without causing substantial disruptive effects. In some types of license revocation, such as those conducted by the regulatory boards for misconduct, increased separation-of-functions provisions

special instance, if they are thought of as precise determinants, they become our masters rather than our servants. The deviation from a generally valid principle may be sensed in its applications without rising to the level of explicit recognition A particularized response to a special case is a sign of a healthy and confident legal system, a system at once sophisticated and sensitive."

663. Thus, for example, in an early draft of an administrative procedure act proposed for Tennessee, three different review standards were embodied in the act for three types of proceedings. Apart from the objections that the definitions were vague and the difficulties of legislating review standards which cannot be reduced effectively to words, the categories embodied in the statute did not correspond to the constitutional categories of "judicial," "legislative" and "administrative." It is possible that a distinction could be made within the accepted judicial categorizations, but I would be wary of ignoring the constitutional labels. I would also be inclined to embody no more than two review standards—such as that of statutory and common law certiorari—which the courts know and have worked with in a procedure act, and I would be extremely careful to use definitions which can be applied without unnecessary dispute. As I have suggested in text, the easiest way of doing this is by reference to cited statutory sections to which a given procedure is made to apply.

might be an improvement. I have warned of some of the dangers inherent in certain provisions of the Revised Model Act. With care in specifying the statutes to which the procedures would be related, however, the provisions of the original Model Act or of a modified form of the Revised Act would probably provide an appropriate model for a Tennessee administrative procedure statute if a generalized act is to be adopted. On balance, I am inclined to think that the enactment of a generalized act based upon the original Model Act might contribute to a gradual awareness of, and sophistication about, administrative processes in Tennessee. I say this because some standardization in language would enable the Tennessee agencies and courts to seek and to obtain guidance from decisions in other states interpreting similar language and from treatises and law review articles discussing the provisions of the Model Acts. The potential disruptive effects of the original act are not great.