PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE

Washington, D. C.

REPORT OF THE

COMMITTEE ON UNIFORM RULES

1954

COMMITTEE ON UNIFORM RULES

	Position and Name of Agency	Alternates and Representatives
Thomas J. Herbert, Chairman	Chairman, Subversive Activities Control Board	
J. Earl Cox	Hearing Examiner, Federal Trade Commission	
Hugh W. Cross	Commissioner, Interstate Commerce Commission	James A. Murray, Office of the General Counsel
David C. Eberhart	Deputy Director, Federal Register, GSA	
Roger S. Foster[1/]	General Counsel Securities & Exchange Commission	
J. Sinclair Armstrong[1/]	Commissioner, Securities & Exchange Commission	Arden Anderson Office of the General Counsel Thomas G. Meeker, Assistant General Counsel
Robert W. Ginnane	Department of Justice	
Clifford P. Grant	Office of the Solicitor Department of Labor	
Mrs. Lucy Somerville Howorth[2/]	General Counsel War Claims Commission	
Andrew T. McGuire[2/]	General Counsel Foreign Claims Settlement Commission	
A. Edmund Johnson	Office of Chief Counsel Coast Guard Department of the Treasury	
Charles B. Nutting	Vice Chancellor, University of Pittsburgh	
Jerome Plapinger[3/]	Acting General Counsel Small Business Administration	Donen Gleick Office of the Acting General Counsel
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The Committee's assignment originated in the suggestion of Attorney General Brownell in his address of June 10, 1953, to this Conference, that the Conference undertake a thorough study as to the feasibility and desirability of formulating uniform rules of procedure for Federal administrative agencies. On June 10, the Conference adopted the Attorney General's suggestion, and, on June 11, Chairman Prettyman assigned the problem to this committee.

Historical Background

Prior to the Administrative Procedure Act of 1946 (5 U.S.C. 1001 et seq.), there existed no formal uniformity in Federal administrative procedures. Regulatory statutes rarely prescribed procedures beyond requiring that certain actions be taken only after an opportunity for hearing and providing agencies with investigatory powers. Practically all agencies adopted the hearing examiner system developed by the Interstate Commerce Commission from the use of masters in chancery. Moreover, the draftsmen of new regulatory statutes tended to copy the procedural provisions of older statutes, and newly created agencies drew heavily, in drafting their rules of procedure, from the rules of older

agencies. Apart from this fairly extensive uniformity by imitation, the principal uniformity in the administrative field derived from judicial decisions regarded as generally applicable--such as United States v. Abilene & Southern Ry., 265 U. S. 274, and the Morgan cases.

The Administrative Procedure Act provides a degree of basic procedural uniformity in cases of formal rule making and adjudication. In large part, it embodies the basic formal procedures previously developed by the agencies. Many aspects of administrative procedure are dealt with by the Act only in general terms, if at all. Presumably, however, the Act represents the extent of the procedural uniformity which its sponsors and draftsmen were prepared to recommend in 1946.

Even then, there existed some belief that further detailed study might find additional possibilities for procedural uniformity. Thus, in 1941, the Final Report of the Attorney General's Committee on Administrative Procedure, from whose recommendations the Administrative Procedure Act is partially derived, further recommended the creation of an Office of Administrative Procedure which would carry on a continuous effort toward procedural uniformity. Thus, under the recommendations of the majority of that Committee, such an Office would have been required to:

> Make such recommendations and transmit such information to the agencies as may facilitate the uniform adoption, wherever feasible and appropriate, of those practices, procedures, and methods of organization which have proved most satisfactory;

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> and recommend rules to simplify and unify to the fullest practicable extent existing provisions which govern utilization of answers and other pleadings; issuance of subpenas; taking testimony by deposition; content, cost, and availability of transcripts of records; introduction of documentary evidence; standard of proof; requests for findings of fact; exceptions to findings; oral arguments; and rehearings. (Final Report, p. 194)

Under the minority recommendation, such an Office would have been directed to:

> * * * make recommendations to Congress and the agencies to secure * * * the adoption of just, efficient, and uniform methods of procedure. (Final Report, p. 222)

It should be noted that in 1942, Robert Benjamin, in Administrative Adjudication in New York (1942) pp. 24-36, made a powerful argument against the feasibility and desirability of uniform rules of procedure for New York's administrative agencies without detailed study, and against a complete procedural code.

In 1947, at the recommendation of its Judicial Council, California enacted legislation establishing a Division of Administrative Procedure, which was directed inter alia, "to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each regular session."

The feasibility of greater uniformity in Federal administrative proceedings than is afforded by the Administrative Procedure Act was ably debated before the Administrative Law Section of the American Bar

Association by Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, pro (34 A.B.A.J. 896) and George T. Washington, later appointed to the Court of Appeals for the District of Columbia, con (34 A.B.A.J. 1011).

In 1949, Senator McCarran introduced legislation S. 527, 81st Congress, to establish a commission to formulate uniform rules of practice and procedure for Federal administrative agencies, such rules to be submitted to Congress and to become effective unless disapproved by a concurrent resolution of the Congress. The enactment of S. 527 was opposed by two bar association committees on a ground highly pertinent to this Committee's assignment. The Committee on Administrative Law of the Association of the Bar of the City of New York reported that:

> * * * no study has yet been made demonstrating the advisability and practicability of adopting uniform rules of practice and procedure for Federal administrative agencies. While we are in favor of procedural reform which will substitute order and certainty for needless differences and confusion--especially in a field where even the appearance of disorder is an irritant to the public and the bar--the areas in the agencies' procedures which lend themselves to the uniform treatment proposed by the bill are still largely, if not entirely, unexplored. (4 Record of the Association of the Bar of the City of New York 244.)

In 1952, a committee of the Administrative Law Section of the American Bar Association urged "the assembling of data to establish the extent of the need for uniformity and the feasibility of meeting that need." Thus, as Attorney General Brownell pointed out, "no one has ever done the necessary spadework to determine whether or to what extent it is feasible to have uniform rules of procedure."

In the meantime, in 1951, the Senate passed S. 17, 82d Congress, which was substantially the same as the earlier S. 527, but the House took no action. In March, 1953, a subcommittee of the Senate Committee on the Judiciary held hearings upon an identical bill, S. 17, 83d Congress, which was reported favorably by the Senate Committee on the Judiciary on July 20, 1954, see Sen. Rep. 1953, 83d Cong., 2d Sess., and passed by the Senate on August 11, 1954; however, it was not acted upon by the House.

The Committee's Procedure

The Committee has recognized at all times that it was not given the job of formulating uniform rules of procedure. Rather, we were directed to investigate the extent to which it would be desirable and feasible to have uniform rules. Even such a more general assignment, however, required us to explore and take into account the diversities in agency functions and procedures. To do this for all aspects of procedure and for all of the regulatory agencies would have required full-time staff assistance. We considered organizing a program of such staff research. Gradually, however, we came to the conclusion that a smaller sample study made by the committee members personally might give us a better insight into the possibilities and difficulties of uniformity than would suggested conclusions prepared by someone else.

Accordingly, to reduce our assignment to manageable size, we first determined to confine our inquiry to the possibility of uniform rules

for proceedings governed by Sections 7 and 8 of the Administrative Procedure Act. The Act already provides a measure of uniformity in this area of procedure. Also, the idea of uniform rules hardly seems applicable to the mass of informal procedures in which public business is carried on by correspondence, in conferences, and on application forms.

Second, we decided to base our studies upon a sample of 10 agencies composed of the following: Civil Aeronautics Board, Coast Guard (Treasury), Federal Communications Commission, Federal Maritime Board, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, Labor Department, Securities and Exchange Commission, and Subversive Activities Control Board. However, the selection of such a sample was not intended to preclude rigidly any consideration of the problems or practices of other agencies; thus, frequent reference was made to the procedures of the National Labor Relations Board.

Third, we decided upon the following points or aspects of procedure on which to make comparative studies of the pertinent portions of the statutes, rules and practices of the 10 sample agencies: Notices; Computation of Time; Service of Process; Subpenas; Depositions, Interrogatories, and Verified Statements; Official Notice, Admissions and Presumptions; Summary Adjudication; Form and Requisites of Decisions; Appeal from Intermediate Decisions; and, Identification, Citation and Publication of agency rules.

Fourth, these subjects were assigned to various members of the Committee for the preparation of individual reports to the Committee setting forth the possibilities and difficulties of formulating uniform rules on these particular aspects of procedure. When different points of view developed over such a report, the subject would often be referred to a subcommittee of several members for further development.

The full committee met 11 times, including two two-day meetings and one all-day meeting. In addition, many informal subcommittee meetings were held.

The Desirability of Uniform Rules of Procedure

It is important to consider to what extent we need or desire uniform rules of procedure, i.e., the price we are willing to pay for uniformity. The purpose of rules of practice and procedure is to inform and guide the parties, and, within limits, greater guidance is furnished by more detailed and specific rules. Detailed rules are necessarily shaped to the characteristics of the particular proceeding. Uniform rules applicable to many types of proceedings can take into account the peculiar problems of particular types of proceedings only if they are drafted in general terms which leave agencies with considerable discretion in applying them to particular cases or types of cases. Thus, the Federal Rules of Civil Procedure are adaptable to the trial of cases ranging from simple tort claims to complex antitrust cases only because at many crucial points the trial

judge is given discretion to shape procedure to the needs of particular cases. Indeed, the rules of practice of some agencies, such as those of the Interstate Commerce Commission, are drafted to apply to a variety of administrative proceedings conducted within the particular agency. It is still true, however, that the price of uniform rules of procedure must be paid in the form of more general rules.

We also recognize that the present diversity in the agencies' rules of procedure does not impose any crushing burden on the practicing bar. With the growing specialization of the law, few individual practitioners appear regularly before more than two or three Federal administrative agencies. In a law firm that has extensive and varied administrative practice, there is often specialization by its members in the work of particular agencies. Moreover, no one can practice law before either a court or an administrative agency merely by reference to a formal set of rules. The informal details of court practice that lawyers learn from experience and from court clerks must likewise be learned in administrative practice by experience and talking with the agency's staff. Similarly, agencies, like courts frequently shape their procedures to the needs of particular cases. For example, the Interstate Commerce Commission, confronted with a massive and complex case, sometimes prescribes by

order a special procedure for that case which will depart drastically from the usual procedures portrayed in its General Rules of Practice.

Again, it should be realized that uniform rules of procedure for Federal administrative agencies inevitably would be subject to varying interpretations by the agencies and by the district courts and courts of appeals which review agency action, just as the Rules of Civil Procedure are construed and applied differently by the various Federal courts. That is, it would be illusory to assume that uniform rules could produce uniform and certain procedures at all times. In brief, no lawyer will ever be able to practice before Federal administrative agencies merely by referring to a pamphlet in his pocket.

It should also be recognized that lawyers generally are accustomed to practicing under different rules of procedure before different tribunals. In New York City, for example, the Committee on Administrative Law of the Association of the Bar of the City of New York has pointed out that judicial proceedings are variously governed by the New York Civil Practice Act, Civil Practice Rules, Court of Claims Act, Surrogate's Court Act, New York City Court Act, New York City Municipal Court Code, and Justice Court Act, together with a mass of judicial decisions interpreting those procedural codes. Similarly, the Federal Rules of Civil Procedure do not apply to admiralty and bankruptcy matters in the Federal district courts, or to the proceedings in

the Court of Claims, the Tax Court, or the Customs Court, and were not drafted with an eye on probate and juvenile matters which are almost exclusively within the jurisdiction of the states.

On the other hand, unnecessary or accidental variations in agency procedures simply clutter up an already complicated legal system. To the extent that we can have uniform procedures without paying too high a price in generalized rules and without impairing the conduct of important governmental functions, our administrative procedure will be simplified and systematized.

The Feasibility of Uniform Rules of Procedure

The fact which controls the possibilities of procedural uniformity is the great diversity of functions performed by Federal regulatory agencies. The mere number of agencies is some measure of the variety of their activities. In 1941, the Attorney General's Committee on Administrative Procedure computed that there were 51 independent agencies or semi-independent bureaus or divisions within the executive departments which exercised significant rule making and adjudicatory powers. Final Report, pp. 7-11. To these may be added such new agencies as the Atomic Energy Commission, Subversive Activities Control Board, and the Federal Coal Mine Safety Board. Also, as the Committee noted:

> No single fact is more striking in a review of existing Federal administrative agencies than the variety of the duties which are entrusted to them to perform. This is true of many single agencies taken alone; it is true, above all, of the agencies

> taken as a group. This central and inescapable fact makes generalization in description difficult. It makes even more difficult generalization in prescription. For variety in functions means variety in the circumstances and conditions under which the activities of the various agencies impinge upon private individuals. A procedure which would be for the protection of the individual in one situation may be clearly to his injury in another. A set of standards evolved to meet one problem may fail wholly to meet another. One need look no further than a single agency--the Interstate Commerce Commission--to be impressed by the basic necessity of differing procedures for different types of activities, and by the varying procedural patterns which the Commission has evolved to meet this necessity. (Final Report, p. 20).

Even in proceedings governed by Sections 7 and 8 of the Administrative Procedure Act, issues range from the usually simple issues of a claim for benefits under the Social Security Act to the complexities of a nation-wide rate case under the Interstate Commerce Act. In some cases, agencies are initiating what amounts to prosecutory action - to revoke or suspend a license or looking to the issuance of a cease and desist order, in others they are acting upon private persons' applications for licenses, and in others they are adjudicating conflicting private interests. In some proceedings, private parties invariably are represented by counsel, while in others they often are not. Some involve hearings which often last months; others typically are heard in a few hours at most. Every rule of procedure applicable to all Federal agencies must in some way take into account these variations.

However, there are present in existing procedures certain elements which have led the Committee to conclude that uniformity is feasible for

certain aspects of procedure. First of all, comparative study of the statutes and agency rules governing particular aspects of procedure quickly reveals that there has been a great deal of copying by draftsmen of both regulatory statutes and agency rules of procedure. Such copying alone has produced a certain degree of uniformity. This imitative uniformity appears, for example, in both the statutes and agency rules governing subpenas and depositions. Indeed, various regulatory statutes have incorporated by reference the subpena provisions of the Interstate Commerce or Federal Trade Commission Acts. An even more conspicuous example is the utilization in many statutes of the system of judicial review in the courts of appeals which was first evolved in the Federal Trade Commission Act. Since 1946, the Administrative Procedure Act has provided a varying degree of uniformity for some aspects of administrative procedure. It should be noted, however, that in recent years and more than ever before Congress has been prescribing detailed procedures for particular agencies. The principal examples of this are the 1947 amendments to the National Labor Relations Act, the 1952 amendments to the Communications Act, and the exclusion and deportation procedures prescribed in the Immigration and Nationality Act of 1952, in each of which the prescribed procedures differ substantially from each other and from the requirements of the Administrative Procedure Act. It would seem that these variations result at least in part from the fact that such legislation was prepared in

different Congressional committees, i.e., the Committees on Labor, Commerce, and Judiciary. A continuation of this trend will make the development of uniform rules of procedure increasingly difficult or even impossible.

Again, some statutory variations will be significant on their face but unimportant in actual practice. For example, in considering the possibility of uniform rules governing subpenas, it was noted that the subpena power of the Veterans Administration is limited to compelling the attendance of witnesses within 100 miles from the place of hearing. The existence of such a geographical limitation, if deliberately imposed and significant in practice, would be an obstacle to the formulation of uniform subpena provisions. Upon inquiry, it was learned that the Veterans Administration rarely has occasion to issue subpenas. Accordingly, it would seem that the 100-mile limitation could be eliminated in the interests of uniformity. Similarly, some statutes empower agencies to subpena witnesses from any place in the United States, while others also provide that witnesses may be summoned from the territories and possessions. There is no reason to believe that this variation is so deliberate or important as to constitute an obstacle to uniform rules.

Another type of variation lies in the detail in which agency rules of procedure deal with a particular phase of procedure. For example, Section 203.46 of the National Labor Relations Board's Rules and

Regulations prescribes the content of exceptions to hearing officers' decisions by merely providing that,

> Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon.

In contrast, dealing with the same subject, Rule XXIII C. of the Federal Trade Commission's Rules of Practice provides as follows:

> Content of appeal brief. --An appeal shall be presented in the form of a brief, designated appeal brief, and shall contain, in the order here indicated, the following:
>
> (1) A subject index of the matters presented, with page references, and a table of the cases (alphabetically arranged), textbooks and statutes cited, and reference to the pages where they are cited;
>
> (2) A concise abstract or statement of the case;
>
> (3) Exceptions to specific findings and conclusions of fact, or parts thereof, or conclusions of law in the initial decision; exceptions to the failure of the initial decision to include other findings or conclusions of fact, law or discretion; exceptions to any prejudicial error in procedure, including conduct or ruling of the trial examiner; or exceptions to the substance or form of the order or part thereof; together with proposed findings of fact, conclusions of fact or of law, and an order, or parts thereof, in lieu of those to which exception is taken, with specific page reference to the parts of the record or the authority relied upon;
>
> (4) Argument exhibiting clearly points of fact and of law relied upon in support of each exception taken, together with specific page references to the parts of the record cited and the legal or other authorities relied upon.

Since everyone would agree that the function of exceptions is to define precisely the issues to be resolved by the agency heads and to identify

the relevant materials, it would seem that agreement could be reached as to the detail in which a uniform rule should prescribe the content of exceptions.

The subject of exceptions also suggests another factor - that some requirements must be so flexible that it makes little difference how the procedural norm is stated. Thus, agency rules variously require that exceptions to a hearing officer's decision be filed within 5, 15, 20, or 30 days after service of the decision. In practice, these time limitations often are extended at the request of the parties, so that it does not seem too important whether a uniform rule specifies 20 days or 30 days so long as provision is made for extensions of time. In our illustrative rule (M) upon filing of exceptions we suggest a 20-day limitation, partly because the Interstate Commerce Act (49 U.S.C. 17(5)) and the National Labor Relations Act, as amended (29 U.S.C. 160(c)) generally provide 20-day periods for filing exceptions to intermediate decisions. It should be noted that within the group of agencies studied by the Committee, such a uniform 20-day limitation could be put into effect by the agencies without legislation, while a uniform limitation of any other duration would require legislation.

Even after taking advantage of these factors conducive to the formulation of uniform rules, there remain for some aspects of procedure substantial variations from which a choice must be made if uniformity is to be attained. That is, there comes a point in the

formulation of uniform rules when the choices to be made between existing alternative procedures amount to procedural reforms. A good example is in the issuance of subpenas, the choice being between (1) automatic issuance of subpenas at the request of private parties, subject to a quashing or revocation procedure, as under Rule 45 of the Rules of Civil Procedure and Section 11 of the National Labor Relations Act, as amended, and (2) the present procedure of most agencies, expressly permitted by Section 6(c) of the Administrative Procedure Act, under which private parties must make a general showing of relevance and reasonableness before they may obtain agency subpenas. Similarly, the preparation of a uniform rule governing appeals from intermediate decisions (Illustrative Rule M) involves a choice between discarding the Federal Trade Commission's rule requiring the filing of a notice of appeal, or recommending, as we have done the adoption of such a rule for all agencies.

The Committee concluded that in the interests of uniformity of legal procedures generally, each of its studies of particular aspects of administrative procedure should take into account the corresponding provisions, if any, of the Rules of Civil Procedure. That is, it was assumed that in the absence of a showing of inapplicability, it would be useful to follow the analogies of the Rules of Civil Procedure. Thus, in deciding to recommend a uniform subpena procedure under which subpenas must be issued to private parties represented by counsel

upon their request, subject only to quashing upon the motion of the witness, we were influenced by the fact that this procedure was already employed by the Federal courts (and by a few agencies) without apparent difficulty.

On the other hand, it should be emphasized that the Rules of Civil Procedure cannot be transferred blindly to the administrative process. For example, under Rule 45, only subpenas duces tecum are subject to motion to quash; however, subpenas issued under Rule 45 may be served only within the judicial district in which the trial is held or within 100 miles of the place of trial. Most administrative agencies, on the other hand, may serve their subpenas anywhere in the United States. Accordingly, under our illustrative subpena provision, both subpenas ad testificandum and duces tecum would be subject to quashing in order to prevent unnecessary inconvenience to distant witnesses. Similar problems arise when consideration is given to applying the deposition provisions of Rules 26 through 32 to administrative proceedings. Thus, the deposition provisions of the Rules are intertwined with the concept of discovery, while discovery, at least in the sense of the Rules, is as yet largely unknown in Federal administrative procedures.

Even as to those aspects of procedure which the Committee believes can be covered by uniform rules, it would seem to be necessary to permit agencies to issue supplementary rules not inconsistent with the particular uniform rule. Thus, there will be certain matters of mechanics or internal organization of the agency which must be defined in subsidiary

rules issued by the particular agency. For example, an agency may need to specify who may issue and quash subpenas prior to hearing or before a hearing examiner is assigned to a case; a decentralized agency may wish to provide that such subpenas may be issued and quashed by designated field officers, while a highly centralized agency may find it necessary to provide that requests for such subpenas and motions to quash be filed with the agency or one of its officers in Washington. Similarly, our illustrative rule on service of process would require such implementation by at least some agencies. Thus, in some respect, uniform rules of procedure would need supplementing in the same way that the Rules of Civil Procedure are supplemented by local district court rules made pursuant to Rule 83. Stated otherwise, the discretion which uniform rules must confer upon all agencies could be usefully exercised by agencies in the form of supplementary rules which would afford more guidance to the parties in particular types of proceedings.

More broadly, the possibilities of formulating practical uniform rules are increased by allowing agencies discretion to shape procedures, or alternative procedures, at certain points where the great variety of substantive issues and interests found in agency proceedings precludes detailed and rigid procedures. Such flexibility appears in Sections 4, 5, 7, 8 and 9 of the Administrative Procedure Act. It also characterizes the Rules of Civil Procedure, as in Rules 5(c), 6(b), 15, 16, 20(b), 24(b), 26(d)(3), 30(b), 42, etc. Actually, under the Rules of Civil Procedure,

the trial judge has extensive power to shape procedure to the needs of particular cases. Moreover, as all lawyers know, much of the precise procedure in particular cases is determined by agreement between counsel and the judge, without regard to the procedural possibilities contemplated by formal rules, a tendency which has culminated in the pre-trial conference. Similarly, the existing rules of procedure of such agencies as the Interstate Commerce Commission must be and are flexible enough to fit a wide variety of proceedings within the particular agency. In brief, while practical uniform rules must be somewhat generalized and allow discretion at many points, such generality and discretion would not be excessive by comparison with the present actual conduct of both judicial and administrative proceedings.

For example, in exploring the deceptively simple looking subject of service of process, we encountered such a variety of practical problems on the method of service as compelled us to conclude that any uniform rule must permit agencies to use several methods of service. Moreover, we were obliged to point out that it may be necessary to permit agencies to prescribe special rules governing service in proceedings involving large numbers of parties.

The Committee has concluded that it is both feasible and desirable to formulate uniform rules governing a number of aspects of the procedure in Federal administrative proceedings governed by Sections 7 and 8 of the Administrative Procedure Act. That is, we believe that it is feasible to

provide for such proceedings more uniformity than is presently provided by the Administrative Procedure Act. Specifically, we believe that it is feasible to formulate uniform rules governing the computation of time, service of process, subpenas, depositions and interrogatories, pre-hearing conferences, official notice, admissions and presumptions, form and content of decisions, and appeals from intermediate decisions.

On the other hand, the Committee has concluded that it is not feasible to formulate uniform rules governing summary adjudications, the use of verified statements, and notice (beyond the present notice requirements of Sections 4(a) and 5(a) of the Administrative Procedure Act.)

Later in this report, the Committee has stated its reasons for believing that a uniform rule on each of these aspects of procedure would or would not be feasible. Where the conclusion is that such a rule would be feasible, we have set forth a draft of an illustrative rule. We do not suggest that any of these illustrative rules is the best that can be drafted. Indeed, we insist that the final formulation of any uniform rules should be preceded by more extensive consultation with the agencies and the bar than has been possible for us.

Most of the suggested uniform rules by which we illustrate our conclusion represent compromises of the variations in present agency procedures. It will be noted that they approach the generality of the Rules of Civil Procedure, and are therefore less precise in some instances than

some agency rules. Like the Civil Rules, they leave considerable discretion in the agencies, but little if any more than do many of the present agency rules.

We have also set forth in appendices to this report suggestions which we have received and which we endorse with respect to the identification, citation and publication of agency rules. These are not suggested as rules of procedure but rather as suggestions for agency policy and practice.

In general, we have found possibilities for uniform rules in those aspects of administrative procedure which are more or less ancillary, or not particularly related to the nature of the substantive issues involved in the particular case. Thus, on the one hand, we believe that uniform rules can be formulated for such matters as service of process, subpenas and depositions, while we concluded that it would not be feasible to have uniformity in the use of verified statements. Also, we venture to deduce from our sample studies that it may be feasible to formulate practical uniform rules with respect to pre-hearing conferences (along the lines of Recommendation c. 6 in the First Report of this Conference) and requests for admissions of fact (see, e.g., Rule XIII of the Federal Trade Commission's Rules of Practice), although we did not study specifically either of these matters. Conversely, and also by deduction, we suspect that the right to intervene is so much a reflection of the substantive issues

and rights involved in a particular proceeding that no helpful uniform rule could be formulated on this subject.

We assume that further detailed research and analysis, plus a period of experimentation with a few uniform rules, will reveal possibilities for uniform rules in addition to those which we have suggested. However, we are inclined to believe that there will remain areas of procedure in which uniform rules cannot be formulated except at the cost of (1) placing a procedural straight jacket upon diverse administrative functions, or (2) highly generalized rules which will afford little guidance to the bar and to agency employees, or (3) permitting either exemptions or supplementation by individual agency rules to an extent inconsistent with the purpose of procedural uniformity.

There remains the question of how we are to obtain workable uniform rules on those aspects of procedure for which uniform rules are desirable and feasible. That is, who is to formulate such rules, how should it be done, and how are they to be made effective?

The Committee is strongly of the view that the formulation of uniform rules is a too extensive and complicated task for any ad hoc group such as the committee. This is true if only for the reason that uniform rules of administrative procedure would require continuing study and amendment in the light of experience, as have the Rules of Civil Procedure. Thus, the job clearly calls for a small group of

competent people who can devote a large amount of time to performing detailed research, analysis and drafting and to carrying on extensive consultation with the agencies and the practicing bar.

The Committee believes that an Office of Administrative Procedure, such as was recommended by the Conference at its session in October 1953, might well act as such a nucleus in developing uniform rules of procedure. Or leaving aside the name, the job could be done by a small group of lawyers located, for example, in the Department of Justice, and working with committees of the agencies and the bar.

As noted earlier in this report, for several years Senator McCarran has introduced bills, the last one being S. 17, 83d Congress. S. 17 would create an Administrative Rules Commission composed of "(1) the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and of the House of Representatives or, in case one or more of them declines to serve, the next ranking member of the committee on the majority or minority side, as the case may be, until four shall accept; (2) one of the Assistant Attorneys General who has served as such not less than two years, designated by the Attorney General; (3) the head of an independent agency who has served more than one term of office as such, designated by the President; (4) the senior chief judge of the judicial circuits or, in case he declines to serve, the next in seniority until one agrees to serve; (5) a dean of a law school, designated by the President; and (6) a practicing lawyer versed in

Federal administrative law and representative of the legal profession, designated by the President, who shall not be subject to title 18, United States Code, section 283, or any similar prohibition." The Commission would be empowered to "formulate, and transmit to the Attorney General for report to Congress, general rules of practice and procedure for agencies, including forms and such rules as it may deem appropriate in agencies respecting judicial proceedings for the enforcement or review of agency action." S. 17 further provides that, "Unless previously disapproved by concurrent resolution of Congress the rules so formulated shall take effect ten days after the adjournment sine die of any regular session of Congress at which, within thirty days of the beginning of such session, they shall have been reported to Congress by the Attorney General."

S. 17 recognizes that the busy men who would comprise such a Commission could not personally perform all of the task of developing uniform rules, for it empowers the Commission both to appoint professional and clerical assistance, and to "provide for, and collaborate with, voluntary and uncompensated advisory committees representative of Government agencies and private or professional interests."

As to the method of formulating uniform rules, there should be noted what the Committee has and has not done. First, in our sample studies and in our illustrative rules, we probably have not taken into account sufficiently the interrelationship between various aspects of

procedure. Thus, we would recommend that a group charged with formulating uniform rules start by blocking out logically the steps and incidents of proceedings governed by Sections 7 and 8 of the Administrative Procedure Act, and rearranging existing agency rules of procedure into this pattern for purposes of comparative study generally, and for the purpose of noting the effect of a proposed uniform rule upon related aspects of agency procedures, in particular.

Second, we believe that it would be useful to formulate and put into effect as soon as possible uniform rules governing a few aspects of procedure. A year or so of such experimentation, even in a few agencies, would be extremely valuable in indicating the possibilities and difficulties of uniformity.

Third, the Committee's approach has been entirely directed to exploring the extent to which there can be formulated uniform rules of procedure applicable to all agency proceedings governed by Sections 7 and 8 of the Administrative Procedure Act. We have not had time to investigate the extent to which, on aspects of procedure on which across-the-board uniformity is impossible, it would be useful and feasible to formulate uniform rules for all such proceedings with specific exceptions or for certain categories of proceedings.

It seems quite possible that at a certain point in the development of a single set of uniform rules of procedure it would become necessary to except at least in part certain types of proceedings. For

example, Congress has been unwilling to apply the degree of uniformity provided by the Administrative Procedure Act to deportation proceedings. A large number of deportation hearings are short and involve only simple issues; traditionally, in such cases, a single employee of the Immigration and Naturalization Service has both presided over the hearing and presented the evidence in support of the deportation charge. Such a combination of prosecutor and hearing officer functions violates the Administrative Procedure Act (Wong Yang Sung v. McGrath, 339 U.S. 33), but Congress, to avoid expense of putting a separate prosecutor and a separate hearing officer in each deportation hearing, has exempted deportation proceedings from the Act.[1/] In any event, we believe that any attempt to formulate uniform rules from which specified proceedings are excepted should be deferred until there is reason to believe that the possibilities of establishing uniform rules applicable to <u>all</u> agencies have been exhausted.

Some of us believe that to the extent that uniform rules cannot be had for all types of proceedings it may be found feasible upon further study to classify proceedings into two or three categories and to provide for further uniform rules within each such category. Others of us are more skeptical. It may be, for example, that proceedings to determine whether there should be issued orders to cease and desist

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1/ Immigration and Nationality Act, Section 242(b), 66 Stat. 209-210.

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from unfair labor practices and unfair methods of competition, under the National Labor Relations Act and the Federal Trade Commission Act respectively, would fit into a common procedural mould to an extent which would be impossible if general rate cases also were to be governed by that procedure. However, the objective of uniform rules is not greatly furthered by the adoption of rules which apply to only two types of proceedings.

A larger category would be licensing proceedings. Thus, the California Administrative Procedure Act (California Government Code, Sections 11370-11528), and the Ohio Administrative Procedure Act (Ohio Revised Code, Sections 119.01-119.13) apply largely to occupational licensing proceedings and do not apply, for example, to the public utility and workmen's compensation agencies of those states. On the other hand, it has been pointed out that Federal licensing proceedings range from the informal and almost automatic issuance of licenses to grain inspectors to the formal and usually contested proceedings on applications for radio and television broadcasting licenses or for air, motor carrier or natural gas pipeline certificates of public convenience and necessity. See Report of the Committee on Administrative Law of the Association of the Bar of the City of New York on The Question of Uniform Rules of Administrative Practice and Procedure. (1949).

At any rate, the Committee believes that as to aspects of procedure for which uniform rules cannot be formulated to apply to all

agencies, it would be useful to explore whether uniformity could be achieved in some instances by excepting one or two agencies or functions which require special procedures, or whether such uniformity could be achieved within each of not more than two or three categories of agencies or administrative proceedings.

S. 17 also raises the question of how uniform rules of procedure would be put into effect. Thus, the accompanying report of the Senate Committee on the Judiciary (Sen. Rep. 1953, 83rd Cong., 2d Sess.) p. 2, states:

> * * * Notably, studies in the field are in progress by the President's Committee on Administrative Procedure, and by a task force of the Hoover Commission. But neither of those two groups is in a position to promulgate rules; they can only recommend. By creation of the Commission proposed under S. 17, there will be provided a place where such recommendations can be delivered with reasonable hope that they may be implemented.

Some uniform rules of procedure could be put into effect by the agencies without further legislation. Each Federal administrative agency has express or implied statutory power to make rules of procedure to govern its proceedings. Of course, such power must be exercised in conformity with the Administrative Procedure Act and with any specific procedural requirements in the regulatory statute involved. But where those statutes are silent, the agencies have a large discretion in prescribing their own procedures. Thus as pointed out, practically all of the agencies could put into effect without legislation a

large part of the illustrative uniform subpena provisions. Similarly, our illustrative uniform rule for appeals from intermediate decisions is consistent with the specific provisions on this point in the Interstate Commerce Act and the National Labor Relations Act, and is within the power of other agencies to adopt.

On the other hand, some possibilities for procedural uniformity can be realized only through legislation. This will be true wherever the various regulatory statutes contain procedural provisions differing from each other and from the Administrative Procedure Act. An example may be found in certain portions of our illustrative uniform subpena provisions. Similarly, uniform provisions governing internal separation of functions and the process of final agency decision would require legislation reconciling the disparate provisions of the Administrative Procedure Act, the National Labor Relations Act, as amended, and the Communications Act, as amended.

However, it should be noted that the method which S. 17 would provide for putting uniform rules into effect has encountered grave objections. S. 17 would empower the proposed Administrative Rules Commission to formulate and submit to Congress uniform rules which would take effect ten days after the adjournment of Congress unless they had been disapproved previously by a concurrent resolution of Congress, i.e., a resolution of the two Houses which is not submitted to the President. The propriety of thus excluding the Chief Executive

from any share in the formulation or final approval of uniform rules has been questioned by a committee of the American Bar Association (Hearings on S. 17, 83rd Cong., 1st Sess., p. 51), and the constitutionality of such a procedure has been questioned by the Committee on Administrative Law of the Association of the Bar of the City of New York (Hearings, ibid., p. 34).[1/] Since the validity of any procedure for the formulation of uniform rules would be open to challenge in the judicial review of agency action under such rules, it is of crucial importance that such procedure be constitutionally valid.

An alternative method, which finds close analogy in the legislation which empowered the Supreme Court to formulate the Rules of Civil Procedure and the Rules of Criminal Procedure,[2/] would be legislation empowering the President to submit to Congress uniform rules which would become effective upon the expiration of a specified period of time unless Congress, acting through the regular legislative process,

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1/ Some materials relevant to an evaluation of this constitutional question are collected in Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L.R. 66 (1953). See also President Eisenhower's message disapproving H.R. 7512. House Doc. 403, 83rd Cong., 2d Sess.

2/ See also Public Law 538, 83d Cong., 2d Sess., approved July 27, 1954 (68 Stat. 567) authorizing the Supreme Court to prescribe and from time to time amend uniform rules of procedure governing the review of decisions of the Tax Court in the courts of appeals, and providing that "Such rules shall not take effect until they shall have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported."

prevents the rules from becoming effective. The validity of such a waiting period requirement appears to be beyond question. Sibbach v. Wilson & Co., 312 U. S. 1, 15. The actual formulation of uniform rules, to be submitted to the President and by him, if he approves, to the Congress, could be carried on by an Office of Administrative Procedure in cooperation with the agencies and the bar.

No matter how uniform rules are formulated and put into effect, three practical principles should be kept in mind: (1) the formulation of such rules must be preceded by thorough spade work; (2) they must be evolved in close cooperation with the agencies and the bar; (3) there must be provision for continuous study and revision, such as we have for the Rules of Civil Procedure, rather than a one-shot operation.

SUBJECTS RESPECTING WHICH UNIFORM RULES ARE FEASIBLE

COMPUTATION OF TIME

The Committee has concluded that it is feasible to formulate a uniform rule governing the computation of time, and submits the following illustrative rule:

> In computing any period of time prescribed or allowed by the (agency) rules, by order of the (agency) or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

The rule stated above is in substance the same as Federal Rule of Civil Procedure 6(a)[1/] except that the word "agency" is used and

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1/ Rule 6(a) reads as follows:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable

that Saturday is excluded in the computation of time as well as Sundays and holidays. Actually, many Federal agencies already have rules very similar to the suggested uniform rule.

The principal variation in existing rules is in the type of provision made for equalizing the time actually available to parties and counsel remote from Washington. Thus, the National Labor Relations Board, in Section 203.86 of its Rules and Regulations, and the Subversive Activities Control Board, in Section 201.3 of its Rules of Procedure, provide, almost identically with Rule 6(e) of the Rules of Civil Procedure, that, "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period." However, the Interstate Commerce Commission in Rule 21(c) of its General Rules of Practice, the Securities and Exchange Commission, in Rule XIII of its Rules of Practice, and the Federal Maritime Board,

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statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

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in Section 201.4 of its Rules of Procedure, appear to deal with the same problem by allowing to parties residing in specified western States an additional five days for filing documents. We have omitted the provision of Rule 6(e) here as unnecessary in view of the fact that we have provided in the rule proposed for Service of Process (immediately following) that while only actual receipt of a paper by an agency shall constitute a filing, the date on which such paper was mailed shall upon such receipt be taken as the date of filing.

Consideration might also be given as to whether a uniform rule as to computation of time should include a provision as to extensions or enlargements of time.

SERVICE OF PROCESS

The Committee believes that it is feasible to formulate a uniform rule governing the service of process in administrative proceedings, and has drafted an illustrative uniform rule, as follows:

(a) By whom served—The agency shall serve all orders, notices and other papers issued by it, together with any other papers which it is required by law to serve. Every other paper shall be served by the party filing it.

(b) Upon whom served—All papers served by either the agency or any party shall be served upon all counsel of record at the time of such filing and upon parties not represented by counsel or upon their agents designated by them or by law. Any counsel entering an appearance subsequent to the initiation of the proceeding shall notify all other counsel then of record and all parties not represented by counsel of such fact.

(c) Service upon parties—The final order, and any other paper required to be served by the agency upon a party, shall be served upon such party or upon the agent designated by him or by law to receive service of such papers, and a copy shall be furnished to counsel of record.

(d) Method of service—Service of papers shall be made personally or, unless prohibited by law, by first-class or registered mail, telegraph or by publication.

(e) When service complete—Service upon parties shall be regarded as complete: by mail, upon deposit in the United States mail properly stamped and addressed; by telegraph, when deposited with a telegraph company properly addressed and with charges prepaid; by publication when due notice shall have been given in the publication for the time and in the manner provided by law or rule.

(f) Filing with agency—Papers required to be filed with the agency shall be deemed filed upon actual receipt by the agency at the place specified in its rules accompanied by proof of service upon parties required to be served. Upon such actual receipt, the filing shall be deemed complete as of the date of deposit in the mail or with the telegraph company as provided in paragraph 5.

Discussion

Service of process is a subject which well illustrates many of the problems involved in formulating uniform rules of administrative procedure. These problems arise both from the variety of statutory procedures and from the diversity of statutory provisions. They include questions as to what shall be served, by whom, on whom, and how.

To start with the analogy of the Federal Rules of Civil Procedure, Rule 4 requires personal service of the summons and complaint upon the defendant by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose. Rule 5 governs the service of "every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper* * *." Rule 5(b) goes on to provide that:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.1/

1/ Rule 5(c) contains special provision as to service where there are numerous defendants, as follows:

> Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of

Rule 77(d) provides that:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; * * *

In brief, under the Civil Rules, summons and complaint and notice of orders and judgments are served by officers of the court, while the parties are responsible for the service of all other papers.

A civil action is commenced by a plaintiff filing a complaint against a defendant. An administrative proceeding typically commences in one of three ways: by a private person asking an administrative agency for some kind of relief against another private person, as in a reparation proceeding; by a private party asking the agency for something, such as applying for a license; or by the agency commencing a proceeding against a private party, as in a proceeding to determine whether a license should be revoked or a cease and desist order issued.

Some Federal regulatory statutes contain specific provisions for the service of administrative process; other statutes are silent.

> the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

Most, if not all agencies have rules relating to service. The principal peculiarities of such existing service provisions will be referred to below.

Who is to serve—Paragraph 1 of the illustrative rule provides that "The agency shall serve all orders, notices, and other papers issued by it, together with any other papers which it is required by law to serve. Every other paper shall be served by the party filing it." Of course, the agency must serve upon parties complaints or other initial process in proceedings instituted by the agency, as well as notices of hearings, the agency's orders upon various motions, pleadings and briefs filed in the proceeding by counsel for the agency, and intermediate and final decisions. This rule is not intended to cover service of agency subpenas issued to private parties. Also, it does not apply to notices or rules which the agency is required to publish in the Federal Register under Sections 3 and 4 of the Administrative Procedure Act.

The reference to "other papers" which the agency is required by law to serve reflects the fact that some statutes require agencies to serve certain documents originating with private persons or parties. Thus, Section 13 of the Interstate Commerce Act (49 U.S.C. 13) provides that "Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon

a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission" (emphasis added). Accordingly, the Interstate Commerce Commission has provided in Rule 34 of its General Rules of practice that it will serve formal complaints (and supplemental, amended and cross complaints). Similar provisions appear in Section 208 of the Communications Act (47 U.S.C. 208) and in Section 1.767(c) of the Rules of Practice of the Federal Communications Commission. Under our illustrative rule, such complaints would continue to be served by I.C.C. and F.C.C., although we think further study might be made as to the utility of this practice.

Under a related practice, but without any statutory compulsion, the Securities and Exchange Commission requires that all pleadings, briefs and other documents filed in its proceedings, no matter by whom, "shall be served by the Secretary or other duly designated officer of the Commission". S.E.C. Rules of Practice, Rules III and XIV. A similar practice is followed by the Department of Agriculture under its various rules of procedure. While representatives of the Securities and Exchange Commission state that this unique practice works smoothly, it would be eliminated solely in the interests of uniformity under our suggested uniform rule.

The second sentence of paragraph 1 provides that "Every other paper required to be served shall be served by the party filing it." It may be that a uniform rule could specify either the types of documents in a proceeding which must be served or, in the alternative, the documents which need not be served—such as requests for extensions of time, subpenas, and oral argument. Otherwise, agencies should be permitted to specify in supplemental rules the documents which are of such ex parte nature that service of them should not be required.

Who is served—The first sentence of paragraph 2 embodies the usual requirement that documents required to be served shall be served upon the counsel for parties represented by counsel; service upon parties not represented by counsel is to be made upon the parties themselves or upon their agents designated by them or by law. The reference to "agents" refers primarily to statutes such as Sections 16(5) and 50 of the Interstate Commerce Act (49 U.S.C. 16(5), (50), Section 1005(b) of the Civil Aeronautics Act (49 U.S.C. 645(b), and Section 413 of the Communications Act (47 U.S.C. 413), which require carriers to designate agents to receive service of notices and process.

Notice of appearance of counsel—The second sentence of paragraph 2 requires that counsel appearing in a proceeding after it has commenced shall notify other parties to the proceeding of that fact.

Numerous parties—It has been suggested that the apparently simple requirement of the first sentence of paragraph 2, that all papers

shall be served upon all parties, will encounter practical difficulties in a proceeding, for example, where a large number of existing motor carriers are opposing an application for a new or extended motor carrier certificate. Thus, it is said to be impractical to require each of 200 objecting carriers to serve each other with copies of every paper filed by each. Again, the Interstate Commerce Commission, by its orders of February 15 and April 19, 1954, has relieved motor carrier applicants for various types of authority and approval from the prior requirement of notifying competitors of the filing of such applications, and has provided that notice to competitors shall be given by publishing in the Federal Register a summary of the application prepared by the Commission. No uniform rule can fail to take into account the special problems involved in proceedings with large numbers of actual or potential parties. Thus, further study may reveal a necessity for including in any uniform rule on service a provision like Rule 5(c) of the Rules of Civil Procedure which would empower agencies to prescribe special service rules in such cases.

Final orders—Paragraph 3 requires that the final order in an agency proceeding, and any other paper required to be served by the agency upon a party, shall be served upon the party and that a copy of such order or paper shall be furnished to any counsel of record.

Method of service—The method of service of papers in administrative proceedings presents several questions. Personal service

(which is used here as defined in Rule 4(d) of the Rules of Civil Procedure) is not required by any of the agency statutes which we have examined, but is universally permitted either by statute or by agency rules of procedure.

Some statutory provisions relating to service of process are as follows:

Section 1005(c) of the Civil Aeronautics Act:

> Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered mail addressed to such person or agent. Whenever service is made by registered mail, the date of mailing shall be considered as the time when service is made.

Section 11(4) of the National Labor Relations Act, as amended:

> Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

Section 41(a) of the Investment Companies Act (15 U.S.C. 80a-39) and Section 211(c) of the Investment Advisers Act (15 U.S.C. 80b-11):

> Notice to the parties to a proceeding before the Commission shall be given by personal service upon

> each party or by registered mail or confirmed telegraphic notice to the party's last known business address.1/

Section 50 of the Interstate Commerce Act (49 U.S.C. 50) in requiring rail carriers to designate agents to receive service of process, seems to require personal service upon such agents, while Section 221 (49 U.S.C. 321) provides for personal service or service by mail upon the similar agents required to be designated by motor carriers.

The Interstate Commerce Act, Civil Aeronautics Act and Communications Act provide that in the case of carriers who have failed to designate agents to receive service of process as required by those Acts, service may be made by posting in the offices of the agencies administering the Acts. These provisions for service by posting are apparently designed primarily to compel the designation of such agents. Perhaps they should be preserved because of that indirect function.

Where statutes are silent as to the method of serving agency process, it would seem that an agency is free to adopt any methods consistent with due process of law. Thus, it is clear that service by

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1/ Section 8 of the Securities Act (15 U.S.C. 77h) provides that the Commission may give notice "by personal service or the sending of confirmed telegraphic notice" of proceedings to prevent a registration statement from becoming effective or to suspend the effectiveness of a registration statement. This provision for telegraphic service of notice reflects the fact that in these matters the Act requires unusually prompt hearings for the protection of investors.

registered mail, even of the documents initiating a proceeding is valid. Hess v. Pawloski, 274 U.S. 352; Wuchter v. Pizzutti, 276 U.S. 13; N.L.R.B. v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445 (C.A. 9). Indeed, it has been suggested by responsible persons that service by registered mail be permitted in judicial proceedings in lieu of personal service. See Fourth Annual Report of the New York Judicial Conference (1938) pp. 187-209.

In Unity School of Christianity v. Federal Radio Commission, 64 F.2d 550 (C.A. D.C.) an order of the Commission was set aside apparently because a party had sent a copy of its exceptions to the examiner's report to the opposing party by ordinary mail instead of by registered mail. However, since the Rules of Civil Procedure permit papers other than initial process to be served by ordinary mail, it would seem that an administrative agency can provide for such service unless a statute requires otherwise. In any event, there would remain the question of whether there is such greater assurance of actual receipt of registered mail as to warrant a requirement that it be used at least for the service of initial process. Absent such assurance, we think that any uniform rule should permit such agencies as the Interstate Commerce Commission to continue their practice of serving initial process by first-class mail.

A question which we raise without attempting to answer is whether a statute, such as Section 1005(c) of the Civil Aeronautics Act,

which expressly authorizes service by personal service or by registered mail has the effect of precluding service by first-class mail.

Notice by publication is authorized or required by statutes in connection with certain rule-making proceedings. E.g., Section 8(b) of the Fair Labor Standards Act (29 U.S.C. 208(f)); Section 4(a) of the Administrative Procedure Act. In other situations involving large numbers of parties, agencies have found it useful to publish certain documents in the Federal Register.

In view of these considerations, we have provided in paragraph 4 of the illustrative rule that "Service of papers shall be made personally or (unless prohibited by law) by first-class or registered mail, telegraph, or by publication."

Time when service is complete—Paragraph 5, specifying the time when service by mail, telegraph or publication shall be deemed made, is in accord with existing agency rules and practices.

Filing with the agency—Paragraph 6 provides, in effect, that papers required to be filed with the agency must be actually received by the agency at the place specified in its rules, accompanied by proof of service. However, paragraph 6 also provides, in a variation from the practice of many agencies, that upon the actual receipt by the agency of papers required to be filed, the date of filing shall be the date upon which the papers were deposited in the mail or with a telegraph company. The purpose of this provision is to equalize the time for preparing and

filing papers which is actually available to parties and their counsel, regardless of whether they are in Washington or in California. Since service by mail upon parties is complete upon mailing (paragraph 5), it seemed to the Committee that the same principle should determine the filing date of papers which parties file by mailing to the agency.

SUBPENAS

The Committee believes that it is feasible to formulate uniform provisions governing the use of subpenas in administrative proceedings. In arriving at this conclusion, we considered it necessary to go beyond our sample of 10 agencies, so as to take into account the unusual detail in which regulatory statutes prescribe the issuance and enforcement of agency subpenas. Thus, we have examined the subpena provisions in the following statutes and in the related agency rules: Administrative Procedure Act, Administrative Expenses Act of 1946, Interstate Commerce Act, Federal Trade Commission Act, Federal Power Act, Natural Gas Act, Shipping Act, Merchant Marine Act, Civil Aeronautics Act, Communications Act, Securities Act, Securities Exchange Act, Public Utility Holding Company Act, Investment Company Act, Investment Advisers Act, National Labor Relations Act, as amended, Social Security Act, Longshoremen's and Harborworkers' Compensation Act, U. S. Employees Compensation Act, Fair Labor Standards Act, Walsh-Healey Act, statutes administered by the Coast Guard, Agricultural Marketing Agreement Act, Perishable Agricultural Commodities Act, Packers & Stockyards Act, Commodity Exchange Act, Tobacco Inspection Act, Federal Seed Act, statutes administered by the Veterans' Administration,

Subversive Activities Control Act, and the War Claims Act. We have also taken into account leading judicial decisions, such studies as Benjamin's Administrative Adjudication in New York, and the subpena procedures under Rule 45 of the Federal Rules of Civil Procedure, as well as the views of a number of experienced administrators and practitioners.

There are such variations in the statutory provisions governing Federal administrative subpenas that a uniform subpena provision covering all legislation, such as a revision of Section 6(c) of the Administrative Procedure Act. However, a substantial amount of uniformity in procedures for the issuance of subpenas could be achieved by changes in agency rules, without legislation. Some of us believe that such concerted action by the various agencies toward uniform subpena procedures is preferable to legislation in that it would allow a period of experimentation and development which would be difficult if not impossible if detailed uniform procedures were embodied in legislation at the outset. Such concerted action assumes, of course, the existence of some central agency or group which would act as a nucleus for such cooperative effort between the agencies and the bar. In the absence of such arrangements, it is clear that uniform subpena procedures can be achieved only through legislation.

We set forth below the text of a possible uniform subpena provision to illustrate our view that it is feasible to formulate such a provision. In the following comment, we describe the problems which we encountered,

the alternative solutions which we considered, and our reasons for the choices embodied in the illustrative text. The illustrative uniform provision is set forth in two segments: the first containing those portions which most of the agencies could put into effect without legislation, and the second containing the portions which would require legislation.

TEXT OF ILLUSTRATIVE UNIFORM SUBPENA PROVISION

The portions of the illustrative uniform subpena provision which the Committee believes could be formulated and put into effect without legislation, are as follows:

(a) Form—Every subpena shall state the name of the agency and the title of the proceeding, if any, and shall command the person to whom it is directed to attend and give testimony or produce designated evidence at a specified time and place.

(b) Issuance to Parties—Upon application of counsel (or other representative authorized to practice before the agency) for any party to a proceeding governed by Sections 7 and 8 of the Administrative Procedure Act, there shall be issued to such party subpenas requiring the attendance and testimony of witnesses or the production of evidence in such proceeding. The agency may issue subpenas to parties not so represented upon request

or upon a showing of general relevance and reasonable scope of the testimony or evidence sought.

(c) Service—Unless the service of a subpena is acknowledged on its face by the witness, it shall be served by a person who is not a party and is not less than 18 years of age. Service of a subpena upon a person named therein shall be made by delivering a copy of the subpena to such person and by tendering him the fees for one day's attendance and the mileage allowed by law. When the subpena is issued on behalf of the United States or its officer or agency, fees and mileage may but need not be tendered, and the subpena may be served by registered mail.

(d) Fees—Witnesses summoned before an agency shall be paid by the party at whose instance they appear the same fees and mileage that are paid to witnesses in the courts of the United States.

(e) Proof of Service—The person serving the subpena shall make proof of service by filing the subpena and the required return, affidavit, or acknowledgement of service with the agency or the officer before whom the witness is required to testify or produce evidence. If service is made by a person other than a United States marshall or his deputy, or an officer of the agency, and such

service has not been acknowledged by the witness, such person shall make an affidavit of service. Failure to make proof of service does not affect the validity of the service.

(f) Quashing—Upon motion made promptly, and in any event at or before the time specified in the subpena for compliance, by the person to whom the subpena is directed (and upon notice to the party to whom the subpena was issued) the agency or its authorized member or officer may (1) quash or modify the subpena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion upon just and reasonable conditions.

(g) Enforcement—Upon application and for good cause shown, the agency will seek judicial enforcement of subpenas issued to parties and which have not been quashed.

The following portions of the illustrative uniform subpena rule would require legislation:

(a) Power to Issue—In any hearing, investigation or other proceeding in which an agency is authorized by law to issue subpenas, such agency or any member of such agency, any hearing officer appointed pursuant to Section 11 (of the Administrative Procedure Act), or any

officer designated by it may issue subpenas requiring the attendance of witnesses to testify or to produce evidence.

(b) Geographical Scope—Such attendance of witnesses and such production of evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(c) Enforcement—In case of contumacy or refusal to obey a subpena issued to any person, any court of the United States within the jurisdiction of which such hearing, investigation or proceeding is carried on, or in which the person to whom the subpena is addressed is found or resides or transacts business, upon application by the agency, may issue an order requiring such person to appear before the agency or member or officer designated by the agency, and give testimony, or produce evidence, or both, touching the matter under investigation or in question.

An order of such court directing compliance with a subpena shall not be subject to appeal. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or in which he may be found.

(d) Penalties—Any person who shall wilfully neglect or refuse to attend and testify or to produce evidence, if in his power to do so, in obedience to the subpena of the agency shall be guilty of an offense and upon conviction by a court of competent jurisdiction shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

COMMENT

We discuss in order, first, the provisions of the illustrative proposal which we believe could be effectuated without legislation, and, second, the provisions which would require legislation in order to achieve uniformity.

Form—"Every subpena shall state the name of the agency and the title of the proceedings, if any, and shall command the person to whom it is directed to attend and testify or produce designated evidence at a specified time and place."

This provision is derived from Rule 45 of the Federal Rules of Civil Procedure and from existing agency subpena forms.

Issuance to parties; quashing. The principal problem to be resolved in achieving uniform subpena procedures is whether agencies should regulate the initial issuance of subpenas to parties to agency

proceedings, or whether subpenas should issue automatically upon application subject to later quashing, as they now issue under the Federal Rules of Civil and Criminal Procedure and under Section 11 of the National Labor Relations Act, as amended.

Until recent years, Federal regulatory statutes vesting subpena powers in Federal agencies were silent as to the right of private parties to have the assistance of agency subpenas. In practice, agencies issued subpenas to private parties to agency proceedings. However, as noted in the Final Report of the Attorney General's Committee on Administrative Procedure (1941) pp. 124-125:

> The practices of the several agencies in respect of the issuance of subpenas upon request of private parties and upon request of the agencies' own employees, show wide differences. Some of them are readily understandable in the light of the special uses to which subpenas may be put by those to whom they have been made available. Other differences are no doubt largely accidental and reflect nothing more profound than the haphazard growth of administrative processes. The Committee doubts the justifiability of a requirement that applications be made in a way that is burdensome to respondents nor does the Committee perceive justification for issuing subpenas for the use of an agency's officers without first requiring a showing that they are needed and will be properly used. To the extent that they will not be governed by the proposals already made by this Committee in connection with adjudicatory proceedings, these are all matters which can readily be regularized by the agencies themselves and which should be evaluated by the Director of Federal Administrative Procedure with a view to conforming and strengthening present practices.

The minority of Attorney General's Committee thought that the right of private parties to subpenas should be defined by statute, and they proposed in their recommendation for legislation that,

> "Administrative subpenas authorized by statute shall be issued upon request and a reasonable showing of the grounds, necessity, and reasonable scope thereof, and shall be issued to private parties as freely as to representatives of any agency."

In an explanatory note, the minority stated that "The right to fair treatment in the issuance of subpenas should be stated. Thus, private parties should be accorded equality of treatment with public agencies in the matter of subpenas, * * *. At the same time, anyone, private party or public officer, should be made to show the necessity and reasonableness of requests for subpenas in order that privacy may not be unnecessarily disturbed. Final Report, p. 221.

The minority view resulted in the enactment (in 1946) of the provision of Section 6(c) of the Administrative Procedure Act that

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought."

The clear purpose of this development was to make subpenas available to private parties to the same extent as to agency representatives, but at the same time to leave the agencies with power to avoid abuses by refusing to issue unnecessary or oppressive subpenas.

In contrast, however, under the Federal Rules of Civil Procedure (Rule 45) and Criminal Procedure (Rule 17), subpenas are signed and issued in blank by the clerk of the court upon the request of a litigant. Under both Rules, a subpena duces tecum is subject to a motion to quash or modify "if compliance would be unreasonable or oppressive." The only check upon the use of subpenas ad testificandum is the requirement that service of the subpena be accompanied by a tender of "the fee for one day's attendance and the mileage allowed by law."

Since 1946, whenever Congress has had occasion to deal with administrative subpena matters, it has tended toward the automatic issuance of subpenas. Thus, Section 11 of the National Labor Relations Act, as amended in 1947, provides that:

> The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required.

That is, the Board must automatically issue subpenas upon the application of parties, subject to a motion to revoke or quash made within five days by the person to whom the subpena is directed. While this provision for revoking subpenas, read literally, seems applicable only to

subpenas duces tecum (as are motions to quash under the Federal Civil and Criminal Rules, Civil Rule 45, Criminal Rule 17), the Board's rules provide for the revocation upon motion of both subpenas duces tecum and testificandum.

Similarly, in 1950, the War Claims Act (50 U.S.C. App. 2001) was amended (Public Law 696, 81st Cong., 2d Sess.) to give the subpena power to the War Claims Commission. The amendment provided that:

> The Commission or any employee so designated by the Commission shall, upon application of a claimant, issue to such claimant subpenas requiring the attendance and testimony of witnesses or the production of documents, or both, required by such claimant in hearings upon his claim: Provided, that the claimant making such application pay the witness fees and mileage of any witness or witnesses subpenaed upon his request.

The quoted provision originated in the House Committee on Interstate and Foreign Commerce which characterized it as follows (H. Rep. 2705, 81st Cong., 2d Sess., p. 2):

> It is the purpose of the Committee amendment to place claimants whose claims are the subject of the aforementioned proceedings in the same position as the Commission . . . The claimant, however, would be required in such cases to pay the witness fees and the mileage of any witness or witnesses subpenaed upon his request.

It should be noted that the quoted amendment to the War Claims Act unlike Section 11 of the National Labor Relations Act, provides for automatic issuance of subpenas to private parties without any express provision for quashing or revocation by the agency.[1/]

1/ See also the Ohio Administrative Procedure Act, 1 Page's Ohio Gen. Code sec. 154-70.

Also, the Civil Aeronautics Board, in Section 302.19(f) of its Rules of Practice in Economic Proceedings, has provided that:

> * * * Any person upon whom a subpena is served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to modify or quash the subpena. If the Board has not acted upon such a motion by the return date, such date shall be stayed pending Board action thereon.

A principle similar to the subpena provision of the National Labor Relations Act has evolved in New York and is discussed by Benjamin in Administrative Adjudication in New York (1942) pp. 162-164, as follows:

> * * * In Matter of Coney Island Dairy Products Corp. v. Baldwin, 243 App. Div. 178, the Appellate Division, Third Department, held that, in the absence of explicit legislation to the contrary, an outside party is entitled to the issuance of ordinary subpenas without disclosing to the agency the names of witnesses or the character of the testimony sought from them. This result seems to me sound as a matter of policy, and I do not advocate legislation to change it. It is supported by the analogy of court proceedings, where the attorney for any party himself subscribes subpenas in the name of the court. Where the agency is itself a party to the proceeding, moreover, a procedure which requires the other party (and the other party alone) to disclose to his adversary in advance the names of his witnesses and the general line of their testimony risks at least the appearance of unfairness, even where the agency in fact exercises care to avoid unfair use of this information. There are, it is true, instances where an unlimited right to subpena witnesses may operate unfairly to the persons subpenaed, as where competitors are subpenaed to testify on an issue that is clearly irrelevant, or where the head of an administrative department (or the president, say, of a public utility corporation) is subpenaed to testify to matter which could as easily be established otherwise, if it is relevant at all. It is not a satisfactory solution of the witness's difficulty to say that he may be excused, or his testimony excluded, at the hearing itself. But the problem can be met, and I believe that

it should be met, as I have suggested above, by allowing the witness to apply to the agency to vacate the subpena (it being the witness alone, and not the agency, whose interests are affected at the pre-hearing stage). The doctrine of the Coney Island case is not, in my view, in conflict with a procedure whereby the witness is enabled to invoke the protection of the agency in this way.

With respect to subpenas duces tecum, there are additional considerations. Since an administrative agency is supposed to issue a subpena duces tecum only "in a proper case," there is something to be said for its inquiring in advance whether "a proper case" exists, even where such a subpena is issued at the instance of an outside party. The burden of producing documentary evidence is, moreover, substantially greater than the burden of mere attendance at a hearing. It is, therefore, arguable that disclosure may properly be required of an applicant for a subpena duces tecum, particularly where the agency to which application is made is not itself a party to the proceeding (e.g., workmen's compensation). Nevertheless it is my view that, as a general matter, the procedure that I have suggested for an application to the agency by the witness (or by any other person whose interests would be invaded by the production of the documentary evidence) is sufficient, and is to be preferred.

The New York State Bar Association has sponsored the following proposal:

> * * * In the event that the attorney for a party to a proceeding before any department, board, bureau, officer, authority or commission of the state or of any of its municipal corporations or other civil divisions authorized by section four hundred six of this article or otherwise to issue subpenas, in which proceeding a hearing is required by law, requests the issuance by such department, board, bureau, officer, authority or commission of a subpena for attendance at or the production of documents at such hearing, such subpena shall be issued without requiring that such party disclose the name of the person or identify the documents to be subpenaed or disclose the nature of the facts to be proved by the witness or documents subpenaed; provided that in any such proceeding in which the attorney

> for a party requests the issuance of more than twenty subpenas the department, board, bureau, officer, authority or commission requested to issue the subpenas shall not be obligated to issue more than twenty subpenas unless satisfied that there is reasonable ground therefor.
>
> Any subpena issued pursuant to the provisions of this section may be quashed by the department, board, bureau, officer, authority or commission which issued the subpena, upon application by the person subpenaed if cause is shown. The granting of such an application to quash shall not be judicially reviewable except in connection with judicial review of the final determination in such proceeding.

We believe that the development of uniform subpena procedures should be in the direction of automatic issuance of subpenas subject to a quashing procedure. There are conflicting considerations to be resolved. Probably everyone agrees that private parties to agency proceedings should have the benefit of compulsory process to obtain evidence, and that such process should be available to private parties on substantially the same terms as to representatives of the agency. Also, there appears to be some feeling on the part of lawyers that it is unfair to require them to disclose to the agency or any of its representatives the evidence which they expect to obtain as a prerequisite to the issuance of a subpena. On the other hand, it has been felt that there is a need to protect witnesses from unnecessary harassment, particularly with respect to subpenas duces tecum and in view of the fact that generally Federal Administrative subpenas may be directed to witnesses anywhere in the United States. However, in view of the procedure for the issuance of court subpenas, and particularly because we understand that

the National Labor Relations Board has encountered no serious difficulties under its present subpena provision, we believe that at least a limited automatic issuance of subpenas coupled with a procedure for quashing would work satisfactorily in Federal regulatory agencies generally.

Under the suggested provision quoted above, the automatic issuance of subpenas would be limited to parties to "agency proceedings" or hearings governed by Sections 7 and 8 of the Administrative Procedure Act. At the present time, Section 6(c) of that Act relates only to the issuance of subpenas to "parties" which are defined in Section 2(b) as parties "in any agency proceeding," which is in turn defined in Section 2(g) of that Act as a general term embracing rule making, adjudication, and licensing.

The proposed rule would also limit the automatic issuance of subpenas to parties represented by attorneys or other representatives authorized to practice before the particular agency. Such a limitation appears in the New York subpena proposal, but does not appear in the Civil or Criminal Rules or in Section 11 of the National Labor Relations Act. We are not certain whether such a limitation is necessary to prevent abuses. We assume that laymen's concepts of the relevant and reasonable may not be as developed as those of lawyers. However, if some agencies should choose to omit such a limitation, it would be useful to

see whether automatic issuance of subpenas to unrepresented parties will actually result in abuses.[1/]

In view of the fact that Federal administrative subpenas may be issued any place in the United States, with the possibility of serious inconvenience to distant witnesses, we have considered whether the automatic issuance of subpenas should be limited to subpenas requiring the attendance of witnesses or the production of evidence from places within 100 miles of the place of hearing. Such a limitation appears in Rule 45 of the Federal Rules of Civil Procedure. While we are not aware that the absence of such a limitation in both the Criminal Rules and Section 11 of the National Labor Relations Act has resulted in unnecessary harassment of distant witnesses, it should be noted that criminal trials must be held in the district in which the crime was committed, and that the N.L.R.B. customarily conducts its hearings in the area in which the matters involved occurred. On the other hand, where for budgetary or other reasons an agency conducts hearings in Washington, it may wish to exercise some control over the initial issuance of subpenas which would require, e.g., the attendance of witnesses from California. In the absence of any specific showing that abuses would occur, we have not recommended such a general geographical limitation.

1/ Under the New York subpena proposal, parties with counsel who apply for subpenas may not even be required to disclose the names of the persons to be summoned. We doubt that it is of great importance whether such information may be required in an application for a subpena.

We believe that any agency rule authorizing the automatic issuance of subpenas should provide a procedure for quashing or revoking a subpena upon the application of the person to whom the subpena is addressed, made upon notice to the party to whom the subpena was issued. Such a quashing procedure appears with respect to subpenas duces tecum in the Federal Rules of Civil and Criminal Procedure, in Section 11 of the National Labor Relations Act, and with respect to both types of subpenas in the Civil Aeronautics Board's Rules of Practice in Economic Proceedings; it is applied to subpenas ad testificandum by the N.L.R.B. in practice and in the New York legislative proposal. We suggest that subpenas thus issued should contain a statement advising witnesses of the existence of the quashing procedure.

The illustrative quashing procedure is drafted to apply to all agency subpenas. Consideration might be given to restricting the quashing procedure to subpenas which have been issued to parties automatically, i.e., without any prior showing of reasonableness and relevance.

It has also been suggested that an agency should permit opposing parties to a proceeding to move to quash subpenas, and that the agency itself should have the power sua sponte to revoke a subpena which it has issued previously - particularly a subpena duces tecum. These suggestions go beyond any of the provisions for automatic issuance of subpenas referred to above. Underlying them is the thought that only by permitting opposing parties and the agency to question subpenas can there be

avoided the use of subpenas to obtain irrelevant or cumulative evidence or at such times as will interfere with the commencement and completion of hearings. A majority of the committee are unwilling to recommend such additional restrictions in the absence of proof that they are necessary to prevent substantial abuses.

The suggested rule would require that a motion to revoke or quash be made promptly after service of the subpena and in any event at or before the time specified in the subpena for compliance. This language derives from Rule 45(c) of the Federal Rules of Criminal Procedure, and differs from the provision of Section 11 of the National Labor Relations Act which authorizes a motion to revoke a subpena within five days after service. It has been pointed out, however, that under such a specific time limitation a witness cannot be held to have disobeyed the subpena until such time has expired, and that this produces awkward results where the subpena is issued immediately before or during a short hearing.

The suggested standard for quashing a subpena is whether it is "unreasonable" or calls for irrelevant evidence, the test under Section 6(c) of the Administrative Procedure Act for denying agency subpenas. Under the Civil and Criminal Rules the test is whether a subpena is "unreasonable or oppressive." Under Section 11 of the National Labor Relations Act the test is "if in (the Board's) opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such

subpena does not describe with sufficient particularity the evidence whose production is required." Under the New York legislative proposal, a subpena may be quashed "if cause is shown." It would seem that the test of reasonableness and relevance would embrace the tests of relevance and specificity under Section 11 of the National Labor Relations Act, and is practically equivalent to the standard under the Civil and Criminal Rules.

An agency adopting a rule such as we have proposed would ordinarily find it necessary to implement it with provisions on such matters as specifying the persons within the agency who are empowered to issue and revoke subpenas.

It seems clear that agency action in quashing a subpena would not and should not be judicially reviewable except in connection with judicial review of the agency's final action in the proceeding. In view of the strict Federal rule as to exhaustion of administrative remedies, a specific provision to this effect, such as that contained in the New York proposal, would appear to be unnecessary.

We believe that under the subpena provisions of most Federal regulatory statutes, agencies presently have the power to provide in their rules for the automatic issuance and for the quashing of subpenas such as we have suggested. The broad subpena powers of most agencies would permit them to issue all subpenas automatically upon the request of parties, and thereafter to revoke them at will. Such a subpena power clearly

includes the power to specify the circumstances in which subpenas will issue merely upon request and to provide a reasonable procedure for quashing for cause subpenas thus issued. No obstacle is presented by the provision of Section 6(c) of the Administrative Procedure Act that "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." Indeed, Section 6(c) clearly contemplates that subpenas will be issued merely upon request unless the agency issues a procedural rule requiring the specified showing. Obviously, it would permit an agency to establish by rule an issuance and quashing procedure under which such a showing of relevance and reasonableness is required only if the subpena is challenged.

> Service—"Unless the service of a subpena is acknowledged on its face by the witness, it shall be served by a person who is not a party and is not less than 18 years of age. Service of a subpena upon a person named therein shall be made by delivering a copy of the subpena to such person and by tendering him the fees for one day's attendance and the mileage allowed by law. When the subpena is issued on behalf of the United States or its officer or agency, fees and mileage may but need not be tendered, and the subpena may be served by registered mail."

The provisions with respect to service of subpenas are taken substantially from Rule 45 of the Federal Rules of Civil Procedure, since the subpena provisions of Federal regulatory statutes are silent as to the service of subpenas. The reference to service by "a person who is not a party" is not intended to prevent agency employees from serving subpenas.

In addition, we suggest that agencies be permitted to serve by registered mail subpenas issued on their own behalf. This would permit such agencies as the Federal Trade Commission and the Civil Aeronautics Board to continue their practice of serving subpenas by registered mail. In Administrative Adjudication in New York (1942) pp. 156-157, Benjamin has the following comment on service of subpenas by registered mail:

> Section 406 of the Civil Practice Act requires personal service of subpenas. Only one departmental statute, the State Labor Relations Act, provides otherwise; that statute authorizes service by registered mail as an alternative, and that method is normally used in serving the Board's subpenas. It will be remembered that the State Labor Relations Act provides a special procedure for the enforcement of subpenas, which requires application to the Supreme Court for an order directing obedience to the subpena, and penalizes only refusal to obey the court's order (Labor Law, Section 708, subd. 3). With such enforcement procedure, there can be no question either of the fairness or of the validity of service of subpenas by registered mail. There would, indeed, in my judgment be no substantial question on either score even where the enforcement procedure is that provided by Section 406 of the Civil Practice Act (or similar departmental statutes), and even where disobedience of a subpena is by statute also made a misdemeanor. In the

> interest of saving the expense, inconvenience and delay which personal service of subpenas involves, I recommend legislation authorizing registered mail service of administrative subpenas generally. It is in my view of particular importance that such provision be made in those fields (e.g., unemployment insurance) where the volume of subpenas to be served is large, and the saving of expense, inconvenience and delay would be correspondingly great.

Witness Fees—Some statutes provide that persons summoned by subpena shall be paid the same fees and mileage that are paid witnesses in the Federal courts. A general provision to this effect, applicable to "departments," appears in Section 10 of the Administrative Expenses Act (Appendix, infra). Some agency rules contain such a provision even where the statutes are silent. A uniform rule should provide to that effect and that such fees and mileage shall be paid by the party at whose request the witness appears. This restatement of the present general rule governing witness fees is not intended to preclude any agency from adopting supplemental rules regulating additional compensation in special situations.

Enforcement—Where subpenas are issued automatically to parties upon their request, the question arises whether such parties should be permitted to apply to district courts for judicial enforcement of subpenas, or forced to rely upon the agency to obtain such enforcement. Existing subpena statutes typically provide for judicial enforcement

upon the application of the agency.[1/] Even Section 11 of the National Labor Relations Act, as amended, provides for judicial enforcement of Board subpenas "upon application by the Board." Section 230.31(d) of the Board's Rules and Regulations provides that:

> Upon the failure of any person to comply with subpena issued upon the request of a private party, the general counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement of such subpena, but neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

In Administrative Adjudication in New York (1942) pp. 165-166, Benjamin has the following comment:

> One point regarding the position of outside parties remains to be noted. Section 406 of the Civil Practice Act is not explicit as to who may invoke its provisions for the enforcement of obedience to subpenas; and it is not clear whether an outside party at whose instance an administrative subpena had been issued would be entitled to do so. A few departmental statutes (agriculture and Markets Law, Section 34, subd. 4; Labor Law, Section 708, subd. 3; Public Service Law, Section 19, subd. 2) provide explicitly that enforcement proceedings may be undertaken directly by the outside party. But the matter is of no great importance. I have no doubt that, if the applicable statute does not provide for enforcement proceedings by the outside party, the agency is obligated to undertake such proceedings in behalf of the outside party on condition that he bear the expense, or in the alternative itself to authorize the outside party to do so. Refusal to render such

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1/ An exception appears in Section 1004 of the Civil Aeronautics Act (49 U.S.C. 644) which provides that:

> * * * In case of disobedience to a subpena, the Authority, or any party to a proceeding

> assistance in the enforcement of a validly outstanding subpena would, I believe, be ground for annulling the agency's final determination (in the absence of particular justification, e.g., that the enforcement proceedings were being resorted to for purposes of delay and that the evidence sought thereby was of no substantial value).

Clearly, agencies should be required to assume responsibility for obtaining judicial enforcement of subpenas which they issue to private parties (and have not quashed), unless the private parties are to be authorized to seek judicial enforcement. Accordingly, we have suggested that the following provision be placed in their rules:

> Upon application and for good cause shown, the agency will seek judicial enforcement of subpenas issued to parties and which have not been quashed.

Perhaps parties should be required to reimburse agencies for the cost of seeking judicial enforcement of subpenas issued to such parties.

There are discussed below the portions of the illustrative uniform subpena provisions which would require legislation.

> Power to Issue; Delegation of Subpena Power—"In any hearing, investigation or other proceeding in which an agency is authorized by law to issue subpenas, such agency or any member of such agency, any hearing officer appointed pursuant to Section 11 (of the Administrative Procedure Act), or any officer designated by it may issue subpenas requiring the attendance of witnesses to testify or to produce evidence."

> before the Authority, may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

Purposes for which subpenas may be issued. A fair consensus of the statutes seems to be that Congress authorizes administrative agencies to issue subpenas both in aid of ex parte investigations and in connection with hearings.

Definition of "agency." The term "agency" is defined in Section 2(a) of the Administrative Procedure Act.

Agencies which may issue subpenas. A uniform subpena provision must take into account the fact that Congress has not heretofore given the subpena power to such agencies as the Post Office Department and the Food and Drug Administration (in the Department of Health, Education and Welfare). Since it would seem that Congress should determine which agencies need subpena powers, the sentence quoted above is limited to agencies to which Congress has expressly given the power to issue subpenas.

Delegation of the power to issue subpenas. The statutes and agency rules dealing with administrative subpenas contain various provisions as to who may sign and/or issue subpenas, i.e., the agency, a member of the agency, or agency employees designated by the agency. The only uniformity on this point is provided by Section 7(b) of the Administrative Procedure Act which states that in the conduct of hearings governed by that Act hearing examiners employed by agencies which have the subpena power shall have the power to issue subpenas (presumably in connection with such hearings).

The Interstate Commerce Act (Title I) provides that "the commission shall have power to require, by subpena, etc.," and the Commission's rules provide that "a subpena will issue only upon signature by the Secretary or a member of the Commission." The Motor Carrier Act (Title II) provides that "the (Interstate Commerce) Commission and the members and examiners thereof and joint boards shall have the same power to * * * required by subpena * * * as the Commission has in a matter arising under Chapter 1 of this title." The Federal Trade Commission Act provides that "the Commission shall have power to require by subpena" and "any member of the Commission may sign subpenas." The Securities Act and other statutes administered by the Securities and Exchange Commission provide that subpenas may be issued by any member of the Commission or by any officer designated by it. Where a subpena statute merely authorizes the head of an agency, or one of the members comprising the agency, to issue subpenas, the courts may hold that he or they are without power to subdelegate the subpena power to officers of the agency, such as regional directors. Cudahy Packing Co. v. Holland, 315 U.S. 357, involving the Fair Labor Standards Act which incorporated the subpena provisions of the Federal Trade Commission Act. However, there seems to be a later judicial tendency to find subdelegation power, Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111. In the case of some agencies, ample authority to delegate subpena powers will be found in the type of reorganization plan which vests all powers and

functions in the head of the agency, who is given broad delegation power. See, e.g., Reorganization Plan 6 of 1950 (Department of Labor (5 U.S.C. 611)). In any event, any uniform provision should be specific on the point. Thus, the illustrative proposal provides that subpena may be issued by a member of the agency or any officer designated by it.

Some statutes and agency rules suggest a distinction between signing subpenas and issuing subpenas, i.e., deciding whether a subpena shall issue in a particular situation. Any such distinction is irrelevant in determining whether agency heads should be empowered to delegate to their subordinates the power to issue subpenas. It is absurd to say that busy and responsible agency heads must sign subpenas (presumably in blank) while their subordinates may be empowered to determine when subpenas shall be issued. It is equally absurd to expect the busy heads of an agency to personally determine when subpenas shall be issued. Controls against abuse of subpenas, discussed above, cannot be predicated upon personal decision of every subpena application by agency heads. The power to sign and issue subpenas should be delegable.

One aspect of the subpena problem that may defy uniformity is that of which agency officials (other than hearing examiners) shall be empowered to issue subpenas. An agency with decentralized operations will desire to delegate the power to regional officers, while a highly centralized agency may have no occasion to do so. Under a uniform

subpena provision, it may be necessary to leave this, and perhaps similar matters to be prescribed in supplemental agency rules.

> Geographical Scope—Such attendance of witnesses and such production of evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Existing subpena statutes vary somewhat as to the geographical area in which subpenas may be issued. Many, such as the Interstate Commerce Act and the Federal Trade Commission Act, provide that "Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing." Others, such as the Merchant Marine Act, 1936, the Public Utility Holding Company Act, and the National Labor Relations Act, provide that the attendance of witnesses and the production of evidence may be required "from any place in the United States or any Territory or possession thereof," etc. The illustrative proposal contains the broader area on the theory that if a witness in Alaska or Guam is essential he should be available; if he is not essential, the cost of summoning him and the quashing procedure discussed above should be adequate safeguards against abuse.

The U. S. Employees Compensation Act provides that the Secretary of Labor "shall have power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles." The

subpena power of the Administrator of Veterans' Affairs also contains a hundred-mile limitation. It is believed that these limitations are unimportant and could be eliminated in preparing a uniform provision, since the Final Reports of the Attorney General's Committee on Administrative Procedure, pp. 416, 429-30, states that these subpena powers are rarely used.

It will be noted that generally Federal administrative agencies may exercise their subpena powers throughout the United States. In contrast, Rule 45(e) of the Rules of Civil Procedure provides that "A subpena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpena; and, when a statute of the United States provided therefor, the court upon proper application and cause shown may authorize the service of a subpena at any other place." However, Rule 17(e) of the Federal Rules of Criminal Procedure provides that "A subpena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

Enforcement—Federal regulatory statutes provide two methods for enforcement of administrative subpenas: (1) the most common and most frequently used provides that in the event a person refuses to obey an agency subpena the appropriate United States district court may issue an order requiring such person to appear and testify or produce evidence,

the failure to obey the court's order being punishable as a contempt; (2) such statutes as the Federal Trade Commission Act and the Federal Power Act which provide the criminal sanctions of fine and/or imprisonment for wilful violation of administrative subpenas; on the other hand, no such criminal sanctions are provided by the Civil Aeronautics Act and the Communications Act.

The provisions for judicial enforcement must now be read with the second sentence of Section 6(c) of the Administrative Procedure Act which provides that:

> * * * Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

This provision has already been construed as preserving the principle of Endicott Johnson Corp. v. Perkins, 317 U.S. 501, and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 166, that a court whose aid is invoked for the enforcement of a subpena should not determine factual issues relating to the coverage of the substantive statute involved. Tobin v. Banks & Rumbaugh, 201 F. 2d 233 (C.A. 5) certiorari denied 345 U.S. 942. Accordingly, we foresee no great difficulty in formulating a uniform provision for judicial enforcement of subpenas.

We also suggest that any uniform subpena statute should alter existing law by specifically providing that a court order enforcing an

agency subpena shall not be an appealable order. A court order enforcing (i.e., denying a motion to quash) a judicial subpena duces tecum is not an appealable order, Cobbledick v. United States, 309 U.S. 323, with the result that a recalcitrant witness may attack the subpena further only by way of defense in a contempt proceeding. A district court order enforcing an administrative subpena is an appealable order, with attendant possibilities for delay and frustration of administrative proceedings. See Penfield Co. v. S.E.C., 330 U.S. 585. Accordingly, it seems desirable to provide that a court order enforcing a subpena shall not be appealable. Of course, the witness could further challenge the subpena by way of defense in a contempt proceeding. On the other hand, a court's refusal to enforce an agency subpena should be appealable, as it is at the present time, otherwise an error by a single judge might effectively terminate an important administrative proceeding without any possibility of recourse course to the appellate courts.

Criminal sanctions for enforcement or subpenas are rarely used. See Note, 51 Harv. L. R. 312, 316 (1937). It would seem that the draftsmen of a uniform provision should consider whether the existence of such criminal sanctions is a useful deterrent to flagrant violation of administrative subpenas and one which should be made applicable to all agencies, or whether it is useless and should be omitted for all.[1/] In any

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1/ Query as to whether the second sentence of Section 6(c) of the APA was intended to have any effect upon these criminal sanctions. See

event, we do not think that this presents a serious obstacle to uniformity. We incline to the former view and, accordingly, we have set forth a possible uniform provision which at least prescribes uniform penalties—in contrast with the varying penalties under present statutes.

The power to grant immunity—A more delicate problem arises out of the fact that many, but not all, administrative subpena statutes empower agencies to grant immunity from prosecution for testimony and evidence given after a claim of the privilege against self-incrimination. It does not follow that every agency with the subpena power should have the further power to grant immunity. On the other hand, in many fields the effective use of subpena powers may require that it be coupled with power to grant immunity. Accordingly, it would seem that a uniform subpena statute probably could not cover the immunity problem. In any event, it need not do so. If uniform subpena provisions were enacted as an amendment of Section 6(c) of the Administrative Procedure Act, they would override subpena provisions in particular statutes except in respects, such as immunity, which the uniform provisions did not purport to regulate. In this way, existing immunity provisions would be left undisturbed. For these reasons, our illustrative uniform subpena provision is silent as to immunity.

Davis, Administrative Law (1951), p. 120, and McFarland & Vanderbilt, Administrative Law Cases and Materials (2d ed., 1952) p. 85. On the policy of providing such criminal sanction, see Benjamin, Administrative Adjudication in New York (1942) pp. 152-155.

DEPOSITIONS AND INTERROGATORIES

The Committee believes that it is feasible to formulate uniform rules governing the use of depositions and interrogatories, and has prepared the following illustrative rules:

DEPOSITIONS

(a) Right to Take—Except as otherwise provided, in an order made pursuant to paragraph (d), any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for use as evidence in the proceeding, except that leave, granted with or without notice, must be obtained if notice of the taking is served by a proponent within thirty days after the filing of a complaint, application or petition. The attendance of witnesses may be compelled by the use of a subpena. Depositions shall be taken only in accordance with this Rule and the Rule on subpenas.

(b) Scope—Unless otherwise ordered as provided in paragraph (e), the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding.

(c) Officer Before Whom Taken—Within the United States or within a territory or insular possession subject to the dominion of the United States depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; within a foreign country, depositions shall be taken before a Secretary of an Embassy or Legation, Consul General, Vice Consul or Consular Agent of the United States, or a person designated by The Agency, or agreed upon by the parties by stipulation in writing filed with the Agency. Except by stipulation, no deposition shall be taken before a person who is a party or the privy of a party, or a privy of any counsel of a party, or who is financially interested in the proceeding;

(d) Authorization—A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the Agency and all parties. The notice shall state the time and place for taking the deposition, the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he

belongs. On motion of a party upon whom the notice is served, the hearing officer may for cause shown, enlarge or shorten the time. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used as other depositions;

(e) Protection of Parties and Deponents—After notice is served for taking a deposition, upon its own motion or upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the Agency may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed, the deposition shall be opened only by order of the Agency, or that business secrets or secret processes, developments, or research need not be disclosed, or that the parties

shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Agency; or the Agency may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Agency may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as above provided. If the order made terminates the examination it shall be resumed thereafter only upon the order of the Agency. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(f) Oral Examination and Cross Examination—Examination and cross examination shall proceed as provided in Rules governing the reception of evidence at an oral hearing. In lieu of participating in the oral examination, any party served with notice of taking a deposition

may transmit written cross interrogatories to the officer who, without first disclosing them to any person, and after the direct testimony is complete, shall propound them seriatim to the deponent and record or cause the answers to be recorded verbatim;

(g) Recordation—The officer before whom the deposition is to be taken, shall put the witness on oath and shall personally or by someone acting under his direction and in his presence, record the testimony by typewriter directly or by transcription from stenographic notes, wire or record recorders, which record shall separately and consecutively number each interrogatory. Objections to the notice, qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented or to the conduct of the officer, or of any party, shall be noted by the officer upon the deposition. All objections by any party not so made are waived.

(h) Signing Attestation and Return—When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes

in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the Agency holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of proceeding and marked "Deposition of (here insert name of witness)" and shall promptly send it by registered mail to the Secretary of the Agency for filing. The party taking the deposition

shall give prompt notice of its filing to all other parties. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent;

(i) Use and Effect—Subject to rulings by the hearing officer upon objections a deposition taken and filed as provided in this Rule will not become a part of the record in the proceeding until received in evidence by the hearing officer upon his own motion or the motion of any party. Except by agreement of the parties or ruling of the hearing officer, a deposition will be received only in its entirety. A party does not make a party, or the privy of a party, or any hostile witness his witness by taking his deposition. Any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party;

(j) Fees of Officers and Deponents—Deponents whose depositions are taken and the officers taking the same shall be entitled to the same fees as are paid for like services in the District Courts of the United States, which fees shall be paid by the party at whose instance the depositions are taken.

DEPOSITIONS UPON INTERROGATORIES

(a) Submission of Interrogatories—Where the deposition is taken upon written interrogatories, the party offering the testimony shall separately and consecutively number each interrogatory and file and serve them with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom they are to be taken. Within 10 days thereafter a party so served may serve cross-interrogatories upon the party proposing to take the deposition. Within five days thereafter, the latter may serve redirect interrogatories upon the party who served cross-interrogatories.

(b) Interrogation—Where the interrogatories are forwarded to an officer authorized to administer oaths as provided in paragraph (c), the officer taking the same after duly swearing the deponent, shall read to him seriatim, one interrogatory at a time and cause the same and the answer thereto to be recorded before the succeeding interrogatory is asked. No one except the deponent, the officer and the court reporter or stenographer recording and transcribing it shall be present during the interrogation.

(c) Attestation and Return—The officer before whom interrogatories are verified or answered shall (1) certify under his official signature and seal that the deponent was duly sworn by him, that the interrogatories and answers are a true record of the deponent's testimony, that no one except deponent, the officer and the stenographer were present during the taking, and that neither he nor the stenographer, to his knowledge, is a party, privy to a party, or interested in the event of the proceedings, and (2) promptly send by registered mail the original copy of the deposition and exhibits with his attestation to the Secretary of the Agency, one copy to the counsel who submitted the interrogatories and another copy to the deponent.

(d) Provisions of Deposition Rules—In all other respects, depositions upon interrogatories shall be governed by the previous Deposition Rule.

Comment

It will be noted that the illustrative rule is largely derived from Rules 26, 28, 29, 30 and 31 of the Federal Rules of Civil Procedure.

A number of regulatory statutes expressly authorize agencies to take testimony by deposition, while other agencies have interpreted

and used their subpena powers (together with their general powers to make rules of procedure) as including the power to obtain testimony by deposition. The statutory provisions which expressly authorize the taking of testimony by deposition, such as Section 12 of the Interstate Commerce Act, are usually drafted in considerable detail as compared with the provisions for other aspects of procedure. Similarly, agency rules relating to depositions are quite detailed, although less so than the corresponding Rules of Civil Procedure.

Many of the variations in the statutory and rule provisions appear to reflect merely the accidental preferences of draftsmen rather than the substantial needs of particular agencies or procedures. For example, in describing the person or officer before whom the deposition is authorized to be taken, the Interstate Commerce Act and the Communications Act enumerate the authorized persons in detail, the Federal Power Act imposes merely the restriction that the person administering the oath not be of counsel to the parties nor interested in the proceeding, while the Civil Aeronautics Act and the Federal Trade Commission Act merely require that the person be designated by the agency and have power to administer oaths. Similarly, with respect to the subject of notice to take depositions, the Acts applicable to the FCC, FPC, and the ICC provide:

> ". . . Reasonable notice must first be given in writing by the party or his attorney proposing to take such

deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition."

The Civil Aeronautics Act simply states:

". . . Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition."

The Federal Trade Commission Act is silent regarding the subject. There should be little difficulty in resolving such variations.

However, the formulation of a uniform rule as to depositions encounters three important questions: (1) whether depositions may be used for discovery purposes, (2) the circumstances under which testimony may be taken by deposition, and (3) the use which may be made of depositions in administrative proceedings.

In our illustrative rule, we have omitted any provision which would make depositions available for discovery purposes, as distinguished from taking testimony for use in an administrative hearing. By such omission, we do not wish to be understood as opposing the use of depositions for discovery purposes. It reflects only the fact that we

have not studied discovery problems, which are being explored by the Committee on Pleadings of this Conference. Only minor changes in drafting would be required to provide for the use of depositions as a discovery device, should any agency so desire.

Following the analogy of the Rules of Civil Procedure, the illustrative rule would permit depositions to be taken by a party upon written notice to the agency and to other parties. However, paragraph (e) provides in effect that the agency, either upon its own motion or upon the timely motion of an opposing party or of the person to be examined, may take any of the actions enumerated in Civil Rule 30 (a) and (d) of the Rules of Civil Procedure for the protection of parties and witnesses from harassment. Such agency control over the taking of depositions is as essential as is judicial control over the taking of depositions in judicial proceedings. In the Federal courts, the propriety of taking testimony by deposition involves striking a balance of such factors as the geographical limitation on the use of subpenas in civil proceedings, and the necessity for obtaining particular testimony by deposition or not at all, vs. the inconvenience and expense to opposing parties of being represented at the examination of a distant deponent, and the desirability of the trier of facts actually hearing and seeing the witnesses. A similar balancing of conveniences to parties and witnesses is involved in the taking of testimony by deposition in Federal administrative proceedings, except that the factors of convenience and necessity are

somewhat different. For example, the subpena powers of most Federal agencies extend throughout the United States; also, administrative hearings officers have, in theory at least, greater freedom than a Federal district court to move a hearing to different places to serve the convenience of parties and witnesses.

The intended effect of paragraph (i) of the illustrative rule is to make testimony taken by deposition admissible in evidence in administrative hearings subject only to the objections as to admissibility which would lie if the witness were testifying orally. It should be specifically noted that illustrative rule omits such restrictions on the use of depositions as are contained in Rule 26(d) of the Rules of Civil Procedure. The Committee believes that the controls against improper use of depositions provided by paragraph (e), together with the absence of a jury in administrative proceedings, justifies the omission of such restrictions.

NON-EVIDENTIAL PROOF

The Committee's study has led to the conclusion that an important means by which the record may be shortened and an administrative proceeding expedited is the intelligent utilization of the judicial tools by which material facts are proved without the introduction of evidence, namely judicial or "official" notice, stipulations, admissions of record, and rebuttable presumptions of fact.

OFFICIAL NOTICE

Official notice, by far the most important of these tools, is infrequently employed in administrative proceedings. This fact may be due in part to the experiential background of the members of the agencies and their staffs of hearing officers. Not all of the members of the administrative agencies are attorneys or are familiar with even the elementary rules of judicial notice. Also, while most of the hearing officers are attorneys, those of regulatory agencies such as the Interstate Commerce Commission, which alone employs over a third of all of the hearing officers, are primarily experts in the economic and technical fields in which the substantive issues in proceedings before such agencies ordinarily arise and relatively few of them have been engaged in general practice of law sufficiently long to enable them to utilize with

confidence the rules of judicial notice and much less to extend the application of such rules to administrative proceedings. A further reason why the agencies have failed to take advantage of the possibilities offered by these principles of law is the widespread but mistaken view that in the Abilene case the Supreme Court held that the Interstate Commerce Commission had no power to take official notice of facts contained in reports of carriers in its public files. That decision set aside the Commission's order upon the obviously sound ground that no opportunity was given to the parties to controvert the facts judicially noticed because the particular facts to be noticed were not specified.[1/] The Administrative Procedure Act expressly requires that such an opportunity be given the parties.[2/]

As a result of the failure to take official notice of material facts volumes of testimony and days of hearings are needlessly expended in proving the obvious.

The conditions under which a court may take judicial notice of facts not proved by evidence are well known by judges and lawyers alike so that there is no need to set forth the applicable principles in rules of civil procedure. This, however, is not generally true of administrative

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1/ United States et al v. Abilene etc. Ry. Co., 265 U.S. 274.

2/ Section 7(d) "Where an agency decision rests on official notice of a material fact not appearing in evidence in the record any party shall on timely request be afforded an opportunity to show to the contrary."

agencies and in their proceedings it is desirable that both the legal principles and procedures of official notice, consistent with due process, should be spelled out in such detail that laymen as well as lawyers may understand and apply them. The principles of official notice being of general application, uniform rules with respect thereto are not only feasible but in the opinion of the Committee are imperative as a means of expediting proceedings. We suggest that the Conference recommend to the several agencies the adoption of uniform rules respecting official notice and in connection therewith submit the following illustrative rules for their consideration:

RULE 1 - Matters of Law

The agency or its hearing officer, with or without prior request or notice, will officially notice:

(a) Federal Law—The Constitution; Congressional Acts, Resolutions, Records, Journals and Committee Reports; decisions of Federal Courts and Administrative Agencies; Executive Orders and Proclamations; and all rules, orders and notices published in the Federal Register;

(b) State Law—The public laws and the decisions of Courts of record of each State of the United States;

(c) Governmental Organization—Organization, territorial limitations, officers, departments, and general

administration of the Government of the United States, the several States and foreign nations;

(d) Agency Organization—The agency's organization, administration, officers, personnel, official publications, and practitioners before its bar.

RULE 2 - Material Facts

In the absence of controverting evidence, the agency and its hearing officers, with or without prior notice or request, may officially notice:

(a) Agency Proceedings—The pendency of, the issues and position of the parties therein, and the disposition of any proceeding then pending before or theretofore concluded by the agency;

(b) Business Customs—General customs and practices followed in the transaction of business;

(c) Notorious Facts—Facts so generally and widely known to all well-informed persons as not to be subject to reasonable dispute, or specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including but not exclusively, facts stated in any publication authorized or permitted by law to be made by any Federal or state officer, department, or agency;

(d) Technical Knowledge—Matters within the technical knowledge of the agency as a body of experts, within the scope or pertaining to the subject matter of its statutory duties, responsibilities or jurisdiction;

Upon the following conditions:

(1) Request or suggestion. Any party may request, or the hearing officer or the agency may suggest, that official notice be taken of a material fact, which shall be clearly and precisely stated, orally on the record, at any pre-hearing conference or oral hearing or argument, or may make such request or suggestion by written notice, any pleading, motion, memorandum, or brief served upon all parties, at any time prior to a final decision;

(2) Statement. Where an initial or final decision of the agency rests in whole or in part upon official notice of a material fact, such fact shall be clearly and precisely stated in such decision. In determining whether to take official notice of material facts, the hearing officer or the agency may consult any source of pertinent information, whether or not furnished as it may be, by any party and whether or not admissible under the rules of evidence.

(3) Controversion. Any party may controvert a request or a suggestion that official notice of a material fact be taken at the time the same is made if it be made orally, or by a pleading, reply or brief in response to the pleading or brief or notice in which the same is made or suggested. If any decision is stated to rest in whole or in part upon official notice of a material fact which the parties have not had a prior opportunity to controvert, any party may controvert such fact by appropriate exceptions if such notice be taken in an initial or intermediate decision or by a petition for reconsideration if notice of such fact be taken in a final report. Such controversion shall concisely and clearly set forth the sources, authority and other data relied upon to show the existence or non-existence of the material fact assumed or denied in the decision.

Comment

The caption of "Rule 1 - Matters of Law" is used although the rule embraces matters of mixed law and fact, which are ordinarily incontrovertible by their very nature. At the common law, the law of another jurisdiction was treated as a fact to be proved by evidence. Today in many jurisdictions, and particularly in the federal courts, the court judicially notices the laws and decisions of all States. Inasmuch

as federal agencies operate throughout the United States, there is no reason why they should not similarly take official notice of the laws and other published official acts and decisions of all of the States. The Federal Register Act requires courts to take judicial notice of the rules, etc., published therein.

The distinction made between material facts and matters of law is important because the Administrative Procedure Act requires notice and opportunity for controversion only of material facts which are officially noticed. The parties have full opportunity to challenge the existence or validity of the matters of law noticed under Rule 1 by brief, exceptions, oral argument, or petitions for reconsideration since the issues involved are those of law rather than those depending upon evidence for their solution.

With the exception of the expert technical knowledge of the agency, the material facts which may be officially noticed under the suggested rule are those ordinarily judicially noticed or which have been officially noticed by administrative agencies with judicial approval.

The particular matters of technical expertise which will be officially noticed will differ as among the several agencies and in the case of some of them will require more detailed specifications of the matters to be noticed.

The three conditions under which material facts may be officially noticed under the proposed rule are intended to assure due process, of

which there are two essential requirements, viz. that the fact which is to be judicially noticed be clearly and precisely stated, and that ample opportunity be given the parties to controvert it either before or after the decision.

The provision of the rule that the agency may consult any source of pertinent information, whether or not such source would be admissible under the technical rules of evidence is in accord with the great weight of authority.

PRESUMPTIONS

Much of what has been said respecting official notice also applies to the question of rebuttable presumptions of fact. The same lack of experiential background among some members of the agencies and their staffs is responsible for the failure to take advantage of these rules which are more or less elementary. The extent to which the greater use of presumptions would shorten records is not as clear as in the case of official notice. From the standpoint of fairness to the parties, particularly when it is remembered that in the case of many public regulatory agencies the participation in proceedings by interested persons without counsel is permitted, it seems desirable that everyone be put on notice as to just when these presumptions of fact will arise.

The Committee suggests that the Conference recommend to the agencies the possibility of adopting a uniform rule dealing with the subject matter. An illustrative rule is submitted below for consideration.

This rule contains six well recognized presumptions of fact which are frequently made in court decisions and which could be equally applicable in many administrative proceedings. Because of the wide difference in the nature of the issues which arise in the proceedings of the different agencies, it doubtless will be necessary for a general rule to be supplemented in the case of many of the agencies by a specification of other presumptions of fact which will be made under given predicate circumstances.

No express provision has been made in the illustrative rule for opportunity to rebut such presumptions. The primary reason for this omission is that the existence of a published rule on presumptions gives notice to a party that the enumerated presumptions may be made unless he adduces evidence which precludes such use of presumptions. Of course, the propriety of basing a presumption upon a particular set of facts may be challenged in briefs, or exceptions or by a petition for reconsideration. However, if it is desired that specific provision be made for controverting presumptions, the procedures found in the illustrative Rule 2 on official notice can be adapted with little change.

Illustrative Rule

Upon proof of the predicate facts specified in the subrules hereof without substantial dispute and by direct, clear, and convincing evidence, the agency, with or without prior request or notice, may make the following

presumptions, where consistent with all surrounding facts and circumstances:

(1) Continuity. That a fact of a continuous nature, proved to exist at a particular time continues to exist as of the date of the presumption, if the fact is one which usually exists for at least that period of time;

(2) Identity. That persons and objects of the same name and description are identical;

(3) Delivery. Except in a proceeding where the liability of the carrier for non-delivery is involved, that mail matter, communications, express or freight, properly addressed, marked, billed and delivered respectively to the post office, telegraph, cable or radio company, or authorized common carrier of property with all postage, tolls and charges properly prepaid, is or has been delivered to the addressee or consignee in the ordinary course of business;

(4) Ordinary Course. That a fact exists or does not exist, upon proof of the existence or non-existence of another fact which in the ordinary and usual course of affairs, usually and regularly co-exists with the fact presumed;

(5) Acceptance of Benefit. That a person for whom an act is done or to whom a transfer is made has, does

or will accept same where it is clearly in his own self-interest so to do;

(6) Interference With Remedy. That evidence, with respect to a material fact which in bad faith is destroyed, eloigned, fabricated, suppressed or withheld by a party in control thereof, would if produced, corroborate the evidence of the adversary party with respect to such fact.

STIPULATIONS AND ADMISSIONS OF RECORD

The third group of principles which permit facts to be established without evidence are those which deal with stipulations and with admissions of record. There is little difficulty with respect to the content of stipulations and admissions or in the manner in which they are made and filed. Hence, in proceedings where only a few parties are involved, the need for specific rules respecting these matters does not arise. However, in proceedings involving a large number of persons whose appearance as parties has been entered and who for one reason or another do not participate or attend throughout the course of the proceeding, it is generally possible to shorten the record substantially by stipulations or by admissions of record by the principal parties in interest. It would be an undue and unnecessary burden as well as one difficult of accomplishment to obtain the consent of the large number of nominal parties, many of whose interests is small or confined to some particular phase of the proceeding. This type of proceeding is of frequent occurrence

before regulatory agencies having wide jurisdiction such as the Interstate Commerce Commission.

The Committee therefore suggests that the Conference recommend to those agencies where the problem arises the adoption of a uniform rule such as that set out below:

Illustrative Rule

The existence or non-existence of a material fact, as made or agreed in a stipulation or in an admission of record, will be conclusively presumed against any party bound thereby, and no other evidence with respect thereto will be received upon behalf of such party, provided:

(1) Upon Whom Binding. Such a stipulation or admission is binding upon the parties by whom it is made, their privies and upon all other parties to the proceeding who do not expressly and unequivocally deny the existence or non-existence of the material fact so admitted or stipulated, upon the making thereof, if made on the record at a pre-hearing conference, oral hearing, oral argument or by a writing filed and served upon all parties within five days after a copy of such stipulation or admission has been served upon them.

(2) Withdrawal. Any party bound by a stipulation or admission of record at any time prior to final

decision may be permitted to withdraw the same in whole or in part by showing to the satisfaction of the hearing officer or the agency that such stipulation or admission was made inadvertently or under a bona fide mistake of fact contrary to the true fact and that its withdrawal at the time proposed will not unjustly prejudice the rights of other parties to the proceeding.

FORM AND CONTENT OF DECISIONS

The Committee has concluded that it would be feasible to formulate a uniform rule defining the form and content of intermediate and final decisions. The following is offered as an illustrative rule:

> Every decision, whether recommended, initial, tentative or final, shall contain in the following order:
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> (1) A correct caption of the proceeding;
>
> (2) Description of the nature and status of the decision;
>
> (3) Separately identified headnotes of the several points decided;
>
> (4) Designation of all parties and counsel to the proceeding;
>
> (5) A concise statement of the nature and background of the proceeding;
>
> (6) A concise statement of the facts but without recitation of the evidence;
>
> (7) A concise definition of the issues to be decided;
>
> (8) In separately identified paragraphs (which will correspond to the appropriate headnotes) a concise

discussion of each issue, the principles involved and the determination made thereof with reasons and precedents relied upon to support the same;

(9) A statement of the rule, order, sanction or relief or the denial thereof to be made in accordance with the decision.

Comment

The essential purpose of the illustrative rule is to improve the quality of all decisions contemplated by section 8(b) of the Administrative Procedure Act with a view to obtaining maximum certainty in each field of law administered by the agencies concerned. Such certainty should contribute substantially to the elimination of unnecessary delay, expense, and volume of records in adjudicatory proceedings.

Your Committee recognizes that complete uniformity of agency practices under section 8(b) is not always feasible or desirable. On the other hand a concerted and continuous effort to improve such practices is clearly desirable. The recommendation expresses the view that the tangible vehicle to carry such an effort forward is a set or sets of standards or guides developed as an aid to the proper interpretation and application of section 8(b).

The development, maintenance, and day-to-day application of such standards are the concern of the agencies involved. It is

suggested that certain uniform principles should be drawn up and adopted by the agencies as a group, and that more specific standards covering individual types of cases should then be developed in each field.

As an example of progress in the area covered by this recommendation, attention is called to the address of Honorable E. F. Howrey, Chairman, Federal Trade Commission, delivered to the Section of Antitrust Law of the American Bar Association, April 2, 1954. This was followed up by actions described in the FTC press release of May 7, 1954, entitled "FTC Adopts New Consent Order Rule," and the release of May 11, 1954, entitled "FTC Adopts Program to Improve Decisions."

APPEALS FROM INTERMEDIATE DECISIONS

The Committee believes that it is feasible to formulate a uniform rule governing appeals to or review by agencies from intermediate decisions. Intermediate decisions include the initial or recommended decisions of hearing officers and the tentative decisions of agencies referred to in Section 8(a) of the Administrative Procedure Act.

An illustrative uniform rule is as follows:

(a) Notice of Appeal—Any party may appeal from an initial or recommended decision of a hearing officer or from a tentative decision of the agency by filing a notice of appeal with the agency within ten days after service upon him of such decision.

(b) Exceptions—An appeal may be perfected by filing exceptions to such intermediate decision within twenty days after service of the decision.

(c) Effect of Exceptions—The effectiveness of the intermediate decision shall be stayed if any party files a notice of appeal and exceptions within the times specified above or if the agency upon notice to the parties undertakes to review the decision. Otherwise, the intermediate decision shall become the final decision of the agency.

(d) Replies—Within ten days after service of exceptions, any opposing party may file a reply to such exceptions.

(e) Content—Exceptions shall identify specifically the findings, conclusions, or proposed action to which objection is made, and shall be supported by concise argument and by specific page references to the parts

of the record and the legal and other authorities relied upon.

(f) Enlargement of Time—The time periods prescribed by this rule may be extended by the agency for good cause.

The principal statutory provisions governing appeals from or the filing of exceptions to intermediate decisions are contained in Section 8 of the Administrative Procedure Act, and particularly in Section 8(b), as follows:

In cases in which a hearing is required to be conducted in conformity with section 7 --

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

> (b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions.

In brief, in all proceedings governed by Sections 7 and 8 (except in cases of rule making or initial licensing involving unusual need for speed), there must be issued an intermediate decision, and parties must "be afforded a reasonable opportunity to submit * * * (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions * * * . The record shall show the ruling upon each such * * * exception presented."

Most regulatory statutes are silent as to intermediate decisions and appeals from such decisions, although the system of hearing examiners' decisions and the filing of exceptions to such decisions long preceded the Administrative Procedure Act. However, Section 17(5) (49 U.S.C. 17(5)) of the Interstate Commerce Act provides that as to certain intermediate orders in proceedings under that Act interested persons may file exceptions to such orders,

> * * * but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended

> order shall become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

Similarly, Section 10(c) of the National Labor Relations Act, as amended, provides that,

> * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Agency rules usually specify the time within which exceptions to intermediate decisions are to be filed, and, less frequently, the form and content of exceptions and the time within which replies are to be filed.

Notice of Appeal—The Federal Trade Commission, in Rule XXIII of its Rules of Practice, provides that "A notice of intention to appeal may be filed by any party within ten (10) days after service upon him of the initial decision", and limits the right to file an appeal (exceptions) to within 30 days after service of the decision to parties who have filed notices of intention to appeal. Rules X and XI of the Securities

and Exchange Commission's Rules of Practice provide that exceptions must be filed within five days and supporting briefs within 15 days after service of the initial decision. We interpret this five-day rule for the filing of naked exceptions as amounting to a requirement of a notice of appeal. We are inclined to believe that this requirement of a prompt notice of appeal, which is analogous to the requirement of 28 U.S.C. 2107 that a notice of appeal be filed within 30 days in Federal court civil actions, is a useful device to compel parties to give prompt notice to the agency and other interested persons as to whether they are acquiescing in or objecting to intermediate decisions. Accordingly, we have suggested that a uniform rule on appeals from intermediate decision should include a requirement that a party desiring to appeal from such a decision must file with the agency a notice of appeal within 10 days after the decision is served upon him.

By a notice of appeal is meant a simple notice of appeal such as that set forth in Form 27 of the Federal Rules of Civil Procedure. Of course, the filing of exceptions within such 10-day period would also constitute a timely filing of a notice of appeal.

Time for Filing Exceptions. The Interstate Commerce Commission (partly by statutory compulsion), National Labor Relations Board (by statutory compulsion), Federal Power Commission, the Federal Communications Commission, the Division of Public Contracts of the Department of Labor, and the Department of Agriculture rules of

practice under some of the statutes which it administers, require exceptions to be filed within 20 days after service of the intermediate decision; the Federal Trade Commission and the Coast Guard prescribe 30 days, the Federal Maritime Board 15 days (30 days in which F.M.B. can review sua sponte), while the Subversive Activities Control Board prescribes on a case-to-case basis the time within which exceptions must be filed. We have suggested that a uniform rule specify 20 days, which reflects both the two statutory provisions dealing with this point and the time most commonly specified in present agency rules. Since this particular time period is frequently extended at the request of parties, the precise number of days specified in a rule probably is not particularly important. Under the suggested rule, exceptions may be filed only by a party who has filed a timely notice of appeal, unless the exceptions are filed within 10 days after service of the intermediate decision, thereby taking the place of a notice of appeal.

Staying effect of exceptions; effect of failure to file exceptions. Paragraph (c) of the illustrative rule provides that:

> (c) The effectiveness of the intermediate decision shall be stayed if any party files a notice of appeal and exceptions within the times specified above or if the agency upon notice to the parties undertakes to review the decision. Otherwise, the intermediate decision shall become the final decision of the agency.

The first sentence of paragraph (c) provides that the timely filing of a notice of appeal and exceptions or the agency's review of the

intermediate decision upon its own motion, shall stay the effectiveness of the intermediate decision. This general principle is not intended to preclude or terminate interim agency action authorized by law, such as the temporary suspension of rates or of a license.

The second sentence of paragraph (c) should be evaluated against the following background. Section 8(a) of the Administrative Procedure Act provides that, in the election of an agency, hearing officers' decisions shall be "recommended decisions" or "initial decisions." A "recommended decision" by a hearing officer is one which is referred to the agency for its own separate final decision, regardless of whether any exceptions to the hearing officer's decision have been filed. Section 8 provides that where hearing officers "make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency." Thus, the distinction between "recommended" and "initial" decisions of hearing officers is procedural - depending upon whether the agency makes its own separate decision in all cases, or whether it permits the hearing officer's decision to stand as the agency's final decision in the absence of exceptions or unless the agency undertakes to review the case. For example, the Federal Trade Commission has provided that its hearing officers' decisions shall be initial decisions, while the Securities and Exchange Commission provides that its hearing officers' decisions shall be recommended decisions.

Section 10(c) of the National Labor Relations Act, as amended, in effect makes the decisions of the Board's hearing officers initial decisions by providing that "if no exceptions are filed within twenty days after service (of the examiner's decision) upon the parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed." However, it has been held that the failure of any party to file exceptions does not deprive the Board of power to modify its hearing officer's decision, but rather that the Board derives such power to modify from Section 10(d) which provides that, "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." N.L.R.B. v. Townsend, 185 F. 2d 378 (C.A. 9). See generally on the continuing jurisdiction of agencies, Davis, Administrative Law (1951), pp. 600-604.

Paragraph (c) of the illustrative rule in effect, therefore, treats all hearing officers' decisions as initial decisions. If this is regarded as undesirable, the effect of a failure to file exceptions could be defined in the alternative as permitting the agency to adopt the findings and conclusions of the decision and to put into effect without further proceedings the action proposed in the decision.

Agency rules often provide with varying emphasis that objections not expressed in timely exceptions are foreclosed from further consideration. Thus, the Civil Aeronautics Board has provided in Section 302.30 of its Rules of Practice in Economic Proceedings that "Any objection to a ruling, findings or conclusion which is not excepted to shall be deemed to have been waived, and the Board need not consider such objections if raised at a later time." See also the Securities and Exchange Commission's Rule X. Other agency rules are more emphatic. Thus, Section 203.46(b) of the N.L.R.B. Rules and Regulations provides that "No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings." This is reinforced by the principle that under a statutory provision, such as Section 10(e) of the National Labor Relations Act, providing that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court," a failure to file exception to a hearing officer's finding or conclusion cuts off judicial review of that issue. Marshall Field & Co. v. N.L.R.B., 318 U.S. 253; N.L.R.B. v. Cheney California Lumber Co., 327 U.S. 385. Such may be the result of a failure to file exceptions even in the absence of such a statutory provision. United States v. Tucker Truck Lines, 344 U.S. 33. At any rate, consideration should be given as to whether such a provision should be included in any uniform rule on this subject.

Reply to exceptions. Paragraph (d) of the illustrative rule provides that an opposing party may file a reply to exceptions within 10 days after they have been served. This provision contemplates that a party who has not filed timely exceptions may not later file exceptions in the guise of a reply to an opponent's exceptions, but rather that the reply shall be limited to sustaining the findings or conclusions in the intermediate decision which have been challenged by exceptions. See, e.g. Rule XXIII E. of the Federal Trade Commission's Rules of Practice. That is, each party must perfect his own appeal from an intermediate decision. This is analogous to the appellate practice in the Federal courts.

Form and content of exceptions. Agency rules as to the form and content of exceptions range all the way from the Subversive Activities Control Board's terse requirement in Section 201.21 of its Rules of Procedure of "supporting reasons", to the detailed specification in Rule XXIII of the Federal Trade Commission's Rules of Practice. Paragraph (e) of the illustrative provision reflects the average requirement contained in present agency rules.

A matter which must be left for specification by individual agency is the number of copies of exceptions (and other documents) to be filed with the agency. Thus, the National Labor Relations Board, with five members, requires that an original and six copies of exceptions be filed, while the Interstate Commerce Commission, with 11 members, requires the filing of an original and 14 copies.

Extensions of time. Paragraph (f) provides that, "The time periods prescribed by this rule may be extended by the agency for good cause." Both the provisions of the Interstate Commerce and National Labor Relations Acts dealing with exceptions and agency rules generally provide for extension of such time periods.

Further study might show that this provision should also permit agencies to shorten the time in particular cases where the public interest requires unusual expedition.

Oral argument. We do not believe that it is possible to formulate a uniform rule governing oral argument on exceptions before agency heads. Both the Administrative Procedure Act and most regulatory statutes are silent on the necessity of providing an opportunity for oral argument. Section 409(a) of the Communications Act, as amended in 1952, is unusual in providing that, "In all (cases of adjudication) the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order or requirement." Some agencies have such a volume of cases that it would be physically impossible for the agency heads to hear oral argument in every case in which it might be requested. Also, F.C.C. v. WJR, 337 U.S. 265, sufficiently illustrates the uncertainty as to the circumstances under which due process of law requires opportunity for oral argument.

UNIFORM IDENTIFICATION OF AGENCY RULES

It is recommended that every agency adopt the following as a policy:

Rules published in the Federal Register and the Code of Federal Regulations when reprinted or republished in any form (pamphlet, booklet, book, etc.) shall be identified and numbered in accordance with the following:

1. The numbers and letters identifying the sections and paragraphs of rules shall be the same as that used in the Federal Register and the Code of Federal Regulations.

2. The cover page, or title page, or table of contents, or first page of the pamphlet, or booklet, or book, etc., containing the rules shall identify where these rules are published in the Code of Federal Regulations, by stating title number and subject, and, if necessary for clarity, any or all of the following as used in the Code of Federal Regulations: The chapter number and subject, subchapter letter and subject, part number and subject, and subpart number or letter and subject.

Comment on the Recommendation

At this Conference the 56 Federal Agencies represented have authority to promulgate rules. The total number of Federal agencies with this authority fluctuates from year to year, but at the present time approximately 130 agencies have issued rules currently in effect. As required by the Federal Register Act and the Administrative Procedure Act, the official, legal text of these rules currently in effect is published in the Federal Register and the Code of Federal Regulations.

The Code of Federal Regulations is the official codified text of rules affecting the public that are promulgated by Federal agencies. This Code consists of 50 functional titles similar to those of the United States Code, and is printed in approximately 47 books. The rules in this Code have been also republished by the various agencies in pamphlet, booklet, book, circular, etc., as they feel will best serve the needs of their agencies. The difficulty encountered has been that a number of agencies use a dual identification system - one system in the Code of Federal Regulations and another system in their own agency pamphlets. This dual numbering system causes confusion.

It is considered very desirable and feasible for the various Federal agencies to use and adopt a uniform identification of agency rules in order that (a) the public may be better served, and (b) the agencies may better comply with the spirit and intent of the Federal Register

Act and the Administrative Procedure Act, by recognizing and utilizing the Federal Register and Code of Federal Regulations as the official text of rules.

Until the passage of the Federal Register Act in 1935, the only method for authenticating agency rules was by the use of the agency pamphlets, booklets, books, reprints, etc., which could then be certified by the certifying officer of the agency as the rules in effect as of a certain date. Because of the difficulties encountered by the public, the courts, and other administrative agencies within the Federal Government determining what rules had been properly promulgated, Congress passed the Federal Register Act (44 U.S.C. 301-310, 311, 312-314). Section 7 of the Federal Register Act provides in part:

> "The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and (d) that all the requirements of the Federal Register Act and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number."

The original provisions of section 11 of the Federal Register Act created the problem regarding identification of agency rules. It is a well-known fact that the agencies strenuously objected to the renumbering of agency rules. However, in order to have a code containing

all the rules of the Federal Government, it was necessary that a numbering system be devised and used consistently in the Federal Register and the Code of Federal Regulations. Section 11 of the Federal Register Act was amended by Public Law 200, 83rd Congress (67 Stat. 388, 389, 44 U.S.C. 311) and continued the authority of the Administrative Committee of the Federal Register to prescribe necessary rules for carrying out the proper codification of agency rules required to be published in the Federal Register.

The Federal Register Act makes it mandatory that an agency publish rules in the Federal Register and the Code of Federal Regulations if they are to apply generally and are to be relied upon by the agency in the discharge of its activities or functions as they relate to the public. However, there is no prohibition in the laws applying to Federal agencies against the reproduction of rules in such additional form as an agency chooses to use. Many agencies are using a dual numbering of agency rules, i.e., one system used in the Federal Register and Code of Federal Regulations and the other system used by an agency in its own publications containing rules and regulations. Certain agencies have been forced in court proceedings and congressional hearings to explain that rules as published by the agency and relied upon have been also published as required by law in the Federal Register and the Code of Federal Regulations. It has been necessary to submit proof that agency rules have been published in the Federal Register and,

while numbered differently in the agency pamphlets, are the same as those published in the Federal Register and the Code of Federal Regulations in all other respects. Section 3 of the Administrative Procedure Act (5 U.S.C. 1002) places further emphasis upon the necessity of publication of rules in the Federal Register by providing that no person shall in any manner be required to resort to organization or procedure which is not published in the Federal Register.

A sampling of the rules of 21 agencies indicates that a wide divergence of practice is followed in the numerical identification of rules published in various pamphlet forms. It was not possible to review the pamphlets of the 130 Federal agencies having authority to promulgate rules. Of certain publications of the 21 agencies selected, 12 agencies followed the numbering system of the Code of Federal Regulations; 5 used the Code identification system partially, and 4 used a dual numbering system.

Of the agencies studied, those which republish or reprint rules using the same numbering system as the Code of Federal Regulations and indicating where such rules can be found in the Federal Register and the Code of Federal Regulations are as follows:

Subversive Activities Control Board
Federal Communications Commission
Internal Revenue Service, Department of the Treasury
Coast Guard, Department of the Treasury
Civil Aeronautics Board
Bureau of Customs, Department of the Treasury

Bureau of Indian Affairs, Department of the Interior
Department of Agriculture, Production and Marketing Administration
Department of Labor, Wage and Hour Division
Department of Labor, Wage and Hour Public Contracts Division
Department of Labor, Bureau of Employees' Compensation
Administrative Committee of the Federal Register

The agencies which have used the Code of Federal Regulations identification system partially are as follows:

Federal Trade Commission
Interstate Commerce Commission
National Labor Relations Board
Department of Health, Education, and Welfare, Public Health Service
Maritime Administration

The agencies that follow a dual numbering system are:

Securities and Exchange Commission
Federal Reserve System
Money and Finance Offices, Department of the Treasury
General Services Administration

The use of a uniform numbering system for rules by all Federal agencies would be of great assistance to the public as well as to other Government agencies. By using a uniform system, substantial savings can be accomplished in printing and publication costs. In this connection it should be noted that a reprint service is offered by the Government Printing Office through the Federal Register Division, as authorized by the General Services Administration Circular No. 76, dated October 30, 1953. By avoiding recomposition, it is possible to reduce the actual printing costs for the agency in reprinting rules by

approximately 60 percent. In addition, the staff work necessary in preparing the copy of the agency rules, proofreading, editing, etc., may be greatly reduced and the possibility of mistakes is reduced. The use of a uniform numbering identification system provides an easy method to determine by comparison the completeness and accuracy of agency publications containing rules.

The distribution of the Federal Register and the Code of Federal Regulations is made officially to all the Federal courts, more than 500 depository libraries throughout the country, most of the Government agencies, and many private libraries. The Federal Register and the Code of Federal Regulations have indexes and tables showing the section numbers and the Federal Register page numbers of rules and regulations affected by various documents published in the Federal Register. By the use of indexes and tables furnished by the Federal Register, it is comparatively easy to determine which rules are in effect as of a certain date.

In summary the benefits of using a uniform identification system by all the Federal agencies are as follows:

A. A single numbering system, identical with that of the Federal Register and the Code of Federal Regulations, reduces the time required and the need for explanation in trying to prove that the rules published in an agency pamphlet are the same as the rules officially published in the Federal Register and the Code of Federal Regulations.

B. The use of the uniform numbering system obviates the confusion inherent in any situation involving multiple designations for single entities, and permits the practitioner to use the code of Federal Regulations as an operating tool.

C. The completeness and accuracy of rules published by an agency can be easily and readily checked against the indexes, tables, etc., published by the Federal Register Division.

D. The republishing and reprinting costs of rules can be reduced by approximately 60 percent. In addition, the staff work necessary in preparing the agencies' publications of rules can be reduced because editing, proofreading, etc., may be eliminated where rules are reproduced from the text of the Federal Register and the Code of Federal Regulations.

UNIFORM CITATIONS OR REFERENCES TO AGENCY RULES

It is recommended that every agency adopt the following as a policy:

> In official literature, reports, orders, briefs, and other formal documents, the citations or references to agency rules, which are published in the Federal Register and the Code of Federal Regulations shall be by title number of the Code of Federal Regulations, initials of the Code of Federal Regulations, and section number. (For example, 49 CFR 1.1.)

Comment on the Recommendation

The need for a uniform system of citation of agency rules becomes apparent when a comparison of various agencies' rules on a particular subject is made. Citations or references to agency rules have been made in accordance with the views of each agency. There are approximately 130 agencies in the Federal Government that have promulgated rules which are published in the Federal Register and the Code of Federal Regulations. When citations or references are made to rules in accordance with informal practices followed by the various agencies, it very often becomes a difficult matter to locate

or to verify the citations or references by checking the official codified text of rules required by law to be published in the Federal Register or the Code of Federal Regulations.

The best description of the various types of informal citations or references to agency rules may be noted in briefs dealing with particular subjects which are administered by many agencies.

In a brief on "Subpenas" citations or references to various agency rules were made as follows:

Interstate Commerce Commission, General Rules of Practice, Rule 56
Federal Trade Commission, Rules of Practice, Rule XIV, Rule XVI, Rule XVII
Federal Power Commission, §1.22
Maritime Board, sec. 201.101, sec. 201.102, sec. 201.103
Civil Aeronautics Board, Rules of Practice in Economic Proceedings, Rule 302.19
Federal Communications Commission, Rules of Practice, §1.831
Securities and Exchange Commission, Rules of Practice, Rule V (e), (f)
National Labor Relations Board, Rules and Regulations, sec. 203.31
Department of Health, Education, and Welfare, Rules Under Social Security Act. sec. 403.709 (f)
Department of Labor Regulations, §511.13
Department of Labor, Division of Public Contracts, Rules of Practice, (b)
Coast Guard, Marine Investigation Regulations and Suspension and Revocation Proceedings, §137.05-5
Department of Agriculture, Production and Marketing Administration, General Regulations, §900.62
Subversive Activities Control Board, Rules of Procedure, §201.16

In a brief on "depositions, interrogatories, and verified statements," the citations or references to various agency rules were made as follows:

Civil Aeronautics Board, Rules of Practice in Air Safety Proceedings, 14 CFR 301.15, 301.22
Coast Guard, Department of the Treasury, 46 CFR 137.09-52, 136.11-10
Department of Labor, Division of Public Contracts, Rules of Practice, Rule VI (not published in Federal Register), 203.18
Federal Communications Commission, Rules Relating to Hearings and Decisions, 47 CFR 1952 Supp., 1.821-1.827, inclusive
Federal Maritime Board, Department of Commerce, Rules of Practice and Procedure, 201.147, 201.201-201.210, inclusive
Federal Power Commission, Rules of Practice and Procedure, 18 CFR 1.22, 1.24, 1.27
Federal Trade Commission, Rules of Practice (16 CFR 2.1, et seq.), Rule XIV, Rule XVI, Rule XIX
Interstate Commerce Commission, General Rules of Practice (49 CFR 1.57-1.67), Rules 57-67
Securities and Exchange Commission, Rules of Practice, Rule V, Rule VIII
Subversive Activities Control Board, Rules of Procedure, 201.17, 201.19

In a brief on "objections to evidence, rulings thereon, and offer of proof" citations or references to various agency rules were made as follows:

Civil Aeronautics Board, 14 CFR 301.23
Federal Trade Commission, 16 CFR 2.18
Securities and Exchange Commission, 17 CFR 201.5
Federal Power Commission, 18 CFR 1.20
Subversive Activities Control Board, 28 CFR 201.10
National Labor Relations Board, 29 CFR 101.10
United States Coast Guard, 46 CFR 137.09-5
Federal Maritime Board, Maritime Administration, 46 CFR 201.121
Federal Communications Commission, 47 CFR 1.844
Interstate Commerce Commission, 49 CFR 1.75

The listings of these citations or references to various agency rules, as taken from 3 briefs on 3 unrelated subjects, illustrate the variations used in legal documents which normally follow the same

pattern in preparation. They reflect the methods used by three agencies when citing or referring to rules.

For a person to verify the text of any rule or regulation cited or referred to by an agency number or by the name of a pamphlet becomes very difficult unless he is thoroughly familiar with the requirements under consideration. If he is not familiar with the agency and its publications, then he is lost unless he contacts the agency or an expert.

One purpose of the Federal Register Act and the Administrative Procedure Act is to help the public and others to know what the rules of the various Federal agencies are by requiring that such material shall be published in the Federal Register and Code of Federal Regulations. These acts do not prohibit these informal modes of citations or references to rules by agency pamphlet titles and by agency numbers. To the beginner or to a person not familiar with the practices of a particular agency, these informal modes of citation can be frustrating and more difficult to learn than the citations or references used in the Federal Register and Code of Federal Regulations.

The Federal Register Act authorizes the Administrative Committee of the Federal Register to prescribe necessary regulations for carrying out the proper codification of all rules published in the Federal Register. The regulations are set forth in Part 1 of Title 1 of the Code of Federal Regulations. Instructions are included in each volume on citing the Code of Federal Regulations. For example, "cite this Code thus: 44 CFR 1.1."

From the lists of citations or references, it is comparatively easy to locate the rules in the Federal Register and the Code of Federal Regulations when the number or the citation is the same as the officially recognized citation or section number used in the Code of Federal Regulations. If only the section number as used in the Code of Federal Regulations is given, it is possible to locate the rule in the Code of Federal Regulations. Approximately 130 Government agencies promulgate rules published in the Federal Register and Code of Federal Regulations. At the beginning of each volume of the Code of Federal Regulations is a table showing all the title numbers and names used in the Code together with the chapter numbers and agencies names issuing rules under the various general titles. By scanning this material it is possible to find the title under which a particular agency may issue rules. After the particular volume is located, then the section number should be easily found because in each title no two sections can bear the same number.

The argument that the citation "46 CFR 201.5" is too long and that a briefer "Rule 5" designation should be permitted in agency official literature, reports, briefs, and other formal documents is not too logical. If it is more convenient to cite "Rule 5," then it becomes harder for the public to find the rule - an objection that Congress tried to overcome by passing the Federal Register Act and the Administrative Procedure Act.

In summary, the recognition and use of the officially recognized method of citation of rules published in the Federal Register and the Code of Federal Regulations will create savings in time to the agencies required to verify text of rules cited, and will advise the public that the rules cited have been published in a series of books available in all Federal courts, over 500 depository libraries in the United States, and in many hundreds of private libraries.

UNIFORM PRINTING PRACTICES FOR THE SEPARATE PRINTING OF RULES REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER

It is recommended that every agency adopt the following policy:

Whenever separate prints of rules published in the Federal Register are required, such prints shall be reproduced photographically from the official text as printed in the Federal Register or Code of Federal Regulations.

Comment on the Recommendation

The purpose of this recommendation is to point out and to eliminate some unnecessary duplication, waste and confusion with respect to official rules required by the Federal Register Act and the Administrative Procedure Act to be published in the Federal Register. Very often in administrative proceedings and Court cases, the agencies concerned, the Courts, and the public, are confronted by two or more versions of the same rule. In many cases the Federal Government has printed and issued at least two versions of the same rule, which appear to be official and authentic and yet are patently different in form. To be sure that such rules are identical in substance requires word-by-word

comparison. This recommendation proposes to have agencies distribute only the official version of a rule as published in the Federal Register.

A party in interest and his counsel, an agency official, an administrative tribunal, and the court each may have a different version of the rule on which a case turns. One may have the Federal Register or Code of Federal Regulations, another may have a mimeographed press release issued by the agency's information officer, another may have a printed pamphlet issued by the agency's administrative officer, and still another may have one of several versions published by various commercial services. Each version may be numbered quite differently. The Federal Register Act and the Administrative Procedure Act were designed to do away with such confusion. Court cases under these acts make it clear that the governing version is that which was properly promulgated in the Federal Register. Photographic processes have made it unnecessary for the Government to print and issue more than one version of its rules, as published in the Federal Register.

Photographic offset lithography makes it possible to obtain absolute authenticity and accuracy with a maximum of speed and economy. It is now used in publishing the United States Statutes at Large and the U. S. Slip Laws. Under this system a page of the enrolled bill, a page of the slip law, and a page of the U. S. Statutes at Large are photographically identical. Adoption of the system eliminated an 18-month

backlog on the U. S. Statutes, put the slip laws on an overnight basis, eliminated costly clerical operations and mistakes, and saved 37% annually on the printing costs alone.

Photographic offset has been used in the area covered by this recommendation with even more dramatic results.

During World War II the system was adopted completely by the War Production Board, the Office of Price Administration, the Office of Defense Transportation, and the War Food Administration. The speed, accuracy, and economy that resulted are illustrated by the WPB report that adoption of the system saved them $25,000 per week in telephone and telegraph charges and enabled them to reduce their large publication unit by 50%. In light of this experience, agencies created under the Defense Production Act of 1950 adopted the system fully and without hesitation. In recent years, CAA, CAB, FCC, Coast Guard, Internal Revenue Service, and others, have tried the system with marked success. In this connection the Coast Guard reports a 60% reduction in actual printing costs.

The "Old Line" agencies have hesitated to follow the example of the emergency agencies in adopting the process of photographic reproduction from Federal Register text. This hesitation apparently is based on an unwillingness to abandon their old numbers and adopt exclusively the Code of Federal Regulations numbering system, and also on a feeling that their present specially composed separate prints are more attractive

typographically. The case against the dual numbering system is discussed in your Committee's recommendation concerning "Uniform Identification of Agency Rules." Clearly a dual numbering system leads to confusion, waste motion, and resultant unnecessary delay and expense.

The feeling that photographic offset is not flexible enough or attractive enough for separate prints arises from a lack of familiarity with this relatively new process. The width of the Federal Register column, the clarity of the Federal Register type face, together with additions that may be made on "camera copy," afford a wide range of make-up, text type, display type choices. The end product may be made as readable and attractive as necessary for all practical purposes.

In summary, the policy proposed by your Committee would further the purposes of this Conference by requiring that each regulatory agency issue only the official Federal Register version of each rule having general applicability and the force and effect of law. The proposal would at the same time eliminate unnecessary duplication, waste, and confusion and introduce substantial economies in the operation of the administrative process of the Federal Government.

NOTICE

The committee considered the possibility of a uniform rule governing notices or other pleadings initiating administrative proceedings, but was unable to suggest anything going beyond the notice provisions of Sections 4(a) and 5(a) of the Administrative Procedure Act.

Section 4(a) provides that:

> General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Section 5(a) provides that (in cases of adjudication):

> Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * * In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Administrative proceedings are initiated not only by notices, complaints, or charges issued by an administrative agency, but also by complaints, applications and other documents filed by private

parties. Many of such initiating documents are filed on forms fitted to particular types of proceedings and issues. They reflect a very broad range in terms of complexity. While we recognize that in administrative proceedings, as in judicial proceedings, formal pleadings have not been important,[1/] we share the view embodied in Recommendation c.4 in the First Report of this Conference that issues should be defined in pleadings as precisely as possible so as to facilitate and shorten subsequent proceedings.

1/ See Davis, Administrative Law (1951) pp. 278-283.

VERIFIED STATEMENTS

Section 7(c) of the Administrative Procedure Act provides:

> * * * In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Several agencies have adopted rules permitting the presentation of written sworn statements as evidence in certain proceedings under certain conditions. For example, in wage determination hearings, the Labor Department provides in Rule 203.18(b) 5:

> Written, sworn statements may be filed at any time prior to the date of the hearing by persons who can not appear personally.

However, the Maritime Board, in rule making, provides in Rule 201.157(b) of its Rules of Procedure:

> Where a formal hearing is held in a rule-making proceeding, interested persons will be afforded an opportunity to participate through submission of competent written evidence properly verified: Provided, That

> such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination.

The Committee has concluded that it is not feasible to formulate a uniform rule governing the use as evidence in administrative proceedings of verified statements, i.e., written statements, whether made under oath or merely signed, by persons who have not been subjected to cross-examination as in the taking of depositions.

UNIFORM RULES RELATING TO SUMMARY PROCEDURE

One of the questions explored by the Committee was whether it would be feasible to make uniform the rules and practices of the agencies relating to what might be called summary procedure. The Committee concluded that this was an area where uniform rules would not be feasible or desirable.

The motion to dismiss is commonly recognized in administrative practice as one means of disposing of a matter summarily in appropriate circumstances. From an examination of the rules of the "sample" agencies it appears that there are ordinarily no formalities as to the mode of submittal of the motion to dismiss except the usual details about size of paper, number of copies, etc., so that uniformity is not particularly called for on this score. On the other hand, the Committee concluded that the question whether a motion to dismiss should be ruled on by the examiner, the agency, or both, and whether the ruling should be immediate or deferred, had best be left to the individual agency for determination, as the best course may depend on the types of cases handled by the particular agency and the nature of the particular case.

In court procedure, the most generalized type of summary procedure is the motion for summary judgment, provided for in Rule 56 of

the Federal Rules of Civil Procedure. Under that procedure, affidavits may be used to establish that there is no genuine issue as to any material fact, but they may not be used to establish any fact as to which there is an issue. In connection with provisional remedies, such as preliminary injunction, the courts may accept affidavits as proof of fact, but only until such time as a full trial can be had. The Committee concluded that these judicial procedures might be appropriate for some agencies, but not for all.

The Committee recognized that Section 7(c) of the Administrative Procedure Act provided agencies with ample authority to adopt procedures allowing for the submission of evidence by affidavit or in other written form properly attested. Under these circumstances it did not appear to the Committee desirable to suggest a uniform rule which might in effect limit the use of such documents to "a summary proceeding."

During the course of its consideration of this question, the Committee concluded that the expedition of administrative matters could be better served through the effective use by the parties of the pre-hearing conference and a full exploration of all possible areas of stipulation of facts not in dispute.