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# FEDERAL ADMINISTRATIVE REGULATIONS: A GENERAL SURVEY

REGINALD PARKER\*

## HISTORY

The most important function of administrative agencies is the making of regulations<sup>1</sup> of general applicability. The separation of powers doctrine has not been able to prevent the rise of quasi-legislation in American law.

An early instance of empowering the executive to act in a quasi-legislative capacity is the Act of June 4, 1794,<sup>2</sup> which authorized the President "whenever, in his opinion, the public safety shall so require," to proclaim or revoke embargoes against foreign vessels.<sup>3</sup> This practice was continued in subsequent statutes and upheld by the Supreme Court.<sup>4</sup> A yet earlier example of legislative delegation, but not to the executive, can be found in the original Federal Judiciary Act of 1789,<sup>5</sup> whose Section 17 empowered the courts to promulgate rules of practice. The Supreme Court upheld this because Congress "may certainly delegate to others powers which the legislature may rightfully exercise itself."<sup>6</sup>

Yet it was only after the *Field* case<sup>7</sup> was decided in favor of the government that administrative agencies were entrusted to an increasing degree with implementing the lawmaker's task. Yet it was not only the President whose quasi-legislative power the courts sanctioned,<sup>8</sup> it became necessary to authorize the heads of departments to make rules which likewise

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1. Of rules, as the APA calls them. Both words are practically synonymous. WEBSTER'S COLLEGIATE DICTIONARY (6th ed. 1949), entries "Regulation" and "Rule"; SEN. DOC. NO. 248, 79th Cong., 2d Sess. 254 (1946); FOSTER, SECURITIES AND EXCHANGE COMMISSION IN THE FEDERAL ADMINISTRATIVE PROCEDURE ACT 215 (Warren ed. 1947). The word "regulation" is often preferred (*cf.* the "Code of Federal Regulations") since, in legal usage, "rule" is usually confined to procedural norms. Another term frequently used is "order" (as in "Executive Order of the President"), a word that, on the other hand, also denotes individual decisions, such as cease and desist "orders." APA § 2 (d).

2. 1 STAT. 372 (Ch. 41, 1794).

3. This and similar measures were caused by the wars in Europe, and America's desire to remain neutral. However, the broad language of the statute did not confine the President's embargoes to the warring nations.

4. *The Brig Aurora*, 7 Cranch 382 (U.S. 1813).

5. 1 STAT. 73, 83 (1789).

6. *Wayman v. Southard*, 10 Wheat. 1, 42-43 (U.S. 1825); *Bank of the United States v. Halstead*, 10 Wheat. 51, 54-55 (U.S. 1825). Until this date, however, the courts have not used such a broad language to justify the regulatory power of administrative agencies.

7. *Marshall Field & Co. v. Clark*, 143 U.S. 549 (1892).

8. *E.g.*, *Marshall Field & Co. v. Clark*, *supra* note 7; *United States v. Chemical Foundation*, 272 U.S. 1 (1926); *J. W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Hirabayashi v. United States*, 320 U.S. 8 (1943).

have been upheld by the courts.<sup>9</sup> Later, so-called independent agencies, not subject to the President,<sup>10</sup> were created for the specific task of making regulations, of which we mention only the oldest, the Interstate Commerce Commission.<sup>11</sup> Finally, to the independent agencies were added organizations of a mixed character, whose heads neither are independent from the President nor have the rank of cabinet members, such as the late Office of Price Administration<sup>12</sup> or the present Office of Price Stabilization.<sup>13</sup> Thus the United States, like every other country in the world, has left more and more legislative tasks to specialized administrative agencies.<sup>14</sup>

#### CLASSIFICATION

Regulations may be classified with reference to their subject-matter, such as postal, broadcasting, or foreign funds control regulations; or they may be denominated according to the source from which they flow, such as executive orders of the President, rules and regulations of the Treasury Department or of the Federal Communications Commission.

A classification of some consequence is that of procedural as opposed to substantive regulations. While it is exaggerated to say that agencies have the "inherent" power to regulate their own procedure,<sup>15</sup> as a matter of positive law, every administrative agency of the federal government may regulate the conduct of its business including the procedure it intends to follow.<sup>16</sup> To be able to issue valid substantive regulations, on the other hand, an agency must be expressly so authorized by the enabling statute:<sup>17</sup> no blanket authority exists here. Furthermore, procedural rules are treated in the Administrative Procedure Act differently from substantive ones<sup>18</sup>

9. E.g., *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (has survey of delegation); *United States v. Grimaud*, 220 U.S. 506 (1911).

10. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

11. *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281, 287 (1908); *Intermountain Rate Cases*, 234 U.S. 471, 486 (1914); *Louisville & Nashville Ry. v. ICC*, 184 Fed. 118 (5th Cir. 1910), *aff'd* 227 U.S. 88 (1913); see also CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSION* (1941); FESLER, *THE INDEPENDENCE OF STATE REGULATORY AGENCIES* (1942).

12. See *Yakus v. United States*, 321 U.S. 414 (1944).

13. Pursuant to Defense Production Act of 1950, 64 STAT. 798, 50 U.S.C. APP. § 2101 (Supp. 1950).

14. CARR, *DELEGATED LEGISLATION* (1921), analyzes the various reasons for this development. And see WALDO, *THE ADMINISTRATIVE STATE* (1948); REP. ATT'Y GEN. COMM. AD. PROC. 97-101 (1941); Laski, *The Growth of Administrative Discretion*, 1 PUBLIC ADMINISTRATION 92 (1923); Weeks, *Legislative Power versus Delegated Legislative Power*, 25 GEO. L.J. 314 (1937); Duff and Whiteside, *Delegata potestas non potest delegari*, 14 CORNELL L.Q. 168 (1929).

15. Correctly speaking, any "power" of any person or organization, government or private, is granted by the legal order. Kelsen, *GENERAL THEORY OF LAW AND STATE* (1945). *But see* *United States v. Macdaniel*, 7 Pet. 1, 13, 14 (U.S. 1833); *Haas v. Henkel*, 216 U.S. 462 (1910); *United States v. Birdsall*, 233 U.S. 223 (1914).

16. Rev. STAT. 161 (1875), 5 U.S.C. § 22 (1946), ultimately deriving from 1 STAT. 28 (1789); *United States v. George*, 228 U.S. 14 (1913).

17. *United States v. George*, *supra* note 16; *Miller v. United States*, 294 U.S. 435 (1935).

18. Section 3(a) (procedural and organizational rules to be stated separately from substantive ones); Section 4(a) (no advance notice of proposed rule of procedure).

and their binding effect, particularly upon the agency itself, is at times not as pronounced as that of substantive rules.<sup>19</sup>

Except for matters requiring secrecy in the public interest<sup>20</sup> or solely relating to internal management,<sup>21</sup> Section 3 (a) of the Administrative Procedure Act requires every federal agency to issue and publish in the Federal Register a description of its organization (including that of the field offices, if any, and their location) as well as the procedure by which it functions.<sup>22</sup> It therefore appears to put an end to the observance of mere customary rules of procedure.<sup>23</sup> The Act, moreover, demands that agency rules on organization, procedure and substantive law, respectively, must be stated separately.<sup>24</sup> If it is not always feasible to distinguish between substantive and adjective law, it is even more difficult to separate norms pertaining to the "organization" of an agency from those dealing with its "procedure." However, there is nothing in the Act that would suggest that a failure to observe the rule of separation invalidates the regulation.

Interpretations of statutes by agencies are often called "interpretative rulings," or just "rulings" or even "rules." Yet they should not be confused with true regulations. Only the latter, but not the former, are binding law.<sup>25</sup>

An attempt to delineate regulations against individual decisions meets difficulties that are enhanced by the fact that regulations often emanate from the same agency that, in turn, at times also renders individual decisions.<sup>26</sup> Yet some distinction must be drawn, for different rules of law are applicable to the procedure that leads to either type of administrative act; and they also differ from one another in their respective effect. No hearing needs to be given to the parties affected by a regulation as a

19. *Angelus Milling Co. v. Commissioner*, 325 U.S. 293 (1945); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788-789 (9th Cir. 1941); GELLHORN, *ADMINISTRATIVE LAW* 442-451 (1947).

20. Such as procedure and organization of the FBI, according to Reich, *Rule Making Under the Administrative Procedure Act* in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT* 496 (Warren ed. 1947); *ATT'Y GEN. MAN. AD. PROC. ACT* 17 (1947).

21. As, e.g., internal budget data or promotion rules. *Ibid.*

22. *ATT'Y GEN. MAN. AD. PROC. ACT.* 19-22 (1947); see also *REP. ATT'Y GEN. COMM. AD. PROC.* 102-105 (1942). The Federal Register, vol. 11, of September 11, 1946, consisting of 966 pages, has the material prepared by the agencies pursuant to § 3.

23. See *United States v. Maedaniel*; *Haas v. Henkel*; *United States v. Birdsall*, *supra* note 15. But see *United States ex rel. Knauff v. McGrath*, 181 F. 2d 839 (2d Cir. 1950), *vacated as moot*, 340 U.S. 940 (1951) (agency's custom binding on agency).

24. APA § 3(a).

25. The APA contributed nothing to dispel this confusion. Compare § 2(c) ("interpretation" included in "rules") on the one hand with § 4(a) (interpretations not subject to rule making procedure) on the other. Cf. *Gibson Wine Co. v. Snyder*, 194 F. 2d 329, 331-332 (D.C. Cir. 1952); Davis, *Administrative Rules—Interpretative Legislative, and Retroactive*, 57 *YALE L.J.* 919, 922, 930 (1948); Parker, *Administrative Interpretations*, 5 *MIAMI L.Q.* 533 (1951). A treatise destined to become a classic is KELSEN, *THE LAW OF THE UNITED NATIONS* xiii-xvii ("On Interpretation") (1950). Cf. Parker, Book Review, 45 *ILL. L. REV.* 822 (1951).

26. Such as the Pure Food, Drug and Cosmetic Administration. 52 *STAT.* 1040 (1938), 21 *U.S.C.* § 301 (1946). Cf. *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 686-687, 692-694 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949). And see KELSEN, *GENERAL THEORY OF LAW AND STATE*, 123-136 (1945) (mere gradual difference between general law and individual norm).

matter of constitutional (as distinguished from statutory) right,<sup>27</sup> whereas an individual decision would generally not be binding without prior hearing. Where the Administrative Procedure Act applies, the rule making procedure is usually different from the adjudicatory procedure. An individual order is more easily set aside by a review court than a regulation.<sup>28</sup>

An example may illustrate our difficulty. The Constitution authorizes Congress to regulate interstate commerce. Congress applies the Constitution by enacting the Federal Food, Drug and Cosmetic Act. This, in turn, authorizes the Federal Security Administrator to establish and promulgate definitions and standards of identity, as well as standards of fill, for canned food.<sup>29</sup> The Administrator applies this statute by directing packers of canned oysters to can their oysters in such a manner that each can contains at least 59% oysters (rather than water, etc.) and is labelled in a certain specified manner.<sup>30</sup> Is this a regulation or an individual order? However gradual the transition from law of the higher order (constitution, statute) to law of the lower order (regulation, individual decision) may be,<sup>31</sup> the practical importance of drawing a line somewhere is obvious in view of what we have said in the preceding paragraph.

In the example above the court held that a regulation and not an adjudication was involved, "even though the result of the order (*sic*) is of immediate and grave economic import to petitioner."<sup>32</sup> The court attempts to draw the distinction from the fact that adjudication is primarily concerned with individual rights and liabilities for past conduct, or present status, under existing law, whereas the legislative, including the rule making process, is normally directed at the future and at "situations" rather than particular persons. The court itself cites legislative divorces as an exception to this rule, to which could be added many more types of decrees in equity, bankruptcy or probate procedure, whose effects can be well regarded as making new law, as indeed *any* valid decision does; only the case of a court decree affecting perhaps thousands of parties makes the point more obvious.

The mode of procedure followed by the agency will often furnish a strong presumption in favor of either answer. Unquestionably, the best way to find out whether an administrative act is a rule or individual order ought to be the language of the administrative action, depending on whether it is, by its wording, addressed to one or more specifically named individuals,

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27. *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26. For a more elaborate treatment of the hearing requirement, see notes 120-125, 155-200 *infra*.

28. *Infra* notes 222-30. And see *Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

29. 52 STAT. 1040 (1938), 21 U.S.C. §§ 301, 341, 343(h) (2), 371 (1946); *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26.

30. 13 FED. REG. 4663 (1948).

31. KELSEN, *GENERAL THEORY OF LAW AND STATE* 37-38, 123-162 (1945). And see Fuchs, *Procedure in Administrative Rule Making*, 52 HARV. L. REV. 259, 263 (1938).

32. *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26, at 686, 692-694.

or to a group defined in general terms. Yet there are instances where an agency couches its decree in general, abstract terms—perhaps in order to avoid the sometimes more stringent conditions under which an individual decision must be issued—although it is in fact addressed only to one party. Upon review, however, the court will disregard the language and technique employed by the agency and treat the act as an order rather than a regulation.<sup>33</sup> In other words, border cases must be solved “according to the merits of each situation,” as lawyers are apt to say, meaning that the answer will depend on whether the preponderant features of the administrative act tend to point in the direction of rule or decision.<sup>34</sup>

Rate making often presents a good example of a link between individual decision and general regulation. The weight of authority has always regarded it as a legislative rather than a judicial act.<sup>35</sup> This includes even the fixing of government payments to common carriers<sup>36</sup> though here the term “rate” is really a “euphemism to embrace a subsidy as well as a compensation.”<sup>37</sup> Accordingly, Section 2 (c) of the Administrative Procedure Act decrees that rates fall within the category of rules. However, it adds not only wages, prices and related matters to this conception but indeed includes “any agency statement of general or particular applicability,” mentioning specifically “the approval or prescription for the future of . . . corporate and financial structures or reorganizations.” The

33. E.g., *Philadelphia Co. v. SEC*, 164 F.2d 889, 899-901 (D.C. Cir. 1947), cert. denied, 333 U.S. 828 (1948), Note, 61 HARV. L. REV. 875 (1948). And see *Philadelphia Co. v. SEC*, 175 F.2d 808, 816-20 (D.C. Cir. 1948), vacated on both parties' motion, 337 U.S. 901 (1949), Note, 34 MINN. L. REV. 464 (1950).

34. E.g., *Union Bridge Co. v. United States*, 204 U.S. 364, 377-388 (1907) (removal of bridge structure upon “order” of the Secretary of War under the River and Harbor Act upheld; Court did not discuss whether there was a regulation or individual decision, but cited authorities are those that have upheld legislative delegation); *United States v. Baltimore & Ohio R.R.* 293 U.S. 454, 459, 463-65 (1935) (safety regulations but addressed to individual railroads; Court stating that the ICC exercised both quasi-legislative and quasi-judicial functions applied the standard of the latter—findings required—to agency's action); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 417-21 (1942), Notes, 42 COL. L. REV. 1197 (1942), 10 U. OF CHI. L. REV. 88 (1942), (Court found FCC action to be regulation, but nevertheless afforded plaintiff standing in court to contest it as if the regulation had been enforced already, thus treating regulation *pro tanto* like an individual order); second *Philadelphia Co.* case, *supra* note 33, at 816-819 (court treats SEC order as an individual decision—hearing constitutionally required—despite APA § 2(c) which declares corporate reorganization approvals to be regulations); *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281, 288-289, 290 (D.C. Cir. 1948); Notes, 97 U. OF PA. L. REV. 121 (1948), 62 HARV. L. REV. 506 (1949), 33 MINN. L. REV. 771 (1949) (rate making was held to be legislation, yet a quasi-judicial or, in its absence, a judicial hearing was considered as constitutionally required).

35. *Munn v. Illinois*, 94 U.S. 113 (1877); *Louisville & Nashville Ry. v. Garrett*, 231 U.S. 298, 305 (1913); *Terminal Ry. Ass'n v. United States*, 266 U.S. 17, 30 (1924); *King Mfg. Co. v. Augusta*, 277 U.S. 100, 102-104 (1928); *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38, 50 (1936); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *United States v. Jones*, 336 U.S. 641 (1949). But see *Chicago, M. & St. P. R.R. v. Minnesota*, 134 U.S. 418 (1890).

36. *United States v. Jones*, *supra* note 35; *Transcontinental & Western Air, Inc. v. CAB*, 336 U.S. 601 (1949).

37. Justice Jackson, dissenting in *Transcontinental & Western Air, Inc.*, *supra* note 36, at 608.

official commentator regards as the main difference between rule making and adjudication the fact that the former "must be of *future effect*, implementing or prescribing future law," whereas the latter "is concerned with the determination of past and present rights and liabilities." We are informed, furthermore, that the authors of the Act were "aware of this realistic distinction between rule making and adjudication" and "shaped the entire Act around it," in that it prescribes "radically different procedures for rule making and adjudication."<sup>38</sup> We can only wish that the authors would have conveyed their awareness to the readers of the Act. In the absence of appropriate enlightenment, we must still hold that most decisions, judicial as well as administrative, are based on past facts and prescribe future conduct. This is so even in the case of a money judgment, where the judge, upon events (in the past) as he sees them, directs the debtor to pay (in the future); but of course here the judgment coexists with, and superficially may be understood as, a mere "finding" that the debtor was (and still is) liable to the creditor. A divorce decree, on the other hand, or one for the partition of property, is entirely addressed to the future, although naturally the grounds for the decision are in the past: the decree "creates" a new obligation in the future. And so do most administrative decisions. Thus, the NLRB or the FTC "finds" that the respondent did engage in unfair practices and directs him to cease and desist therefrom in the future. The SEC "finds" that an undesirable situation, contrary to law, exists in a given corporation and directs the latter to act in a specified manner. But this last-mentioned administrative action, however singular and individually limited its effect may be, is supposed to be a regulation under the mandate of Section 2 (c) of the Act. It is only by an act of faith that this kind of a distinction between rule making and adjudication can be termed "realistic" rather than blurred.

By way of summary we may state that in order to ascertain whether the rule making or the adjudicatory procedure should be followed by an agency in a given instance, the enabling statute and, where applicable, Section 2 (c) of the Act must be consulted. If the intention of the statute is uncertain and the subject-matter not one involving wages, prices, rates, financial structures, etc., the distinction will depend on whether the administrative action is expected to be one of a relatively wide and general application, or limited to a relatively small number of addressees.<sup>39</sup> And if the matter involves individual financial structures, rates, prices, etc., the act will be a regulation—according to Section 2 (c)—more in name than

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38. ATT'Y GEN. MAN. AD. PROC. ACT. 12-15 (1947). But see *Philadelphia Co. v. SEC*, *supra* note 33, at 816, which pays no attention to the bemuddled legislative definitions.

39. See Fuchs, *Procedure in Administrative Rule-Making*, *supra* note 31, at 259, 263.

in substance. Specifically, the party to such a "regulation" must be given a due process hearing as in the case of any other individual determination.<sup>40</sup>

#### CONSTITUTIONALITY

In order to be valid, a regulation must neither itself violate the Constitution nor be based on a statute that violates the Constitution.

The former deficiency is not frequent. In most cases where regulations were found unconstitutional, it was the enabling statute that was held to violate some provisions of our basic law. Yet there are instances where administrative regulations were held to be contrary to the Constitution, as where a state prison regulation purported to abridge or impair the prisoners' right to apply to the federal courts for a writ of habeas corpus,<sup>41</sup> or where a presidential regulation was alleged to have invalidated a claim for services rendered prior to the regulation.<sup>42</sup>

In most instances, however, regulations were found to be invalid either because they exceeded the statutory mandate, which will be discussed below, or because the underlying statute was unconstitutional.<sup>43</sup>

A statute, whether or not it contains rule making authority, may be unconstitutional for a variety of reasons that have nothing to do with administrative law, but rather fall within the scope of constitutional law.<sup>44</sup> Of peculiar interest to administrative lawyers, however, is the actual or imaginary situation where a statute, in authorizing rule making, contravenes the maxim—or what is still left of it—that the legislature may not delegate its law making authority. As the storm over the old rule has largely subsided, there is little left for discussion.<sup>45</sup> With the exception of the New Deal cases,<sup>46</sup> no federal regulation has been set aside for many years as violative of the non-delegation rule; and it is not likely that the experience of the New Deal cases will repeat itself. The comparative absence, however, of modern decisions adverse to quasi-legislation does not mean that there is "no law" whatever on this point. It only means that Congress is exercising sufficient self-restraint to remain within the wide

40. *Philadelphia Co. v. SEC*, *supra* note 33 (second case).

41. *Ex parte Hull*, 312 U.S. 546, 549 (1941).

42. *See United States v. Davis*, 132 U.S. 334, 336 (1889).

43. At times a statute, yet not the resulting regulation, may be unconstitutional in that the latter does not make use of the unconstitutional authorization. See the concurring opinion in *Marshall Field & Co. v. Clark*, *supra* note 7, at 697. The courts follow the principle that a law should be set aside only where this is necessary for the determination of the case before the court and leave the statute untouched as long as it is not unconstitutionally administered. *United States v. Butler*, 297 U.S. 1 (1936); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (dissenting opinion of Justice Brandeis).

44. See the (incomplete) list in *PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT* (Library of Congress 1936).

45. Except from a historic point of view, for which see Parker, *Separation of Powers Revisited: Its Meaning to Administrative Law*, 49 MICH. L. REV. 1009 (1951).

46. So-called, because they nearly killed the New Deal. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). See Stern, *The Commerce Clause and the National Economy 1933-46*, 59 HARV. L. REV. 645 (1946).



boundaries of the Constitution as now drawn by the courts. What, then, are those boundaries?

First of all, there must be an express statutory authorization for an agency to promulgate regulations. Under some foreign constitutions, the heads of the executive departments may act regardless of, and to an extent even contrary to, parliamentary authorization.<sup>47</sup> This is not the law in the United States.<sup>48</sup>

Secondly, the statute authorizing the regulation must limit the agency's authority to a certain, specified, circumscribed task. Obviously, a law empowering the Attorney General "to make a criminal code" would impose some limitation—he could not, under such a law, promulgate a labor relations code—but this would not be sufficiently narrow.<sup>49</sup> On the other hand, it is today no longer necessary for the statute to be so complete and specific that the agency may merely proclaim the commencement or end of the statute's legal force.<sup>50</sup> Between these two extremes there lies what is now considered permissible legislative delegation.<sup>51</sup>

We have selected at random and without claim to completeness of a few instances of delegation where both the statutory standards and the limitations upon the agency's power have satisfied the courts as sufficient.

CIRCUMSTANCES UNDER WHICH  
AGENCY'S QUASI-LEGISLATIVE  
POWER WAS TO BECOME EFFECTIVE<sup>52</sup>

AGENCY'S AUTHORITY

If England and France continued to *violate* America's neutral commerce,<sup>53</sup>

To revive an embargo act of Congress. (President)

47. For instance, under the notorious Art. 48 of the "Weimar" Constitution of the late German Reich.

48. See 1 COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER 224 (8th ed. 1927).

49. Cf. 6 OPS. ATT'Y GEN. 10 (1853) (226-page code for Navy issued by President as Commander-in-Chief held invalid as exercising legislative power).

50. This was the criterion applied in *The Brig Aurora*, *supra* note 4; *Marshall Field & Co. v. Clark*, *supra* note 7; and still to a degree in *J. W. Hampton, Jr. & Co. v. United States*, *supra* note 7. But see *Lichter v. United States*, 334 U.S. 742, 785 (1948); *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26; CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 130-2 (1948).

51. Older authorities, such as the *Field* and *Hampton* cases *ibid.* denied the existence of "delegation," but nowadays this or similar terms are freely used. *E.g.*, *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 142-143 (1941); *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26, at 686-7, 693; CARROW, *supra* note 50, at 118-130 (1948); Note, 130 A.L.R. 272, 273 (1941). If Congress confines itself to laying down an intelligible principle, this "is not a forbidden delegation of legislative power." *Lichter v. United States*, *supra* note 50.

52. Italics supplied in order to indicate relative vagueness.

53. *The Brig Aurora*, *supra* note 4.

If a prohibition to sell arms to the belligerents in the Chaco conflict <i>may</i> contribute to the restoration of peace; <sup>54</sup>	To prohibit the export of arms to the belligerent countries. (President)
If it is <i>in the interest of national defense</i> ; <sup>55</sup>	To prohibit the export of <i>war supplies</i> . (President)
If the United States is in <i>danger of invasion</i> from foreign nations or Indian tribes; <sup>56</sup>	To call forth the militia. (President)
<i>If necessary for the country's protection</i> against sabotage and espionage; <sup>57</sup>	To expel American citizens of Japanese ancestry from the West Coast, to impose curfews upon them, etc. (President, military commanders)
If foreign countries impose "reciprocally unequal and <i>unreasonable</i> " custom duties on certain American goods; <sup>58</sup>	To suspend statute permitting free import of certain goods. (President)
If the statutory custom duties do not <i>equalize</i> our <i>production costs</i> with those of foreign countries; <sup>59</sup>	To increase or decrease, up or down to 50 per cent, the statutory custom duties. (President)
If necessary for the protection and improvement of national forests and to secure favorable conditions of water flow; <sup>60</sup>	To issue regulations concerning the occupancy and use of national forests. (President, Secretary of Agriculture)
If an <i>undue discrimination</i> in railroad rates is found to exist; <sup>61</sup>	To promulgate <i>reasonable</i> rates. (ICC)

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54. United States v. Curtiss-Wright Export Corp., *supra* note 8.

55. United States v. Rosenberg, 150 F.2d 788 (3d Cir. 1945), *cert. denied*, 326 U.S. 752 (1945).

56. Martin v. Mott, 12 Wheat. 10 (U.S. 1827).

57. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944). *But see Ex parte Mitsuye Endo*, 323 U.S. 283 (1944); Rostow, *Our Worst Wartime Mistake*, 191 HARPER'S MAGAZINE, Sept. 1945, p. 193.

58. Marshall Field & Co. v. Clark, *supra* note 7.

59. J.W. Hampton, Jr. & Co. v. United States, *supra* note 7.

60. United States v. Grimaud, 220 U.S. 81 (1911).

61. Shreveport Rate Cases, 234 U.S. 342 (1914), Note, 14 COL. L. REV. 583 (1914); Wisconsin Rate Cases, 257 U.S. 563 (1922), Comment, 31 YALE L.J. 870 (1922).

If minimum wages are *economically feasible* without *substantially* curtailing employment;<sup>62</sup>

To issue regulations providing for minimum wages. (Wage and Hour Administrator)

If necessary to stabilize prices, prevent *speculative, unwarranted and abnormal* increases in prices, rents, wages; to eliminate *hoarding*, etc.; to protect *consumers, wage earners, investors, etc.*;<sup>63</sup>

To promulgate "*fair*" (or equitable) prices (so far as *practicable* at the level of 1942), rent, wages. (Price Administrator, National War Labor Board)

The comparative uncertainty of many of these standards is further enhanced by the fact that the executive charged with carrying out the provisions by making the regulations is most nearly the ultimate judge as to whether the facts that give rise to the regulatory power do actually exist. In many instances this is so stated in the enabling statute itself.<sup>64</sup> And even where the law does not say so either expressly or by strong implication, the situation is nevertheless the same.<sup>65</sup> The courts as a rule will not substitute their own judgment for that of the agency as to whether the facts upon which the agency is authorized to regulate do exist.<sup>66</sup>

The enabling statute may constitutionally empower the agency to accomplish the statutory ends by any means the statute itself may have validly enacted. Thus the statute may authorize a regulation that declares contraventions of the regulation to be crimes. This was alleged to be unconstitutional by the defendants in the *Grimaud* case,<sup>67</sup> where the statute authorized the Secretary of Agriculture to issue regulations concerning sheep grazing in the national forests, and violations of the regulation were declared to be crimes. The court, upholding the statute, emphasized that this must not be confused with a situation where an agency without

62. *Opp Cotton Mills, Inc. v. Administrator*, *supra* note 51.

63. *Yakus v. U.S.*, *supra* note 12; *Bowles v. Willingham*, 321 U.S. 503 (1944); *O'Neal v. U.S.*, 140 F.2d 908 (6th Cir.), *cert. denied*, 322 U.S. 729 (1944); *National War Labor Board v. Montgomery Ward & Co.*, 144 F.2d 528 (D.C. Cir.), *cert. denied*, 323 U.S. 774 (1944).

64. "Whenever the President . . . shall find" would be the most outspoken expression of this policy, as used, *e.g.*, in *J. W. Hampton, Jr. & Co. v. United States*, *supra* note 7. Other statutes, such as the Emergency Price Control Act underlying the *Yakus* case, *supra* note 12, while not using this language, make it clear enough that the finding rests with the agency.

65. See *Martin v. Mott*, *supra* note 56, at 12, declaring the President to be "the sole and exclusive judge whether the exigency has arisen" that justifies the calling of the militia.

66. For a discussion see *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26. This case also demonstrates that agencies do not enjoy the same degree of freedom in choosing remedies. See notes 226-7, *infra*.

67. *United States v. Grimaud*, *supra* note 60.

specific-statutory authorization declares violations of its regulations to be crimes.<sup>68</sup>

Nor can it be doubted that, to the extent to which statutes may be retroactive,<sup>69</sup> they may also authorize regulations to take effect prior to their promulgation.<sup>70</sup> However, this does not happen frequently.<sup>71</sup>

#### LEGALITY

Unlike mere interpretations,<sup>72</sup> the issuance of regulations must be statutorily authorized.<sup>73</sup> As to procedural rules, a general permission has been given to federal agencies long ago;<sup>74</sup> and it is now mandatory for those coming under the Administrative Procedure Act to issue and publish their rules of procedure.<sup>75</sup> No such over-all authorization, however, exists in regard to substantive lawmaking. In other words, the requirement that the delegating law be specific and relatively detailed is pressed much more strongly as to substantive than as to adjective law.

The authority that may be conferred by a statute is "to make regulations to carry out the purpose of the act—not to amend it."<sup>76</sup> But of course here as elsewhere the borderline between "carrying out" the purpose of a statute and "amending" it is fluctuating. A very strict view was taken not so long ago, when a World War I risk insurance law provided, in regard to compensation cases, that loss of one hand and the sight of one eye are to be regarded as total permanent disability, but had no such provision as to insurance cases. A regulation extended the legal definition of "total permanent disability" to insurance cases, and was held invalid as in excess of the statutory authority.<sup>77</sup> Similarly rigid was an opinion dealing with a

68. As was attempted in *United States v. Eaton*, 144 U.S. 677 (1892). *But see* *Kraus & Bros. v. United States*, 327 U.S. 614, 620 (1946), where the "inartistically drawn" statute was construed by the Court so as to allow the agency the making of criminal regulations. For further discussion, see notes 87-96, *infra*.

69. *Cf. Welch v. Henry*, 305 U.S. 134 (1938); *United States v. Hudson*, 299 U.S. 498 (1937); *Louisville & Nashville R.R. v. United States*, 219 U.S. 467 (1911); *Howell Electric Motors Co. v. United States*, 172 F.2d 953 (6th Cir. 1949).

70. *Speert v. Morgenthau*, 116 F.2d 301 (D.C. Cir. 1940). See also *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944). For a lucid discussion see *Note, Retroactive Operation of Administrative Regulations*, 60 HARV. L. REV. 627 (1947); *Davis, op. cit. supra* note 25, at 944.

71. In the *Holly Hill* case, *supra* note 70, the wage regulation before the Court exceeded the statutory authority. The Court directed the Administrator to draw another one in conformity with the statute, which was to go into effect as of the day of the original (invalid) regulation.

72. *United States v. Macdaniel*, *supra* note 15; 28 OPS. ATT'Y GEN. 549 (1911). And see the "policy statement" of the NLRB concerning Board jurisdiction which was issued as a kind of interpretation without benefit of statutory authorization. NLRB Press Release, r-342 (Oct. 6, 1950).

73. *United States v. Eaton*, *supra* note 68; *United States v. Grimaud*, *supra* note 60.

74. REV. STAT. 161 (1875), 5 U.S.C. § 22 (Supp. 1951), deriving from 1 STAT. 28 (1789).

75. APA § 3(a); ATT'Y GEN. MAN. AD. PROC. ACT. 17-22 (1947). This includes agencies not otherwise falling under the Act. APA § 2(a).

76. *Miller v. United States*, 294 U.S. 435 (1935); *M.E. Blatt Co. v. United States*, 305 U.S. 267 (1938); *Roberts v. Commissioners*, 176 F.2d 221 (9th Cir. 1949).

77. *Miller v. United States*, *supra* note 76.

statute which permitted the free importation of animals for breeding purposes. The customs regulation, however, tried to carry out its task by prescribing that the animals must be of superior stock and adapted for breeding purposes, which was held to be in excess of authority.<sup>78</sup> A further example is Mr. Justice Holmes' opinion, which denied the so-called Tea Board's right to reject, pursuant to its regulations, tea as unfit for importation because of its contents of Prussian blue where the enabling statute did not expressly so allow.<sup>79</sup>

These decisions may be contrasted, however, with those that have allowed a wide latitude of discretion and have permitted agencies to do more than "fill in the details"<sup>80</sup> of a statute. Thus the Treasury Department was held to be authorized to define the statutory term "association" as including trusts.<sup>81</sup> During World War II, the president was authorized to "allocate" certain materials, including fuel oil. He redelegate his authority to the Price Administrator, who in turn by regulation decreed that violators of the pertinent rationing order "may by administrative suspension order, be prohibited from receiving . . . any fuel oil . . ." This was upheld by the Supreme Court, rejecting the argument that the authority to allocate does not include the power to issue suspension orders.<sup>82</sup>

Yet at times even modern courts feel called upon to exercise their judgment in determining the limits of the law that are drawn around an agency's discretion. Thus, Section 13(a)(10) of the Fair Labor Standards Act of 1938<sup>83</sup> exempted certain workers engaged in canning of agricultural products and employed "within the area of production (as defined by the administrator)." The Wage and Hour Administrator defined "area of production" to include employees of canneries that obtain their raw material exclusively from local farms, if "the number of employees . . . does not exceed seven." *Held*, not covered by the term "area of production" and thus in excess of statutory authority.<sup>84</sup> A Treasury regulation provided that litigation expenses, unless income producing, be non-deductible from trust income. The Supreme Court, upholding the Tax Court and reversing the

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78. *Morrill v. Jones*, 106 U.S. 466 (1882). See also *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 609-610 (1930).

79. *Waite v. Macy*, 246 U.S. 606 (1918).

80. This expression, so frequently repeated, was used by Chief Justice Marshall in *Wayman v. Southard*, *supra* note 6, at 43.

81. *Morrissey v. Commissioner*, 296 U.S. 344, 349, 354 (1935).

82. *Steuart & Bro., Inc. v. Bowles*, 322 U.S. 398 (1944). And see *Field, Rationing Suspension Orders: A Reply to Dean Pound*, 39 A.B.A.J. 385 (1944). See also *Atchison, T. & S.F. Ry. v. Scarlett*, 300 U.S. 471 (1937); *Scaife Co. v. Commission*, 314 U.S. 459 (1941); *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218 (1943); *Johnston v. Board of Dental Examiners*, 134 F.2d 9 (D.C. Cir. 1943), *cert. denied*, 319 U.S. 758 (1943).

83. 52 STAT. 1060 (1938), 29 U.S.C. § 201 (1946).

84. *Addison v. Holly Hill Fruit Products, Inc.*, *supra* note 70.

Court of Appeals, found that the regulation<sup>85</sup> was in conflict with Section 23(a)(2) of the Internal Revenue Code and hence "unauthorized."<sup>86</sup>

The requirement of legality applies, of course, not only to the subject-matter regulated, but also to the sanction chosen. Here, however, it can be stated that quite generally a rather wide discretion has been allowed agencies in determining the means of enforcement. Short of outright criminal sanctions, almost every mode of repression was found to be covered by the statute and sufficiently "reasonable" to fall within the permissible limits of administrative discretion.<sup>87</sup> Perhaps the most revealing example is the *Steuart* case.<sup>88</sup> As we have seen, the statute merely directed the OPA to "allocate" goods of any kind "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense;" but the OPA decreed that violators of the rationing regulations may "by administrative suspension order, be prohibited from receiving" fuel oil. This was upheld, despite the company's argument that since the statute did establish specific sanctions, such as fine, imprisonment, and injunction, it could not validly be subjected to penalties not mentioned in the act.<sup>89</sup> And the National Labor Relations Board—a tribunal rather than a regulatory agency, but with power to issue procedural rules<sup>90</sup>—was held to be authorized to implement its power to issue a complaint by subpoenaing books and records in advance of issuing a formal complaint.<sup>91</sup> "The relation of remedy to policy is peculiarly a matter for administrative competence, and the courts may enter this area only if administrative discretion has been exceeded."<sup>92</sup>

85. It could be argued, however, that the "regulation" involved, viz., U.S. Treas. Reg. 103 § 19.23 (a)-15, was a mere interpretation. Cf. Dwan, *The Federal Administrative Procedure Act and the Bureau of Internal Revenue* in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 142-169 (Warren ed. 1947).

86. *Trust of Bingham v. Commissioner*, 325 U.S. 365, 376-377 (1945). The opinion could have rested upon *Dobson v. Commissioner*, 320 U.S. 489 (1943), where the Court strongly emphasized the "finality" of decisions on "mixed questions" (often a euphemism for "questions of law") rendered by administrative tribunals such as the Tax Court. Cf. Paul, *Dobson v. Commissioners: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944). However, the *Bingham* opinion not only did not rest on the *Dobson* case, but by way of dictum considerably diminished its force in that it emphasized that "questions of law" like the one at bar are for the courts to decide.

87. Cf. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 274 (1946); ATT'Y GEN. MAN. AD. PROC. ACT 88-9 (1947); GELLHORN, *ADMINISTRATIVE LAW* 167-70, 322-52 (1947).

88. *Supra* note 82.

89. *Steuart Bro., Inc. v. Bowles*, *supra* note 82. See Field, *op. cit. supra* note 82; Rosden, *The Legality of Suspension Orders Issued by the Federal Emergency Agencies*, 33 GEO. L. J. 45 (1944).

90. Section 6 of the (old and new) NLRA, 49 STAT. 449 (1935), 29 U.S.C. § 156 (1946).

91. *NLRB v. Barrett Co.*, 120 F.2d 583 (7th Cir. 1941); Note, 55 HARV. L. REV. 134 (1941). And see *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir.) *cert. denied*, 311 U.S. 690 (1940), Note, 8 U. OF CHI. L. REV. 129 (1940); Comments, 29 GEO. L.J. 328 (1940), 26 WASH. U.L.Q. 270 (1940).

92. *NLRB v. Gullett Gin Co.*, 340 U.S. 361-364 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *In re Electric Power & Light Corp.*, 176 F.2d 687, 692 (2d Cir. 1949).

There is, however, one traditional exception to the agencies' freedom of choosing sanctions. The courts have held that to establish an act as a crime is a legislative prerogative not to be exercised by way of regulation.<sup>93</sup> Yet the exception is not so rigid as it sounds. *Firstly*, it is held sufficient if the act makes violations of the regulation (not yet promulgated) a crime, rather than defining the crime itself.<sup>94</sup> This, of course, makes the agency in fact the co-partner in the legislative process of defining crimes. *Secondly*, the requirement that the crime be "established" by law is at times taken with a grain of salt. For instance, Section 205(b) of the late Emergency Price Control Act made willful violations of Section 4 a criminal offense. A corporation was indicted under Section 205(b) although it had violated not Section 4, but merely regulations issued pursuant to Section 4. This was upheld, although the Court conceded that Section 205(b) was "somewhat inartistically drawn" in that it did not "specifically impose criminal liability on those who violate the regulations and orders of the Administrator;" the Court, however, was satisfied that Section 205(b) referred to Section 4, which in turn made it "unlawful" to sell in violation of any regulation.<sup>95</sup> *Thirdly*, the borderline between "penalties," which the agencies may impose without limiting, specific authorization, and "punishments," which are the consequence of "crimes" and may not be visited upon malefactors without specific statutory authority, may be of great importance to a lawyer, but certainly not to his client. I for one entertain the heretic view that, if an agency without express authority may deprive a business concern of its right to buy supplies,<sup>96</sup> because the agency deems this to be the most efficacious way of treating offenders of its rules, then the fact that the same agency may not cause the concern to be fined five dollars without express statutory authority amounts to very little—certainly not to a safeguard of actual (or imagined) liberties!

Another instance of strict interpretation of the agencies' regulatory authority in regard to enforcement is the proscription of retroactive regulations. While not invalid if specifically so authorized,<sup>97</sup> the authorization is not to be presumed, but must be express.<sup>98</sup> However, the retroactive effect

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93. *Pakas v. United States*, 245 U.S. 467, 472-73 (1918); *United States v. Eaton*, 144 U.S. 677 (1892). It has long been thought that under a constitutional government (the German Rechtsstaat) a crime must be "a violation of a public law forbidding it," as 4 BL. COMM. \*5 demands, who, however, overlooks that in England most crimes were judge-made rather than statutory; but of course, to Blackstone judges did not make, but merely "found" the (natural) law. See also Jerome Hall, *Nulla poena sine lege*, 47 YALE L.J. 165 (1937); Note, 28 N.C. REV. 84 (1949).

94. *United States v. Grimaud*, *supra* note 60. Cf. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 427-437 (1941).

95. *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 619 (1946).

96. See *Steuart Bro., Inc. v. Bowles*, *supra* note 82.

97. *Supra* notes 69-71.

98. *Transcontinental Western Air, Inc. v. CAB*, *supra* note 36 at 604, 607.

of a regulation replacing an invalid one as of the date of the latter was upheld by the Supreme Court.<sup>99</sup>

The general rule—subject to the above-named exceptions—of wide latitude of agency discretion in selecting means of enforcement includes the establishment of procedural rules, inasmuch as any “reasonable” rule of procedure is likely to be upheld.<sup>100</sup> Older decisions, however, at times have found certain phases of agency procedure to be *ultra vires*, as where the ICC issued a regulation whereby it would not recognize assignments of reparation awards to a stranger to the transportation record. The Supreme Court treated this to be in excess of statutory authority and hence not binding on the ICC.<sup>101</sup>

Some authorities insist that regulations, in addition to being both constitutional and legal, must be “reasonable.” To be sure, the demand that laws be “just,” “adequate” or “reasonable” is probably the oldest ethical postulate that lawmakers have been confronted with since times immemorial.<sup>102</sup> Under positive law,<sup>103</sup> however, “reasonable” must necessarily mean “reasonable as understood by the person deciding upon it.” The proposition that a regulation must not only “be consistent with the statute but it must be reasonable” was squarely reiterated by the Supreme Court in *Manhattan General Equipment Co. v. Commissioner*.<sup>104</sup> This opinion, however, merely denies the alleged retroactivity of a certain regulation and reaches the conclusion that the regulation, therefore, was reasonable.<sup>105</sup> The precedent quoted by the Court<sup>106</sup> sheds but little light on the question as to just what the Supreme Court had in mind when it required regulations to be reasonable. It was held there that it was “clearly unreasonable” to impose on the owner of an international bridge the obligation of furnishing an indemnity bond to cover the losses that may accrue from the acts of, not the owner, but rather the passengers crossing the bridge. However, the “regulation” pursuant to which the

99. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 135 (1936); *Addison v. Holly Hill Fruit Products, Inc.*, *supra* note 70; *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1940); Note, 60 HARV. L. REV. 627, 631 (1947).

100. REV. STAT. 161 (1875), 5 U.S.C. § 22 (1946); SEN. DOC. NO. 248, 79th Cong. 2d Sess. 198 (1946). And *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223-24 (1944); *NLRB v. Barrett Co.*, 120 F.2d 583 (7th Cir. 1941).

101. *Spiller v. Atchison, T. & S.F. Ry.*, 253 U.S. 117, 135-37 (1920). The ICC in this case disregarded its own regulation by *de facto* recognition of the assignment, an attitude which the Court approved, because as an administrative regulation “it, of course, constituted no limitation” on the ICC. The soundness of this reasoning must be doubted. See also notes 243-45, *infra*.

102. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 17, *passim* (1949).

103. For a survey of the subject in regard to the law of the Roman Catholic Church see Roelker, *The Meaning of the Term “Rationabilis” in the Code of Canon Law*, 9 THE JURIST 154 (1949).

104. 297 U.S. 129, 134 (1936); *International Ry. v. Davidson*, 257 U.S. 506, 514 (1922); *United States v. Obermeier*, 186 F.2d 243, 247-8 (2d Cir. 1950).

105. The regulation went into effect on the date it replaced an older illegal one. It might as well be termed retroactive. Cf. *Addison v. Holly Hill Fruit Products, Inc.* *supra* note 70, at 620 (1944).

106. *International Ry. v. Davidson*, *supra* note 104.



defendant customs collector acted was in fact an internal instruction and hence merely an interpretation of the statute not binding on the courts. Quite consistently, the Court admits that what the Treasury wanted to accomplish could have been done by express authorization of Congress.<sup>107</sup> In other words, the instruction was merely not a tenable construction of existing law. There are indeed numerous examples of this vague type where the courts assert that a regulation must be reasonable; actually, however, they either simply hold this to be the case without more elaboration or they term the regulation "unreasonable" because it is contrary to the statutory intention. Thus, in a recent case<sup>108</sup> the immigration authorities barred from entering this country a foreign war bride, duly investigated before marriage. The appellate court refused to invalidate the regulation that permitted this rather serious instance of tossing human beings about as neither inconsistent with the underlying statute nor "unreasonable or inappropriate,"<sup>109</sup> and the Supreme Court, affirming, found the regulation to be "reasonable in the circumstances."<sup>110</sup> But the Court has not informed us what, then, would be sufficiently unreasonable—yet not contrary to the statute—to warrant a different opinion. In other cases the courts have approved in express words as reasonable, or disapproved as unreasonable, procedural regulations<sup>111</sup> and forms.<sup>112</sup> Yet, in the final analysis, the requirement amounts to no more than that the regulation must not exceed the statutory authority as conferred by the lawmaker or violate the Constitution. A regulation is "unreasonable" if it is *ultra vires* of the enabling statute, even as an unconstitutional act of Congress may perchance be termed as unreasonable interpretation of the Constitution.<sup>113</sup>

Fortunately, the requirement of reasonableness is usually spelled out in the enabling statutes, which deprives the requirement of its character *praeter legem*.<sup>114</sup> The Administrative Procedure Act has no over-all mandate of reasonableness for regulations except for Section 10(d), which proscribes administrative acts that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>115</sup>

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107. *Id.* at 514.

108. *United States ex rel. Knauff v. Watkins*, 173 F.2d 599 (2d Cir. 1949), *aff'd sub nom.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

109. *United States ex rel. Knauff v. Watkins*, *supra* note 108, at 603.

110. *United States ex rel. Knauff v. Shaughnessy*, *supra* note 108, at 544.

111. *E.g.*, *Shoong Investment Co. v. Anglin*, 45 F. Supp. 711, 713 (N.D. Cal. 1942) (approving internal revenue procedural rules); *Spiller v. Atchison, T. & S.F. Ry.*, *supra* note 101 (disapproving ICC procedural rules); *United States v. Obermeier*, *supra* note 104 (approving naturalization rules). And see *NLRB v. Barrett Co.*, *supra* note 91; Note, 55 HARV. L. REV. 134 (1941).

112. *Commissioner v. Lane-Wells Co.*, *supra* note 100.

113. *Cf. United States v. La Franca*, 282 U.S. 568, 575-77 (1931).

114. *E.g.*, 52 STAT. 1046 (1938), 21 U.S.C. § 341 (1946); *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26, at 697; INT. REV. CODE 23(1)(m); *Rockford Life Ins. Co. v. Commissioner*, 292 U.S. 382 (1934).

115. The words "otherwise not in accordance with law" indicate that acts that are capricious, etc., constitute mere examples of acts not in accordance with law; rather

And where the law demands reasonableness, who is to decide whether a regulation is reasonable or not—the agency or the courts? This problem is in fact a part of the broader question: What administrative acts—and regulations in particular—are subject to judicial control? For the purpose of this study we may merely state by way of summary that the extreme advocates of judicial supremacy would invariably let the courts decide upon the reasonableness of a rule as on any other legal question;<sup>116</sup> and that, on the other hand, at least the federal courts have in recent years shown a tendency toward self-restraint by identifying the question of reasonableness as a “purely administrative” one into which the courts will not delve.<sup>117</sup> However, despite such pronouncements the federal courts do not infrequently—though not as often as in previous years—indulge in deciding themselves the question whether an administrative regulation is or is not reasonable.<sup>118</sup> State courts are even more apt to adhere to this older trend.<sup>119</sup>

#### PROCEDURE

Before discussing the many types of procedure that lead to the making of rules we must briefly enter upon a problem that is still occasionally being tossed about. To what extent, if any, does the Constitution require a “fair hearing,” or any hearing at that, to precede the issuance of a regulation?

To a naive reader of many a court opinion it might still appear that

than vices *aside* from unlawfulness as the naturalists would have it. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 40, 278, 310 (1946).

116. Commenting on the rise in importance of the judiciary at the time of and after John Locke, BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 639 (1945), remarks that this “has merely substituted the judge’s prejudice for the king’s.” See also Parker, *Separation of Powers Revisited*, 49 MICH. L. REV. 1009 (1951). LASKI, *THE AMERICAN DEMOCRACY* 110-16 (1948), is critical of our way of making the Supreme Court “in fact a third chamber in the United States” and the resulting “impossibility of reconciling the judicial function with the power to solve the problems of modern government.” And see Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936): “There is neither scope nor historical support for the expansion of the constitutional exaction of reasonableness of official action implied in uses of the phrases ‘liberty,’ ‘property,’ ‘due process,’ ‘unreasonable,’ and the like, into a body of detailed rules attaching definite consequences to definite states of fact.”

117. *E.g.*, *United States v. ICC*, 337 U.S. 426, 437 (1949); *Ambassador, Inc. v. United States*, 325 U.S. 317, 321 (1945); *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 139 (1939); *Armour & Co. v. Alton R.R.*, 312 U.S. 195 (1941); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562 (1919); Brandeis, J., concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 76 (1936). And see *Illinois Steel Co. v. Baltimore & Ohio R.R.*, 320 U.S. 508, 510 (1944); *United States ex rel. Knauff v. Shaughnessy*, *supra* note 108.

118. See notes 104-12 *supra*.

119. A *reductio ad absurdum* of the tale that judges know better than administrative officers what is reasonable furnishes *Lakewood Express Service, Inc. v. Board of Public Utility Commissioners*, 137 N.J.L. 440, 60 A.2d 298 (Sup. Ct. 1948), *rev’d*, 1 N.J. 47, 61 A.2d 730 (1948). The Public Utilities Commission, acting pursuant to statute, found seven-passenger sedans not to be reasonably safe for bus transportation. The state supreme court, on July 23, held unanimously that the Commission’s ruling was “entirely reasonable and appropriate.” But a brand new supreme court, on November 1, in a 4-1 decision held the rule of the Commission to be unreasonable and “counter to common experience of mankind,” without being disturbed in its self-assurance by the fact that a number of persons, including supreme court judges and experienced commissioners, had found the rule to be reasonable!

some "hearing," or even a quasi-judicial procedure, must precede the issuance of any regulation as a matter of due process.<sup>120</sup> A closer scrutiny dispels the doubt, however. "In legislation, or rule-making, there is no constitutional right to any hearing whatsoever."<sup>121</sup> Whenever hearings informal or formal, or even regular adversary proceedings, are held preparatory to rule-making, this is purely a matter of statutory law. Even as the legislature itself is not bound to hear parties affected by intended legislation, the lawmaker need not require such of those organs that make laws in his name.<sup>122</sup> This of course does not mean that it is at times not desirable to hold hearings or even base regulations on a formal, quasi-judicial record.<sup>123</sup> Apart from procedural regulations, where the sole procedure required is their publication in the Federal Register,<sup>124</sup> it is today the rule rather than the exception that agencies follow at least a consultative or auditive procedure, if not an adversary one.<sup>125</sup>

The non-applicability, however, of procedural due process to rule making is not unqualified, at least since the enactment of the Administrative Procedure Act.<sup>126</sup> As we have seen, this statute includes in its definition of "rules" not only such norms as are generally understood by this term, i.e., quasi-laws addressed to a relatively indefinite and unnamed group of

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120. *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908); *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431-33 (1935); *United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 463-5 (1935). See also *Morgan v. United States*, 298 U.S. 468 (1936), 304 U.S. 1 (1937); *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281, 285 (D.C. Cir. 1948), Notes, 62 HARV. L. REV. 506 (1949), 97 U. OF PA. L. REV. 121 (1948), and 33 MINN. L. REV. 771 (1949); *Hackney Bros. Body Co. v. New York Central R.R.*, 85 F. Supp. 465, 467 (E.D.N.C. 1949).

121. *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26, at 694; *Bowles v. Willingham*, 321 U.S. 503, 519 (1944); *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318-23 (1933). See also *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935); Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938).

122. *Supra* note 121. See *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920).

123. REP. ATT'Y GEN. COMM. AD. PROC. 105-11 (1941) is very unenthusiastic on adversary hearings, but believes in consultation and discussions to precede rule making. Following this viewpoint, the makers of the APA have made the latter form of procedure mandatory (subject to important exceptions) and left the prescription of formal hearings to the enabling statute. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 12, 17-21, 193-4, 199-202, 225, 248, 251-2, 257-60, 285, 304-5, 315, 353-4, 358-9, 384 (1946).

124. APA §§ 3(a), 4(a). For rules where not even publication is required see § 3, first sentence. And see notes 138-54 *infra*.

125. APA § 4(b), first and second sentences, respectively; Fuchs, *supra* note 121 at 273-8 (1938); REP. ATT'Y GEN., *supra* note 123; ATT'Y GEN. MAN. AD. PROC. ACT 31-35 (1947), which, however, is of the opinion that statutes "rarely require hearings prior to the issuance of rules of general applicability." The examples listed, which include such important laws as the (old) Wage and Hour, Federal Food, Drug and Cosmetic, Interstate Commerce, Natural Gas, Packers and Stockyards Acts, and others, somewhat belie this statement.

126. *Supra* notes 38-9.

persons,<sup>127</sup> but includes all norms<sup>128</sup> of general or *particular* applicability including those that prescribe corporate or financial structures or reorganizations,<sup>129</sup> a definition not fortified by the fact that "orders" (*i.e.*, individual decisions) are defined either as licensing or any final agency disposition that is not a rule.<sup>130</sup> Thus it seems to follow that any agency action that is final, and not licensing, is a regulation! It is true that Section 2 (c) appears to be restricted to such acts that are of "future effect," but this is, indeed, true of any legal command, be it a divorce decree, a money judgment, a jail sentence, an order to cease and desist from unfair labor or trade practices or to remove a nuisance, or a food regulation.<sup>131</sup> It is clear that the constitutional requirement of due process cannot be avoided by calling a decision a "rule," where it is directed against one or more named parties and affecting their life, business or property.<sup>132</sup> Apart from this exception, however, which we may call "individual regulation," the procedural requirements in the law of rule making are statutory rather than constitutional.<sup>133</sup>

127. Fuchs, *supra* note 121, at 263-64 (1938); KELSEN, *op. cit. supra* note 26, at 134, 255-258 (1945).

128. Section 2(c) uses the term "statements."

129. APA § 2(c). SEN. DOC. NO. 248, 79th Cong. 2d Sess. 14, 197, 225, 283, 284, 355. The confusion created by this legislative definition is demonstrated in Foster, *Application of the Administrative Procedure Act to the Statutes Administered by the Securities and Exchange Commission in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 213, 230-31 (WATSON ed. 1947); Miller, *Impact of the Federal Administrative Procedure Act on the Procedures of the Interstate Commerce Commission*, *id.* at 305, 322-23; Reilly, *The Labor Board and the Administrative Procedure Act*, *id.* at 468, 484; Reich, *Rule Making Under the Administrative Procedure Act*, *id.* at 492, 510-12; CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 33-6 (1948); Schwartz, *Administrative Terminology and the Administrative Procedure Act*, 48 MICH. L. REV. 57, 67 (1949); Parker, *The Administrative Procedure Act: A Study in Over-estimation*, 60 YALE L.J. 581 (1951).

130. APA § 2(d).

131. Fuchs, *supra* note 121, at 260-64. The "future effect" theory is largely based upon *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), distinguishing between rate making (future effect) and determining of the lawfulness of rates charged in the past. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 225, 306, 355 (1946). Yet the true criterion would seem to lie in the individual applicability of the latter type of decision, which most certainly has future effect, too. Some laws relating to human rights and the like have purported, in the fashion of the Declaration of Independence, to "find" rather than establish rights. This of course is a natural-law fiction.

132. The Supreme Court seems to try to avoid taking a stand on what is, after all, not solely a matter of proper nomenclature. See, *e.g.*, *SEC v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). But see *Philadelphia Co. v. SEC*, *supra* note 33, at 816, where the court calls it "elementary" that the actions of the SEC is "adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect," without ever referring to the so-called definitions of the APA. No attempt can be made here to enter into a comprehensive discussion of the constitutional problem involved.

133. The practical importance of the exception of the "individual regulation" is diminished by the fact that the pertaining statutes dealing with this type of administrative act usually prescribe a mode of procedure that lives up to the due process standards required under the Constitution. See *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26, at 694.

Unification or at least simplification of the rule-making process is one of the tasks that the Administrative Procedure Act has not accomplished. It adopts a few corrections here, a clarification<sup>134</sup> there, but by and large it follows the rule of *ne aliquid innovetur* and leaves everything of importance to the enabling statute. Consequently, we have a multiplicity of procedures rather than a uniform rule. There are regulations that may be promulgated without legally prescribed procedure; where some formalities must be observed; where a more elaborate procedure must be followed; where a regular hearing must be held; and yet others where the procedure is not incorrectly termed quasi-judicial.

(a) The first-named group, where no procedure whatsoever is required, as a matter of law except for the necessity that the regulation be issued by the statutorily designated organ, is small, albeit important.<sup>135</sup> It consists of regulations exempted from both the public-information requirement of Section 3 of the Administrative Procedure Act and the procedure of Section 4. Potentially it could happen that a subject-matter is exempted from Section 3, yet not from Section 4. Actually, however, this is not likely to occur. For "rules involving any matter relating solely to the internal management of any agency" are synonymous with "rules of agency organization," and free from the operation of Section 4.<sup>136</sup> And regulations requiring secrecy will inevitably constitute a "good cause" that gives the agency the right to "find" that Section 4 should not be applied. In these instances, then, rule making is neither regulated by the Administrative Procedure Act nor are the rules to be published anywhere.<sup>137</sup>

(b) Regulations (not expressly exempted as involving governmental functions that require secrecy in the public interest or as relating solely to internal agency management) must be published in the Federal Register as provided in Section 3(a). There are three classes of regulations dealt with in this subsection: procedural, organizational, and substantive regulations.

The first two groups include descriptions of the agency's central and field organization, delegation of "final authority" and the "places at which and methods whereby the public may secure information or make submittals or requests,"<sup>138</sup> as well as "the general course and method by which its functions are channeled and determined," including formal and informal procedure, forms, and information as to "the scope and contents of all

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134. Amply outweighed by the confusion created in § 2(c).

135. Where "there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." This situation must not be confused with the one arising under § 2(a), which excludes certain agencies from the operation of the Act in general, but not from § 3. For further elaboration see notes 153-4 *infra*.

136. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 18, 258 (1946).

137. An enabling statute, however, may of course provide for some procedure for the issuance of regulations that are either secret or involve merely agency management.

138. APA § 3(a)(1).

papers, reports, or examinations."<sup>139</sup> The Federal Register of September 11, 1946, containing 966 pages, carried all the regulations thus published.<sup>140</sup> However, as to procedural and organizational rules that had already been published before September 11, 1946, it was not necessary to republish them.<sup>141</sup>

The third group are substantive rules as well as mere interpretations, *i.e.*, "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public. . . ." <sup>142</sup> Again we are confronted with the question, What is a rule? If it really were what Section 2 (c) purports to define, it could be held that administrative decisions, too, must be published in the manner of rules. Fortunately, the Act, not carrying out its own definition, adds after the above-quoted words the qualifications, "but not rules addressed to and served upon named persons in accordance with law."<sup>143</sup>

The last sentence of Section 3 (a) decrees that "No person shall in any manner be required to resort to organization and procedure not so published." This means that he may not forfeit procedural rights, appeals, defenses, or the like, if the agency attempts to rely on an unpublished procedural rule.<sup>144</sup> For reasons not apparent, the Administrative Procedure Act has nothing analogous in regard to substantive rules.<sup>145</sup>

Section 7 of the Federal Register Act<sup>146</sup> stipulates that no "document required to be published" under Section 5 of the Act "shall be valid as against any person who has not had actual notice thereof" until the document or a certified copy is filed with the Federal Register Division of the National Archives Establishment and a copy made available for public inspection. This filing constitutes notice of the contents of the document "to any person subject thereto or affected thereby." Publication in the Register, in turn, establishes the presumption that the document was lawfully issued, promulgated and filed with the above-named Division,

139. APA § 3(a)(2). I cannot see any relevant difference between description of central and field organization and statements of the general course and method by which functions are channeled. Yet § 3(a) requires that organizational, procedural rules and substantive rules be published "separately." This has led to repetitions. ATT'Y GEN. MAN. AD. PROC. ACT 18-23 (1947); Delaney, *The Federal Administrative Procedure Act and the Post Office Department* in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 199-200 (Warren ed. 1947). The separation requirement does not apply to rules published before the APA went into effect. SEN. DOC. No. 248, *supra* note 136, at 415.

140. 11 FED. REG. Part II (1946). Much of the material therein was later repealed and amended.

141. ATT'Y GEN. MAN. AD. PROC. ACT 18-19 (1947); SEN. DOC. 248, 79th Cong. 2d Sess. 357 (1946).

142. APA § 3(a)(3).

143. *Ibid.* And see *Toledo, P. & W. R.R. v. Stover*, 60 F. Supp. 587 (N.D. Ill. 1945).

144. ATT'Y GEN. MAN. AD. PROC. ACT 21 (1947); SEN. DOC. No. 248, 79th Cong. 2d Sess. 198, 256, 357 (1946).

145. But see FED. REG. ACT § 7, quoted *infra* note 146, which, however, applies equally to procedural, organizational and substantive rules.

146. 49 STAT. 500 (1935), 44 U.S.C. § 301 (1946).

and that the printed text is a true copy of the filed original.<sup>147</sup> The contents of the Federal Register are judicially noticed.<sup>148</sup> The term "document" includes rules and regulations;<sup>149</sup> and the inclusion of regulations in the category of documents "required to be published" was decreed by executive order of the President and is now embodied in the Code of Federal Regulations.<sup>150</sup>

From the two pertinent statutes<sup>151</sup> it appears that an unpublished regulation—unless exempted from publication—is not enforceable against persons not apprised of it.<sup>152</sup> Publication, then, is a requirement of the rule-making process, unless the rule

(i) involves "any function of the United States requiring secrecy in the public interest." This statement includes the confidential operations of any agency such as the Secret Service or the FBI as well as those aspects of agency procedure whose disclosure would reduce its utility, as, e. g., confidential rules of the Comptroller of the Currency to National Banks.<sup>153</sup> The exception also lies when there is involved

(ii) "Any matter relating solely to the internal management of an agency," such as agency budget data, promotional policies, or internal directives concerning vacation, etc.<sup>154</sup> It is to be noted

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147. FED. REG. ACT § 7; *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380 (1947).

148. FED. REG. ACT § 7. Consequently, a confidential circular of the Secretary of the Treasury, however binding on his subordinates and hence affecting parties, is not subject to judicial notice. *Kiyochi Fujikawa v. Sunrise Soda Water Works Co.*, 158 F.2d 490 (9th Cir. 1946), *cert. denied*, 331 U.S. 832 (1947).

149. FED. REG. ACT § 4.

150. The Federal Register Regulations, approved by the President, 3 FED. REG. 1013 (1938), 1 CODE FED. REGS. 2.2(d), list in small print on 24 pages all the classes of documents issued by the agencies "hereby" determined . . . to be of general applicability and legal effect." Section 2.3 states that all other documents having "general applicability and legal effect" issued by any agency, but not designated in § 2.2(d), shall be forwarded to the Federal Register Division, which files and publishes them if they have general applicability and legal effect. It would have been simpler if the Act without further ado had included regulations in the list of documents to be published, but in any event we may be grateful for the pregnant definition of regulations and documents being of general applicability and legal effect.

151. FED. REG. ACT § 7 and APA § 3(a).

152. APA § 3(a) last sentence, differs from FED. REG. ACT § 7 in that its language appears to make unenforceable procedural and organizational rules even against persons who had actual notice of the rules. This, however, is not the legislative intent. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 415 (1946). See APA § 3(a) and its rather limited value, Caldwell, *The Federal Communications Commission in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 90 (Warren ed. 1947); Wanner, *Effect of the Administrative Procedure Act Upon the Civil Aeronautics Board*, *id.* at 117; Dawn, *The Federal Administrative Procedure Act and the Bureau of Internal Revenue*, *id.* at 145; Delaney, *The Federal Administrative Procedure Act and the Post Office Department*, *id.* at 198; Miller, *supra* note 129, at 318; Reich, *supra* note 129, at 495.

153. Reich, *supra* note 129, at 496. Internal, confidential rulings of the late Foreign Funds Control of the Treasury Department filled several volumes by 1948 when its functions were transferred to the Department of Justice. Many of these rulings required in fact no secrecy whatever and were kept confidential solely because of the agency's desire to prevent the public learning when it may expect favorable action on "blocked" accounts.

154. ATT'Y GEN. MAN. AD. PROC. ACT 18 (1947); SEN. DOC. NO. 248, 79th Cong. 2d Sess. 254 (1946). According to the interpretation of this passage by both the

that in order to fall under this exception, the rule must be truly "internal." Where it affects outsiders, it comes under Section 3 (a) (1) and (2)—description of organization and statement of procedures—and thus under the publication requirement.

(c) Though the rule-making process is "wholly legislative" and it is "not a condition of its validity that there be adduced evidence of its appropriateness" in respect to every party "to which it will be applicable,"<sup>156</sup> some regulations do require more than the mere publicity just discussed. Section 4 (a) and (b), first sentence, of the Administrative Procedure Act decrees that certain regulations may be promulgated only after the general public be notified of the intended regulation and be given an opportunity to take part in a consultative hearing. This is true of any regulation (1) not exempted from Section 3 as discussed above, (2) made by an agency falling under the Administrative Procedure Act, and (3) not exempted under Section 4 of the Administrative Procedure Act.

(1) A grammatical interpretation of the first sentence of Section 3 could lead to the belief it is merely overlapping with the exemptions to Section 4. The Act does not make it clear that regulations exempted from the requirement of being published in the Register are also exempted from the quasi-notice and hearing requirements of Section 4. Yet this is the only possible construction. For if a matter is either, because of its confidential nature, to be kept secret from or, because of its purely internal character, not sufficiently important to, the general public, so that not even the regulation itself need to be made known, then *a fortiori* the public has no right to be notified of a merely proposed regulation. Thus Section 4 need not be followed where Section 3 does not apply.

(2) According to Administrative Procedure Act Section 2 (a) and subsequent statutes certain agencies are excluded from the operation of the Act,<sup>156</sup> namely:<sup>157</sup> agencies composed of the parties to a dispute or their representatives;<sup>158</sup> courts martial and military commissions; military

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Attorney General and the Civil Service Commission, this exception includes "not only intra-agency personnel but also governmental personnel generally." Letter of the United States Civil Service Commission to this writer, File CL:AK: bh, dated April 10, 1950; ATT'Y GEN. MAN. AD. PROC. ACT at 18, 27. Civil Service rules would thus be exempted not only from the procedure of § 4 but also from the publication requirement of § 3, although the latter speaks only of internal management, whereas § 4 exempts "agency management or personnel" in general. The Civil Service Commission, however, does in fact publish its rules, although it does not make them pursuant to § 4.

155. The Assigned Car Cases, 274 U.S. 564, 583 (1926).

156. Except for the operation of § 3, as stated above, (b).

157. To this list can be added "Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." APA § 2(a), first sentence. These authorities, however, are not federal administrative agencies.

158. Such as the National Railroad Adjustment Board, the Railroad Retirement Board, and special fact finding boards. ATT'Y GEN. MAN. AD. PROC. ACT 10 (1947); SEN. DOC. NO. 248, 79th Cong. 2d Sess. 253, 307, 355 (1946). See however, *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950), 64 HARV. L. REV. 114 (1950), which show that the modern rules of administrative law are applicable to such agencies, too.



or naval authority exercised in the field<sup>159</sup> in times of war or in occupied territory; functions expiring at the end or within a fixed period after World War II;<sup>160</sup> functions conferred by the Selective Training and Service Acts;<sup>161</sup> the Contract Settlement Act;<sup>162</sup> the Surplus Property Act;<sup>163</sup> the Veterans' Emergency Housing Act;<sup>164</sup> the Sugar Control Extension Act;<sup>165</sup> the Housing and Rent Act;<sup>166</sup> the Second Decontrol Act;<sup>167</sup> the Rubber Act;<sup>168</sup> the Export Control Act;<sup>169</sup> and of course such others as may be added by subsequent legislation.<sup>170</sup> As far as the various agencies entrusted with the administration of the above-listed laws are authorized to make substantive regulations, the regulations need not be made in accordance with Section 4.

(3) Certain matters are exempted, not from the Act as such, but *expressis verbis* from the rule-making procedure of Section 4. The matters are listed, for no apparent reason, in two different parts, of Section 4, viz., the introductory clause and the second sentence of subsection (a). They consist of: military or naval functions;<sup>171</sup> foreign affairs functions;<sup>172</sup> matters relating to agency management or personnel<sup>173</sup> as well

159. Thus not in Hawaii, though there was a military government during World War II. See *Kam Koon Wan v. E.E. Black, Ltd.*, 75 F. Supp. 553 (D. Hawaii 1948).

160. No doubt this exemption extends to all functions that are limited by phrases similar to "on the termination of the present hostilities" (as used in § 2(a)), such as "for the duration of the war" or "upon cessation of hostilities," etc. ATT'Y GEN. MAN. AD. PROC. ACT 11-12 (1947); SEN. DOC. NO. 248 at 82-83, 355.

161. Now 62 STAT. 604 (1948), 50 U.S.C. APP. §§ 451, 1001 (Supp. 1951).

162. 58 STAT. 649 (1944), 41 U.S.C. § 101 (1946).

163. 58 STAT. 765 (1944), 50 U.S.C. APP. 1611 (1946), as amended; now FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, 63 STAT. 378 (1949), 41 U.S.C. § 201 (Supp. 1951).

164. 60 STAT. 207, 12 U.S.C. § 1738 (1946). This and the following four exemptions are not listed in APA § 2(a), but rather in subsequent acts.

165. 61 STAT. 35 (1947), 50 U.S.C. APP. § 981 (Supp. 1951).

166. 63 STAT. 18 (1949), 50 U.S.C. APP. §§ 881, 1884 (Supp. 1951).

167. 61 STAT. 323 (1947), 62 STAT. 342 (1948), 50 U.S.C. APP. §§ 633, 645 (Supp. 1951).

168. 62 STAT. 101 (1948), 50 U.S.C. APP. § 1921 (Supp. 1951).

169. 63 STAT. 7 (1949), 50 U.S.C. APP. § 2021 (Supp. 1951).

170. Such as the DEFENSE PRODUCTION ACT OF 1950, 64 STAT. 798 (1950), 50 U.S.C. APP. § 59 (Supp. 1951). But see INTERNAL SECURITY ACT OF 1950, 64 STAT. 987 (1950), 50 U.S.C. §§ 795, 818 (Supp. 1951), declaring APA to be applicable.

171. Not only all the functions of the National Military Establishment but also such military functions as may be exercised by any other agency, e.g., under the FEDERAL POWER ACT, 49 STAT. 847 (1935), 16 U.S.C. § 824a(c) (1946) (concerning electric power connection with foreign countries during wartime). SEN. DOC. NO. 248 at 225; ATT'Y GEN. MAN. AD. PROC. ACT 26 (1947).

172. Foreign affairs functions are also listed in § 5, first sentence, as excluded from the hearing provisions concerning individual decisions. The term is supposed to mean not "any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences." SEN. DOC. NO. 248 at 199, 257, 358. Moreover, the exemption may perhaps not be limited to "diplomatic functions," which term was used in a prior draft of the APA bill (*id.* at 157 and ATT'Y GEN. MAN. at 27), although another passage of the legislative history would seem to give weight to just this construction. SEN. DOC. NO. 248 at 358. The difference is not quite unimportant. A passport regulation is

as to agency organization, procedure or practice;<sup>174</sup> matters relating to public property,<sup>175</sup> loans,<sup>176</sup> grants,<sup>177</sup> benefits,<sup>178</sup> or contracts;<sup>179</sup> and mere interpretations.<sup>180</sup> In addition to these specifically named subjects, any other matter may be exempted in the agency's discretion, unless the enabling statute expressly demands notice and hearing.<sup>181</sup>

If, on the other hand, the Administrative Procedure Act applies and no exemption lies, the rule-making procedure of Section 4 must precede the enactment of a regulation. This means that the agency is required (1) to publish a notice of the proposed rule in the Federal Register and (2) to afford persons interested an opportunity to present their views; and that (3) the agency may also for good cause dispense with this procedure.

(1) The notice need be only a "general" one. It is not necessary that

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certainly not the exercise of a diplomatic, but probably of a foreign affairs function. Comment, 61 *YALE L.J.* 171 (1952). The danger of a broad construction of the term "foreign affairs" is manifest in the dictum in *Yiakoumi v. Hall*, 83 F. Supp. 469, 472 (D. Va. 1949), where the court held deportation proceedings, concerning alien residents, to be a foreign affair not subject to § 4 of the APA. The Supreme Court adopted the opposite view by subjecting deportation proceedings to § 5, (*Wong Yang Sung v. McGrath*), 339 U.S. 33 (1950); Comment, 38 *GEO. L.J.* 659 (1950); Note, 18 *GEO. WASH. L. REV.* 557 (1950); Comment, 48 *MICH. L. REV.* 1127 (1950). Congress, however, has obliterated this by exempting deportation procedures from APA § 5, 8 U.S.C. § 155a (1946).

173. "Agency management or personnel" is considered identical with the second exemption of § 3, despite its different wording. *ATT'Y GEN. MAN. AD. PROC. ACT 27* (1947). Agency management regulations are thus exempted from the entire Act, since no other of its provisions appear to be applicable, either. The law could have expressed this a bit simpler.

174. Thus all the procedural rules are made by the agencies without resort to the consultative procedure of § 4.

175. The many rules concerning the sale, lease or granting of grazing or mineral rights in public lands; the management of the TVA properties; ships owned by the Maritime Commission; or even Indian property, which is held by the United States in trust or as a guardian, are in this category. *ATT'Y GEN. MAN. AD. PROC. ACT 27*; *SEN. DOC. NO. 248* at 257. According to the views of both the Post Office Department's Solicitor General and his Assistant, the rules issued by that Department prescribing the conditions (such as rates and weight limits) upon which mail service is rendered to the public are likewise exempted as involving only matters relating to "public property." Delaney, *Federal Administrative Procedure Act and the Post Office Department* in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 200-203* (Warren ed. 1947), citing authorities in support of the view that the United States has a "property right" in the postal service, particularly *In re Debs*, 158 U.S. 564, 583 (1895). The author, however, fails to explain just in what this property "interest" or "right" is supposed to consist except in a pure fiction.

176. Such as granted by the RFC or guaranteed by the FIIA or the Veterans Administration. *ATT'Y GEN. MAN. AD. PROC. ACT 27* (1947).

177. This excludes rules pertaining to subsidies as well as the very important grant-in-aid programs under which the Federal Government aids state and municipal governments for the purpose of carrying out such tasks as unemployment compensation or road construction. *Ibid.*

178. This exempts old-age insurance payment or veterans' pension regulations. *Id.* at 28.

179. Public contracts increase daily in number and size proportionally with the increase of statism and armament. Yet all regulations relating to this field are exempt from § 4, such as, e.g., rules relating to public contracts by the Department of Labor under the Davis-Bacon and Walsh-Healey Acts, 46 *STAT.* 1494 (1935). 40 U.S.C. § 276a (1946); 49 *STAT.* 2036 (1942), 41 U.S.C. § 35 (1946). See also *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

180. See Parker, *Administrative Interpretations*, 5 *MIAMI L.Q.* 533 (1951).

181. See notes 201-20 *infra*.

the agency announce the complete wording of every detail of the intended regulation. The "substance" is all the law requires. Hence, terms that indicate what changes in the existing law are sought to be enacted suffice.<sup>182</sup> The notice need not be published in the Register if all persons "subject" to the proposed rule are named and personally served or have otherwise notice of the proposal.<sup>183</sup> It must contain a statement of "time, place, and nature" of the proceedings to be held.

(2) "After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . ."<sup>184</sup> This language is the result of many a battle that preceded the enactment of the present law.<sup>185</sup> The Act requires no particular period to elapse between publication of the intention and that of the rule.<sup>186</sup> The law makes it clear now that, unless the enabling statute specifically so requires, no quasi-judicial hearing is required:<sup>187</sup> no witnesses need be heard by the agency; nor may parties insist on cross-examining witnesses or experts that were heard; no formal record of the proceedings need be taken; and, if taken, it need not form the sole basis for the regulation eventually arrived at by the agency.<sup>188</sup> The statute even leaves it to the agency to decide whether the parties may present their views and data in writing or orally. The general American predilection for conferences, however, has made the oral, consultative "hearing" the rule, rather than the expression of opinions by correspondence.

"After consideration of all relevant matter presented,"—if any—"the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose."<sup>189</sup> No reference to whatever material was presented needs to be made and none is customarily made.

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182. *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26.

183. APA § 4(a); ATT'Y GEN. MAN. AD. PROC. ACT 28 (1947); SEN. DOC. NO. 248, at 285 (1946). The phrase is anything but lucid in that it goes beyond the more usual "affected by" a regulation. If railroad rates are announced—who is "subject thereto"? The railroads only? Or rather passengers and shippers, too, in short everybody? Cf. *Fuchs*, *supra* note 121, at 263-64.

184. APA § 4(b); ATT'Y GEN. MAN. AD. PROC. ACT 31-32 (1947). This type of so-called informal rule making existing in many agencies long before the APA. REP. ATT'Y GEN. COMM. AD. PROC. 103-105 (1941).

185. There was a clamor from many quarters that the procedural requirements for rule making should be stricter or, indeed, that rules should be allowed to be made only after a full hearing. REP. ATT'Y GEN. COMM. AD. PROC. 103-111 (1941); SEN. DOC. NO. 248, 79th Cong. 2d Sess. 20 (1946).

186. ATT'Y GEN. MAN. AD. PROC. ACT 28-29 (1947) emphasizes that interested parties should have sufficient time to participate in the rule making process. But see *Lansden v. Hart*, 168 F.2d 409 (7th Cir. 1948), *cert. denied* 335 U.S. 858 (1948), where notice of the proposed rule was given six days prior to, and the hearing thereon held after (1) the publication of the rule.

187. APA § 4(b).

188. See Reich, *Rule Making Under the Administrative Procedure Act in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 497, 500 (Warten ed. 1947); ATT'Y GEN. MAN. AD. PROC. ACT *supra* note 186, at 32.

189. APA § 4(b); ATT'Y GEN. MAN. AD. PROC. ACT, *supra* note 186, at 32. The

(3) Even these minimum requirements are not mandatory. No notice of proposed rule making, and consequently of an opportunity to present views and data, is required "in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."<sup>190</sup> While "contrary to the public interest" could lend itself to an objective determination, this is hardly so where the categories of "unnecessary" or "impracticable" are involved. In other words, the whole procedure need not be employed where the agency sees fit, for reasons stated, to dispense with it. Thus the Fair Labor Standards Act of 1949, Section 7(d) (3) (b) authorizes the Wages and Hours Administrator to issue certain regulations concerning employees' profit sharing plans; the statute became law on October 26, 1949, and went into effect on January 25, 1950; only on that day did the Administrator publish his regulation, stating that the fact that the Act went into effect the same day made it necessary to promulgate the regulation with immediate effect, wherefore there was no publication of proposed rule making since that would have been impracticable!<sup>191</sup> The Administrator failed, however, to explain why it was necessary to wait until the pre-publication became "impracticable." Be this as it may, there can be no doubt that the ultimate determination of whether the procedure of Section Four must be followed is mostly up to the agency's discretion unless, of course, a statute makes the procedure mandatory. In other words, we have here a procedural *lex imperfecta* whose violation will not affect the resulting regulation.<sup>192</sup>

(d) A perusal of Section 4 of the Administrative Procedure Act gives the impression as if there were, apart from stated exceptions, but two types of rule-making procedures: the consultative one of the first sentence of subsection (b), where it is left to the agency's discretion to consult with parties interested; and the quasi-judicial one of the second sentence, which will be discussed below, (e). Other statutes, however, have developed a category of the middle between the two. An inspection, not of the Administrative Procedure Act, but of ancillary material reveals that it was not the lawmaker's intention to repeal these statutes *pro tanto*.<sup>193</sup>

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postulate that laws should have a preamble stating its purpose and subject goes back to PLATO, LAWS 723. And see CO. LITT. \* 79a; CAIRNS, *op. cit. supra* note 102, at 51-52.

190. APA § 4(a) (last sentence).

191. 15 FED. REG. 401 (1950).

192. *Lansden v. Hart*, *supra* note 186.

193. The history of the Act produces, indeed, nothing from which legislative will to preserve this type of procedure could be clearly deduced. SEN. DOC. NO. 248, 79th Cong. 2d Sess. 20, 200, 219, 225, 237, 259, 285, 364 (1946). As a matter of fact, from some remarks it could be inferred that it was the intention of the law that every "statutory agency hearing" relating to rule making be governed by the formal procedure of §§ 7 and 8. SEN. DOC. NO. 248 at 206, 364. Yet it is probably true (albeit exaggerated to refer to persuasive legislative history) that "Congress did not intend §§ 7 and 8 to

The type of procedure here involved exists whenever the law demands that the agency "hears" the parties, *without, however, insisting that the resulting regulation be based solely on the evidence produced at the hearing.* For instance, the Federal Seed Act provides that the agency must give notice in the Federal Register of its intention to promulgate a regulation as well as of a public hearing to be held with reference thereto, and no rule or regulation may be promulgated until after such hearing."<sup>194</sup> Other examples can be found in the Dangerous Cargoes Act,<sup>195</sup> the Tanker Act,<sup>196</sup> the Flexible Tariff Act<sup>197</sup> and statutes similarly worded. Now, all these statutes do require hearings, but they do not require that the ensuing regulation is "to be made on the record," as the second sentence of subsection (b) of Section 4 demands. Consequently, the rule-making procedure is regarded as not requiring a quasi-judicial hearing where the regulation must be supported by substantial evidence,<sup>198</sup> but merely as prescribing a consultative hearing not categorically different from the informal procedure that was discussed above (c).

Precisely what importance the mandatory, but not quasi-judicial, hearing has with regard to the validity of the regulation is not altogether obvious. The failure to hold a hearing in these cases appears to be not an unconstitutional procedure, for no hearing whatsoever is required by the Constitution in the rule-making process.<sup>199</sup> However, the deficiency obviously may amount to an essential procedural error that subjects the regulation to invalidation upon judicial review.<sup>200</sup>

(e) At times regulations are "required by statute to be made on the record after opportunity for an agency hearing." When this is the case, the procedure takes place in accordance with Sections 7 and 8, rather than Section 4, of the Administrative Procedure Act.<sup>201</sup>

Such situations here are by no means rare.<sup>202</sup> They may arise by

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apply to rule making where the substantive statute merely required a hearing." ATT'Y GEN. MAN. AD. PROC. ACT 34-35 (1947). This statement is supported by the history of earlier administrative procedure bills. Reich, *op. cit. supra* note 188, at 501-504. And it is consonant with the pertinent words of APA § 4(b), "to be made on the record." But of course the realization that a statute destined to unify the law in fact obscures it, remains deplorable.

194. 53 STAT. 1273 (1939), 7 U.S.C. § 1592(c) (1946).

195. REV. STAT. 4472 (1875), as amended, 46 U.S.C. § 170(9) (Supp. 1951).

196. REV. STAT. 4417a (1875), as amended, 46 U.S.C. § 391a(3) (Supp. 1951).

197. 46 STAT. 701 (1930), 19 U.S.C. § 1336(a) (1946); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933).

198. See *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26.

199. *Id.* at 694.

200. This may be deduced from the statutory language, such as quoted above, at note 194, as well as court opinions, such as the *Norwegian Nitrogen* case, *supra* note 197, that investigate whether the hearing was in conformity with the law.

201. APA § 4(b) (second sentence). And see Reich, *Op. Cit. supra* note 188, at 492-523; SEN. DOC. NO. 248, 79th Cong. 2d Sess. 20, 200, 248, 252, 259, 285 (1946); Ginanne, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. OF PA. L. REV. 621, 629 (1947).

202. As Reich, *supra* note 188, at 502, and ATT'Y GEN. MAN. AD. PROC. ACT 32 (1947) seem to believe.

express of implied command of the law.<sup>203</sup> An example of the former are certain regulations under the Federal Food, Drug and Cosmetic Act, which must be based "on substantial evidence of record at the hearing," to be preceded by notice, and the regulation must be based on findings of fact which, upon court review, are conclusive if supported by substantial evidence.<sup>204</sup> In other instances, such as rate orders issued under the Natural Gas Act<sup>205</sup> or minimum wage orders under the Fair Labor Standards Act,<sup>206</sup> the statute must be construed to the same effect in view of the fact that upon judicial review the agency files with the court "a transcript of the record upon which the order was complained of was entered" and that the regulation will be upheld only if based upon substantial evidence. Obviously, a rule in these cases must be made on record after opportunity for hearing.<sup>207</sup>

Moreover, judicial construction has held that regulations issued after a hearing required by statute and reviewable under what used to be the Urgent Deficiencies Act of 1913<sup>208</sup> on the basis of the evidence adduced at the hearing, must be regarded as falling into our category, too.<sup>209</sup> Examples are rate regulations for carriers and stockyards under the Interstate Commerce Act and the Packers and Stockyards Act, respectively. Both the ICC and the Secretary of Agriculture, as well as the courts, have held that rate regulations—which indeed constitute administrative acts often bordering on individual decisions—must be based on the record of the hearing.<sup>210</sup>

Since Section 2(c) of the Administrative Procedure Act includes in its definition of "rules" norms of particular applicability, specifically listing

203. The final bill substitutes the word "statute" for "law" as used in prior drafts of the Act in order to conform to the first sentence of § 5, but not to exclude the possibility of a mere implicit statutory intention to require that a rule be made upon the record of a hearing. SEN. DOC. NO. 248 at 285; Reich, *op. cit. supra* note 188, at 503. Cf. *Wong Yang Sung v. McGrath*, *supra* note 172.

204. 16 STAT. 1055 (1938), 21 U.S.C. § 371(e) (1946); *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26; Markel, *The Impacts of the Federal Administrative Procedure Act on the Federal Food, Drug and Cosmetic Act in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 389-413 (Warren ed. 1947).

205. 52 STAT. 821, 831 (1939), 15 U.S.C. §§ 717, 717r (1946).

206. NOW 63 STAT. 910 (1949), 29 U.S.C. § 201 (Supp. 1951). Under the Act of 1938, the minimum wage orders were of major importance for the entire country until the legal goal was reached everywhere except in Puerto Rico and the Virgin Islands. The present statute is confined to these islands. FLSA § 8. Cf. *Opp Cotton Mills, Inc. v. Administrator*, *supra* note 51, for the procedure followed in this type of rule making.

207. ATT'Y GEN. MAN. AD. PROC. ACT 33 (1947); Reich, *op. cit. supra* note 188, at 502-3.

208. 38 STAT. 220 (1913), NOW JUDICIAL CODE, 28 U.S.C. §§ 1253, 2101, 2284, 2321-25 (Supp. 1951).

209. ATT'Y GEN. MAN. AD. PROC. ACT, *supra* note 207, at 33-34; Reich, *op. cit. supra* note 188, at 503-4.

210. This is so because the reviewing under the former Urgent Deficiencies Act is done only on the basis of the administrative record. ATT'Y GEN. MAN. AD. PROC. ACT at 33-4; Reich, *op. cit. supra* note 188, at 503-4; *Stafford v. Wallace*, 258 U.S. 495 (1922); *United States v. Abilene & Southern Ry.*, 265 U.S. 274 (1924); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934); *Acker v. United States*, 298 U.S. 426 (1936). See also *United States v. ICC*, 337 U.S. 426 (1949), 63 HARV. L. REV. 150-53 (1949).

"the approval or prescription for the future of . . . corporate or financial structures or reorganizations thereof . . .," some orders of the SEC and agencies engaged in similar tasks must also fall within the purview of the second sentence of Section 4(b). Without the definition of Section 2(c), SEC "orders" would be treated as they were before the Administrative Procedure Act, namely, as individual administrative decisions which, affecting property rights of parties, could validly be issued only after notice, hearing, and such other safeguards as the modern interpretation of due process demands. In short, it cannot be doubted that the making of an SEC order must approximate a procedure under Administrative Procedure Act Section 5 ff. in order to be constitutionally valid;<sup>211</sup> and this legal situation could not be changed by calling the order a "rule." Consequently, agencies like the SEC afford parties against whom "individual rules," as we may call them, are to be promulgated a procedure that is in accordance with Sections 7 and 8 of the Administrative Procedure Act. Query: Must in such a case the principle of separation of functions between the "prosecutor" and the one who hears be adopted? Sections 4(b) and 5 say in substance that in rule making, even though the rule is to be made upon the record of quasi-judicial hearing, the separation of functions rule need not be applied.<sup>212</sup> The Supreme Court, on the other hand, has made it clear that, at least as far as a decision involving a person's liberty is concerned, the Administrative Procedure Act desires no commingling of the two functions.<sup>213</sup> It might not be unreasonable to extend this principle to decisions involving property rights though they may call themselves "rules" under the misdefinition of Section 2(c) of the Administrative Procedure Act.

In the cases where the statute makes hearing and rule making on the record mandatory, procedure follows Sections 7 and 8 of the Administrative Procedure Act. The details of this procedure are the same as the formal adjudicatory procedure subject to the following exceptions:<sup>214</sup>

(1) Regulations are often based upon voluminous reports, analyses, statistical data, and similar writings, rather than the testimony of witnesses. The Administrative Procedure Act allows that the agency may adopt rule-making procedures that provide for the submission of all or part of the evidence in written form rather than orally.<sup>215</sup>

(2) Ordinarily, when an officer and not the agency itself presides at the hearing but the latter wishes to make the decision, the officer must

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211. *Philadelphia Co. v. SEC*, 177 F.2d 720, 724 (D.C. Cir. 1949). And see the *Philadelphia* case cited *supra* note 33.

212. See notes 216-20 *infra*.

213. *Wong Yang Sung v. McGrath*, *supra* note 172, Note, 18 GEO. WASH. L. REV. 557 (1950); Comments, 38 GEO. L.J. 659 (1950), 48 MICH. L. REV. 1127 (1950).

214. See for all three exceptions *Willapoint Oysters Inc. v. Ewing*, *supra* note 26. And see Reich, *op. cit. supra* note 188, at 506-9.

215. APA § 7(c) (last sentence); *Willapoint Oysters Inc. v. Ewing*, *supra* note 26, at 690-92; Reich, *op. cit. supra* note 188, at 507.

first recommend a decision, which is served on the parties and thus subject to their exceptions. In rule making, however, the agency itself may issue a tentative decision, though it did not preside; or any of its responsible officers (rather than the hearing officer) may recommend a decision as if he had presided at the hearing; and the agency may also dispense with this procedure entirely whenever it "finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."<sup>216</sup> There is not much left of the maxim of the *Morgan* cases<sup>217</sup> (involving rate making under the Packers and Stockyards Act) that "The one who hears must decide," but this has been clear for some time.<sup>218</sup>

(3) Finally, the separation of functions rule under the express language of the first sentence of Section 5 applies only to adjudications.<sup>219</sup> Thus the hearing officer, if any, may consult with any member of the agency's staff on the facts involved in a rule-making case. This follows from its legislative character, as contrasted with the accusative nature of individual cases.<sup>220</sup>

Executive orders of the president of the United States are regulations in that they are norms of general applicability that are not statutes, *i.e.*, not enacted by Congress. The procedure in making these orders, however, seemingly does not fall under the Administrative Procedure Act, although the latter nowhere so states.<sup>221</sup>

#### BINDING EFFECT OF REGULATIONS

Regulations promulgated pursuant to proper procedure and in accordance with statutory authority are often characterized as having the binding force of law.<sup>222</sup> Of course, a statement like this is a tautology. Any norm

216. APA § 8(a) (last sentence); *Willapoint Oysters Inc. v. Ewing*, *supra* note 26, at 696; Reich, *op. cit. supra* note 188.

217. *United States v. Morgan*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1937).

218. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

219. And § 4(b) refers merely to §§ 7 and 8.

220. Reich, *op. cit. supra* note 188, at 509; SEN. DOC. No. 248, 79th Cong. 2d Sess. 24 (1946).

221. Nor does the legislative history of the present Act give any clue as to whether and why the President's quasi-laws are excluded from the APA. Section 5 of the Federal Register Act, 44 U.S.C. § 305 (Supp. 1951), expressly lists "Presidential proclamations and Executive orders" of general applicability among the documents to be published in the Register, unless the order is effective only against federal agencies or officers. For the procedure followed in this type of rule making see Exec. Orders Nos. 7298, 10,006 (1936), 13 FED. REG. 5927, (1948), 1 CODE FED. REG. 1.91 - 1.97.

222. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 626, 629 (1950). And see *United States v. Eliason*, 16 Pet. 291, 302 (U.S. 1842); *Gratiot v. United States*, 4 How. 80, 117-18 (U.S. 1846); *United States v. Eaton*, 144 U.S. 677, 688 (1892); *Caha v. United States*, 152 U.S. 211, 220 (1894); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484-85 (1942); *Illinois Steel Co. v. Baltimore & Ohio R.R.*, 320 U.S. 508, 511 (1944); *Tiller v. Atlantic Coastline R.R.*, 323 U.S. 547, 577 (1945); *Wilkins v. United States*, 96 Fed. 839, 841 (3d Cir.), *cert. denied*, 175 U.S. 727 (1899); *Willapoint Oysters Inc. v. Ewing*, *supra* note 26, at 693; *Continental Oil Co. v. Helvering*, 100 F.2d 101 (D.C. Cir. 1938); *Latgis v. United States*, 97 F.2d 588 (4th Cir. 1938); *Lichten v. Eastern Air Lines, Inc.*, 87 F. Supp. 691, 694 (S.D.N.Y. 1949).



that is valid is binding, and "binding" is the essential attribute of any norm; consequently, the statement amounts to saying "If a regulation is valid, it is binding."

Yet the phrase is not without meaning. Invalid norms are not binding, it is true, but they may yet be validated with the help of auxiliary norms that provide for *res judicata*, courts of last resort, and like rules of finality. Even a "wrong" court decision becomes valid if nobody appeals it, and a decision of the supreme tribunal that is contrary to law is yet binding, and hence valid in this sense, because no appeal is possible.<sup>223</sup> As to statutes, the power to declare a law invalid is one which the judge "will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."<sup>224</sup>

Administrative regulations stand in the middle between statute and decision as far as scrutiny of their validity is concerned. They are not binding to the same extent as statutes, but in doubt will be construed so as to avoid a question of their legality.<sup>225</sup> This "doubt," on the other hand, will be more readily on the judge's mind than in the case of a congressional statute.

The *Willapoint Oyster* case<sup>226</sup>—a veritable treatise on administrative rule making—furnishes a good example for both propositions. The Federal Security Administrator promulgated a regulation pursuant to the Pure Food, Drug and Cosmetics Act decreeing that oyster cans must contain at least 59 per cent oysters and that "Pacific" oysters must be so identified. The court of appeals upheld the standard of fill but set aside the standard of identity. As to the former, it declared itself powerless to substitute its own judgment for that of the Administrator. As to the latter, however, the court held that to force the name "Pacific Oysters" on the West Coast industry would be unreasonable (and hence not in accordance with the law, which authorizes only reasonable standards of identity) as long as other oysters need not be labeled "Atlantic" or "Gulf" oysters respectively.<sup>227</sup>

Summarizing the trend of opinions,<sup>228</sup> we might say that the courts pay greater deference to the presumption of validity of governmental acts in cases of regulations than in those of individual orders, but not as much as in the case of statutes. This is another way of saying that, while the making of a regulation must be statutorily authorized, its contents are largely left to the agency's discretion for which the judgment of the reviewing court will not be substituted, even though the court might think

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223. KELSEN, *op. cit. supra* note 15, at 135-36, 154-55, 157-59, 403.

224. Justice Brandeis dissenting in *Ashwander v. TVA*, *supra* note 43, at 345, 346-48; 1 COOLEY, *op. cit. supra* note 48, at 332.

225. *United States v. Jones*, *supra* note 35, at 664; *Morrissey v. Commissioner*, 296 U.S. 344 (1936); *Roberts v. Commissioner*, 176 F.2d 222, 223 (9th Cir. 1949); *Willapoint Oysters Inc. v. Ewing*, *supra* note 26, at 696.

226. See note 222 *supra*.

227. *Ibid.*

228. *Ibid.*

that another regulation could reasonably have been made.<sup>229</sup> Nor will the court, if it finds a regulation invalid, redraft or amend it so as to make it valid.<sup>230</sup>

As a rule, substantive regulations go into effect thirty days after publication in the Federal Register or, if published by personal service, thirty days after service.<sup>231</sup> Procedural regulations do not fall under this clause. It furthermore does not apply: (a) Where the Act does not apply, Section 2(a); (b) Where Section 4 does not apply according to its first sentence; (c) Where the regulation pursuant to statutory authority grants or recognizes exemptions or relieves restrictions from some statutory requirement;<sup>232</sup> (d) Where the "regulation" amounts to an interpretation or statement of policy;<sup>233</sup> (e) Where the agency holds that the period should be shortened "upon good cause found and published with the rule."<sup>234</sup> The thirty-day requirement does not prevent a regulation from being retroactive.<sup>235</sup>

The extent to which an agency may set aside its own individual decision is uncertain,<sup>236</sup> but there is no uncertainty concerning the agencies' right to repeal their regulations. The act of repealing is, as in the case of a statute, a legislative act and must comply with the requirements of law-making, particularly with the procedural rule-making procedure described above.<sup>237</sup> The revocation of a regulation, like that of a statute, does not abate liability for damage that accrued while the rule was in force.<sup>238</sup> Under common law the repeal of a statute ends the power to prosecute violations committed while the statute was in force.<sup>239</sup> However, this is not so in regard to regulations. A defendant was indicted for selling beef in violation of a price regulation revoked prior to the indictment. The Court, *per* Justice Roberts, held that "revocation of the regulation does not

229. *Federal Security Administrator v. Quaker Oats Co.*, *supra* note 82, at 231-33; *Scaife Co. v. Commissioner*, *supra* note 82; *Atchison, T. & S.F. Ry. v. Scarlett*, *supra* note 82. And see *Hackney Bros. Body Co. v. New York Central R.R.*, 85 F. Supp. 465, 467 (E.D.N.C. 1949). But cf. *Willapoint Oysters, Inc. v. Ewing*, *supra* note 26, at 695.

230. *Addison v. Holly Hill Fruit Products, Inc.*, *supra* note 70; *Flour Mills of America, Inc. v. RFC*, 179 F.2d 965, 969-70 (Em. C. A. 1950).

231. APA § 4(c).

232. *Ibid.*; ATT'Y GEN. MAN. AD. PROC. ACT 37 (1947).

233. APA § 4(c); ATT'Y GEN. MAN. AD. PROC. ACT 36-7 (1947).

234. *Ibid.*

235. *Ibid.*; SEN. DOC. NO. 248, 79th Cong. 2d Sess. 283 (1946); Davis, *Administrative Rules—Interpretative, Legislative and Retroactive*, 57 YALE L.J. 919, 944-49 (1948); Note, *Retroactive Operation of Administrative Regulations*, 60 HARV. L. REV. 627 (1947).

236. Cf. *Schopflocher, The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 5 and 198; Parker, *Administrative Res Judicata*, 40 ILL. L. REV. 56 (1945); GELLHORN, *ADMINISTRATIVE LAW* 205-6, 273-83, 762-804 (1947); PARKER, *ADMINISTRATIVE LAW* 245-53 (1952).

237. APA § 2(c) (last sentence).

238. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119 (1947); *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946); *Collins v. Porter*, 328 U.S. 46, 49 (1944); *Bowles v. Nichols*, 151 F.2d 155 (10th Cir. 1945).

239. *United States v. Hark*, 320 U.S. 531 (1944). And see the *Utah Junk* and *Collins* cases, *supra* note 238.

repeal the statute, and though the regulation calls the penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation."<sup>240</sup> Of course, Justice Roberts was inclined to believe in the no-delegation theory, according to which the statute and not the regulation "creates" an offense, whereas others might not have hesitated to declare that without the regulation there would have been no criminal offense; hence it was the regulation that "created" the crime, or made it indictable, which is the same.<sup>241</sup>

Congress is bound to observe its own laws until changed. Logically, the same rule applies in regard to agencies and their regulations. In a recent dictum the Supreme Court, *per* Justice Jackson, stated that a regulation, promulgated pursuant to the enabling act and hence having the force of law, binds the Secretary as well as others while it is in effect.<sup>242</sup>

May an agency waive—i.e., not enforce—a regulation, particularly a procedural one? A waiver of procedural requirements is probably permissible where no other party's rights are impaired,<sup>243</sup> but it seems to go too far to say "that since the Board has power to make the rules it has power to suspend them"<sup>244</sup> regardless of other parties' rights that may have accrued under the regulation thus "waived." It might be more accurate to say that, like any other law, regulations both substantive and procedural may be waived only if this is not contrary to the purpose of the law and then only if no party concerned objects.<sup>245</sup>

Invalid regulations, like statutes, may be subsequently ratified and thus validated either by an act of Congress or by another valid regulation.<sup>246</sup>

Whereas the above-listed characteristics of regulations render them closely akin to statutes,<sup>247</sup> there are other features that show that regulations

240. *United States v. Hark*, 320 U.S. 531, 536 (1944).

241. See Justice Roberts' dissent in *Yakus v. United States*, *supra* note 12, at 448, and *Bowles v. Willingham*, 321 U.S. 503, 529 (1944).

242. *Chapman v. Sheridan-Wyoming Coal Co.*, *supra* note 222, at 629. And see *Christoffel v. United States*, 338 U.S. 84 (1949; Note, 63 HARV. L. REV. 176 (1949)); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Bilokumsky v. Todd*, 263 U.S. 149 (1923); *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949). *But see Spiller v. Atchison, T. & S.F. Ry.*, 253 U.S. 117, 135-137 (1920); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788-89 (9th Cir. 1941).

243. *Board of Tax Appeals v. United States ex rel. Shults Bread Co.*, 37 F.2d 442 (D.C. Cir. 1929), *cert. denied*, 281 U.S. 731 (1930); see *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296 (1945).

244. *NLRB v. Pacific Gas & Elec. Co.*, *supra* note 241.

245. *Johnston Broadcasting Co. v. FCC*, *supra* note 241; *Christoffel v. United States*, *supra* note 241; Note, 63 HARV. L. REV. 176 (1949). For a good analysis of "co-gent" law as distinguished from law that may be waived see Lenhoff, *Optional Terms (jus dispositivum) and Required Terms (jus cogens) in the Law of Contracts*, 45 MICH. L. REV. 39 (1946).

246. *Hirabayshi v. United States*, 320 U.S. 81 (1943); *Addison v. Holly Hill Fruit Products, Inc.*, *supra* note 70; *Retroactive Operation of Administrative Regulations*, *supra* note 235, at 628-34.

247. To which may be added the fact that regulations published in the Federal Register must be judicially noticed. FED. REG. ACT § 7 (1935), 44 U.S.C. § 307 (1946).

are administrative acts after all, and thus not unrelated to orders. (1) As we have seen, regulations must be grounded in law, which to be sure is the logical equivalent of the requirement that statutes must be grounded in the Constitution, but which in fact gives the quasi-lawmaker a much narrower discretion than that of the lawmaker. (2) Statutes need not be "reasonable," except if one identifies this expression with constitutional terms such as "due" process, "just" compensation, "equal" protection, etc. In the world of both regulations and orders, on the other hand, reasonableness is a standard requirement of many an enabling statute that at times is even read into it where express words to that effect are missing.<sup>248</sup> In our system of law and power distribution, these two criteria mean that rules are more strictly subject to judicial review albeit not so much as orders. (3) Conflicts between congressional statutes can be more or less easily resolved, depending on whether or not the maxim *lex posterior derogat priori* is followed; regulations, on the other hand, may emanate from different agencies and yet perchance deal with the same subject matter. The state of the law on this point is not very clear.<sup>249</sup> If any general rule can be drawn here, then it must be in opposition to the *lex posterior* rule: the agency that acts first acquires jurisdiction.<sup>250</sup> It is a problem that must be discussed in connection with administrative jurisdiction.<sup>251</sup>

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Confidential circulars, however, are not judicially noticed. *Kiyochi Fuyikawa v. Sunrise Soda Water Works Co.*, 158 F.2d 490 (9th Cir. 1946), *cert. denied*, 331 U.S. 832 (1947).

248. See notes 102-19 *supra*.

249. See *United States v. ICC*, 337 U.S. 426 (1949); *Northwestern Elec. Co. v. FPC*, 321 U.S. 119, 125 (1944) (no conflict found); *London Independent School District v. Thomerson*, 223 S.W.2d 314, 318 (Tex. Civ. App. 1949); *Kleinfeld and Coding, Res Judicata and Two Co-Ordinate Federal Agencies*, 95 U. OF PA. L. REV. 388 (1947); *Note, Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 HARV. L. REV. 1050 (1949).

250. *London Independent School District v. Thomerson*, *supra* note 248.

251. For which see PARKER, *ADMINISTRATIVE LAW* 125 (1952).