



12-1-1959

Administrative Law -- Administrative Procedure Act -- A Literal Interpretation as Applied to Purely Investigative Functions

Thomas M. Clusserath

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Thomas M. Clusserath, *Administrative Law -- Administrative Procedure Act -- A Literal Interpretation as Applied to Purely Investigative Functions*, 35 Notre Dame L. Rev. 77 (1959).

Available at: <http://scholarship.law.nd.edu/ndlr/vol35/iss1/3>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

ADMINISTRATIVE LAW — ADMINISTRATIVE PROCEDURE ACT — A LITERAL INTERPRETATION AS APPLIED TO PURELY INVESTIGATIVE FUNCTIONS

Introduction

The administrative agency appeared on the federal scene in 1887 as a governmental body exercising quasi-legislative and quasi-judicial functions.¹ Because of the constitutional doctrine of the separation of legislative and judicial functions, constitutional questions of fair play arose and often prevented a real understanding of the role of such agencies. After the turn of the century, the need for boards of expert specialization in the general scheme of government regulation promoted the widespread use of administrative agencies by the federal government. With this development came the need for a somewhat simplified and standard procedure to govern such agencies. In 1946, after more than ten years of consideration, Congress passed the Administrative Procedure Act.² This act was designed to meet this need for a simple and standard plan of procedure for the functions of federal administrative agencies.³

As the administrative concept has developed, two functions, adjudication and rule-making, have traditionally been attributed to it.⁴ Adjudication is a quasi-judicial activity; it usually applies to a named party; it looks backward to the activities of the named party and determines his present legal position as a result. It resembles the function of a court in deciding a case.⁵ On the other hand, rule-making is a quasi-legislative function: it applies to unnamed parties; it looks to the future applicability of its determination on indicated groups or persons; and it resembles what a legislature does in enacting a statute.⁶ However, the administrative agency's role, as a board of expert specialization, is not fully carried out by limiting agencies to quasi-legislative and quasi-judicial activity. The agency exists as a repository of specialized knowledge which is relevant to the scheme of government regulation in general. It becomes a repository of specialized knowledge by performing a third function, the agency investigation. The investigatory function is designed to produce information.⁷ Of course, the investigative information may be obtained for an adjudicative proceeding or for a rule-making proceeding and, for such purposes, the investigation is a part of the adjudication or rule-making process. But since the agency is a repository of specialized knowledge, the information from its investigations may be used for formulating general policy, for recommending legislation to Congress, or for illuminating obscure areas in order to supply such information either to the public or to an external body as needed or requested. Investigations for these purposes are investigations for the sake of investigation, and these constitute the third, separate and distinct function of an administrative agency.⁸

1 BAR ASS'N OF DISTRICT OF COLUMBIA, TRIAL TECHNIQUE IN ADMINISTRATIVE PROCEEDINGS 102 (1958).

2 60 Stat. 237 (1946), 5 U.S.C. § 1001-1011 (1958). [Hereinafter referred to as APA.]

3 S. Doc. No. 248, 79th Cong., 2d Sess. 241-2 (1946).

4 1 DAVIS, ADMINISTRATIVE LAW 1 (1958).

5 *Id.* at 286-7.

6 *Ibid.*

7 *Id.* at 159-160.

8 Hereafter, these investigations solely for the purpose of gathering information will be referred to as *purely investigatory functions*.

Under the APA, Congress has provided an informal procedure for rule-making⁹ and a much more formal procedure for adjudication.¹⁰ The APA provides no procedure for the purely investigatory function of an agency. Of course, those investigations for rule-making and adjudication will be governed under the act by the procedures for rule-making and adjudication respectively. But what of the investigations purely for the purpose of gathering information? Does Congress in the APA subject such purely investigatory functions to the informal procedure for rule-making, to the more formal procedure for adjudication, or to neither?

A problem arises under the APA in relation to these purely investigatory functions because the definitions in the act, if taken literally, classify all administrative activities as either rule-making or adjudication. If the purely investigatory functions do not come under the rule-making definition and the informal procedure required for it, they ostensibly come under the definition of adjudication and the more formal procedure required therefor in the APA.¹¹ Some authors suggest that these non-adjudicative, non-rule-making investigations need not come under either definition in the act, and hence are not covered by the act.¹² The latter view points up the problem. An agency gathering specialized information, not for its own use but as a repository of expert knowledge for the public in general and for external bodies, should not be hampered by the imposition of formal procedure. The latter view recognizes this and reaches the conclusion that such purely investigatory functions cannot come under the APA. It may be true that they should not come under the APA, but has the APA itself excepted them to the extent that they remain purely investigatory?

This problem has become especially acute when viewed in the perspective of the recent three-judge federal court decision in Louisiana in the case of *Larche v. Hannah*.¹³ The court issued a permanent injunction restraining the Civil Rights Commission from carrying on its investigations in Louisiana unless it gives accused witnesses, subpoenaed to testify before it, the "traditional rights" of confrontation and cross-examination.¹⁴ Of interest is the court's determination that the Civil Rights Commission in its investigations, because they are non-adjudicative and non-rule-making, is not required to follow the formal adjudication procedure set out in the APA.¹⁵ The court implicitly recognizes the purely investigatory function, which should not be subjected to a formal procedure, but then goes on to require the commission to provide some of the traditional safeguards which are required in a formal judicial procedure and which would be required under the adjudication procedure in the APA.¹⁶ Should not the very reason for the court exempting the investigations from the formal procedure of the APA, if correctly arrived at by the court, except it from the due process argument of the court?

9 The informal procedure provided for rule-making in section 4 of the APA (60 Stat. 238 (1946), 5 U.S.C. § 1003(a), (b) (1958)) requires general notice of the proposed rule-making to be published in the Federal Register, and any interested party must be given 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.

10 The formal procedure for adjudication in sections 5 through 8 of the APA (60 Stat. 241 (1946), 5 U.S.C. § 1004-7 (1958)) provides who the hearing officers will be; the subpoena and testimony powers of the presiding officers; the rules of evidence including cross-examination; the type of record to be kept; the hierarchy of action by subordinates in an agency; and the decisional process in general.

11 See APA, § 2 (c), (d), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (c), (d) (1958). See also Blachly & Oatman, *The Federal Administrative Procedure Act*, 34 GEO. L. J. 407, 417 (1946).

12 See, e.g., 1 DAVIS, *op. cit. supra* note 4, at 159, n.1.

13 Civil No. 7479, W. D. La., Oct. 7, 1959.

14 *Id.* at 11 (mimeo.).

15 *Id.* at 2, n. 3.

16 APA § 7 (c), 60 Stat. 241 (1946), 5 U.S.C. § 1006 (c) (1958). "(c) EVIDENCE. . . . Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

The approach of this Note to the problem of APA coverage of the purely investigatory functions of agencies will be to examine ten typical federal administrative agencies and determine whether their non-adjudicative, non-rule-making investigations logically fall under the adjudication procedure required by the APA. The agencies chosen¹⁷ are administrative groups which meet the definition of an "agency" in Section 2(a) of the APA.¹⁸

I. ADMINISTRATIVE PROCEDURE ACT

In substance, the APA requires all federal agencies to publish certain information in the Federal Register as to their own procedure and make public other administrative materials.¹⁹ It states the essentials of the informal rule-making procedure and the essentials of the formal procedure required for adjudication.²⁰ It prescribes limitations on sanctions and licensing procedures,²¹ and sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong.²² Since Congress passed this bill with the expressed intent that it "be operative 'across the board' in accordance with its terms, or not at all,"²³ the problem of whether the adjudicative process is applicable to an agency's non-adjudicative, non-rule-making investigations is circumscribed by the terms and definitions of the act. Section 2(d) defines an order, which is formulated by the agency process of adjudication, as: "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing."²⁴ As is plain from the language, order and its corresponding term adjudication are residual definitions. Thus, agency activities which don't come within the definition of rule and rule-making are encompassed by the definitions of order and adjudication. This residual phenomenon is important, because: first, it appears to include all of those purely investigatory functions which are non-adjudicative as well as non-legislative; and second, the definition of a rule, as the House Report emphasizes, determines whether the fairly informal procedure of section 4 applies rather than the more formal procedure of Sections 5, 7, and 8.²⁵ The act defines "rule" as:

... the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the fore-

¹⁷ Eight of these agencies are regulatory ones, and two are distinct, solely investigative bodies.

¹⁸ 60 Stat. 237 (1946), 5 U.S.C. § 1001(a) (1958).

As used in this Act . . . 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes . . .

¹⁹ 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1958).

²⁰ See notes 9 & 10, *supra*.

²¹ APA § 9, 60 Stat. 242 (1946), 5 U.S.C. § 1008 (1958).

²² APA § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

²³ S. Doc. No. 248, 79th Cong., 2d Sess. 250 (1946).

²⁴ 60 Stat. 237 (1946), 5 U.S.C. § 1001 (d) (1958).

²⁵ S. Doc. No. 248, *supra* note 23, at 254.

going. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.²⁶

As can be easily seen, this definition of rule includes not only those quasi-legislative functions of future effect and applicability to unnamed parties, but a wide miscellany of administrative actions such as the implementation and interpretation of law, prescription of law or policy, and descriptions of the organization, procedure and practice requirements of any agency.²⁷ The definition also includes statements by the agency of particular applicability, but this means only that what is otherwise rule-making does not become adjudication merely because it applies only to particular parties or to a particular situation.²⁸

One basic rule of construction in determining whether a particular agency's purely investigative functions come under the APA's definition of rule or order "is to determine whether it falls within the more affirmative and specific definition of 'rule' in Section 2(c), if not, it is 'adjudication.'"²⁹ But the specific enumeration of activities included in the definition of rule is not intended to be exhaustive.³⁰ Some authors suggest that the process of classifying any agency function should not be limited to the strict construction described above, but be bound only by the more functional distinction between rule-making and adjudication.³¹ This would be a rational construction, except as applied to the investigations considered in this Note, which are not easily classified as either quasi-legislative or quasi-judicial activities. In reality, this puts us back with the strict construction of the definitions and the resulting residual phenomenon. Davis, in his *Treatise on Administrative Law* suggests that

the way to solve problems of classifying activities which analytically fall into more than one category or into no category is to keep an eye on producing a good practical result in the particular case. . . . The ideas of both courts and agencies about the desirability or undesirability of applying the requirements of Section 5 to a particular proceeding should assist the classification in each case.³²

This solution to the classification problem is worthy of discussion because it seems there is no practical reason for insisting upon adjudicatory procedure in a pure investigation. The House Report on the APA sees the definitions as closely tied in with the procedures under sections 4, 5, 7, and 8.³³

Section 4 of the APA prescribes the procedure for rule-making. The introduction to the section lists two exceptions to its provisions:

Except to the extent that there is involved (1) any military, naval, or foreign affairs functions of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. . . .³⁴

The second exception automatically removes from the prescribed rule-making procedure those regulations of a particular agency by which its functions are channeled and determined.³⁵ In other words, the definition of rule includes these regulations but the exceptions in section 4 distinguish between regulations controlling the agency which are not subject to the procedure, and those affecting other parties. Section 4 also makes another distinction: "Where rules are required by

26 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1958).

27 Blachly & Oatman, *supra* note 11, at 409.

28 1 DAVIS, *op. cit. supra* note 4, at 296. S. Doc. No. 248, *supra* note 23, at 197.

29 Ginnane, *Rule Making, Adjudication, and Exemptions Under the A.P.A.*, 95 U. Pa. L. Rev. 621, 623 (1947).

30 See S. Doc. No. 248, *supra* note 23, at 197 & 254.

31 See, e.g., Ginnane, *supra* note 29, at 624.

32 1 DAVIS, *op. cit. supra* note 4, at 298.

33 S. Doc. No. 248, *supra* note 23, at 251. "The definitions in section 2 are important, but they do not indicate the scope of the bill since the subsequent provisions make many functional distinctions and exceptions."

34 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1958).

35 However, under section 3(a)(2) of the APA these regulations of the particular agency must still be published in the Federal Register. 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1958).

statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in the place of the provisions of this subsection."³⁶ Thus many quasi-legislative results involving rates, facilities, appliances, services, valuations, etc., which are defined as rules in section 2(c) become, because a hearing and a record are required by statute, the subject of an "order" under the adjudicative process of sections 7 and 8. In relation to the problem of this Note, this exception further complicates the problem, since an investigative function may literally come under the terms of the definitions of "rule" and "rule-making," but not escape the formal adjudicative process because the statute may require a hearing and a record.

Coverage under section 5 subjects the proceeding to the procedural requirements of sections 7 and 8. But again section 5, by means of an introductory clause, removes many functions defined as adjudication from the rigors of the formal procedure required for it:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives. . . .³⁷

It seems evident that Congress has, by the exception clauses in sections 4 and 5, provided for the elimination of many of the activities of an administrative agency, such as purely investigative functions, which, unless within the specific terms of the definition of rule, seem to fall into the residual definition of an order. Since Congress has attempted to closely connect definitions with the procedures, it would be best to determine if the particular investigation falls within the terms of the definition of rule. If it does, then the exceptions in section 4 seem applicable. If it does not, then it will fall under the residual definition of an order, and the exceptions in section 5 can be applied.

II. FEDERAL ADMINISTRATIVE AGENCIES

A. *Regulatory Agencies*

(1) *The Interstate Commerce Commission*

The Interstate Commerce Commission was created in 1887 by the Interstate Commerce Act, which was the first attempt by Congress to effect any regulation through an agency exercising quasi-legislative and quasi-judicial powers.³⁸ Initially, the ICC regulated only railroad carriers engaged in interstate commerce. Today, the ICC also regulates motor carriers,³⁹ water carriers,⁴⁰ and freight forwarders.⁴¹ Under the general empowering sections of the Act in relation to freight forwarders,⁴² water carriers,⁴³ and railroad carriers,

36 60 Stat. 239 (1946), 5 U.S.C. § 1003(b) (1958).

37 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958). In explaining the various sections of the APA, the Senate Judiciary Committee pointed out that the introductory clause of section 5 removes from the operation of sections 5, 7 and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing Limiting application of the sections to these cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing.

S. Doc. No. 248, *supra* note 23, at 21.

38 BAR ASS'N OF DISTRICT OF COLUMBIA, *op. cit. supra* note 1, at 102.

39 49 Stat. 543 (1935), 49 U.S.C. §§ 301-27 (1952).

40 54 Stat. 929 (1940), 49 U.S.C. §§ 901-23 (1952).

41 56 Stat. 284 (1942), 49 U.S.C. §§ 1001-1022 (1952).

42 56 Stat. 286 (1942), 49 U.S.C. § 1003(e) (1952).

43 54 Stat. 933 (1940), 49 U.S.C. § 904(b) (1952).

the Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with such carriers. . . . The Commission . . . may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.⁴⁴

This type of investigation, where the ICC may turn the facts over to Congress or may use them in rule-making or adjudication under other sections of the statute is not the type of investigation with which this Note is primarily concerned. If this section only empowered the ICC to gather the facts about the management of the business of common carriers and turn them over to Congress, its function would be the non-adjudicative, non-rule-making type of investigation with which we are concerned. Another example of this same type of investigation, which is not exactly an investigation for the sake of investigation, is found in Section 19a of the Interstate Commerce Act where the ICC is given power to investigate and evaluate the property of common carriers, and to report on the investigations to Congress. *But*, such final valuations by the ICC after the carrier has had a chance to protest "shall be published and shall be prima facie evidence of the value of the property in all proceedings under this chapter . . . and in all judicial proceedings for the enforcement of this chapter."⁴⁵ Such a valuation-investigation by the ICC is an investigation resulting in adjudication if the ICC uses it later to enforce the act.⁴⁶ Therefore, this type of investigation is not within the purview of this Note since its aim is not just investigation for the sake of investigation but it is specifically for use by the ICC itself indirectly enforcing the other provisions of the act.⁴⁷

In relation to these valuations, the ICC does make investigations and valuations of common carriers subject to the Federal Communications Act when requested to do so by the Federal Communications Commission; and, it transfers all *records* of the investigations and resulting valuation to the Federal Communications Commission.⁴⁸ These investigations of the ICC are non-adjudicative, non-rule-making investigations as far as the ICC is concerned, although the Federal Communications Commission may use them for adjudication or rule-making. As far as the APA definitions of rule and order are concerned, these valuation-investigations fall under the more specific terms in the definition of a rule.⁴⁹ Of course, if the rule — the valuation — is required to be made on record after opportunity for an agency hearing, the adjudicative procedure of sections 7 and 8 of the Administrative Procedure Act will still apply.⁵⁰ In section 213(a) of the Federal Communications Act, the Federal Communications Commission may make the valuation itself after opportunity for hearing; so in section 213(g) where the ICC shall make such valuations, if requested to do so, it is quite probable that the ICC will be bound to make its valuations after opportunity for an agency hearing in the same way as the Federal Communications Commission. Also, in section 213(g) the ICC must turn over the record relating to the valuation. So from the terms of this section, the ICC, in performing these investigations for the Federal Communications Commission, should come under the adjudicative procedure of sections 7 and 8

44 54 Stat. 910 (1948), 49 U.S.C. § 12 (1952).

45 49 Stat. 543 (1935), 49 U.S.C. § 19(a) (1952).

46 See *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 130 (1939).

47 Almost every agency considered in this Note has such general investigative powers, but such investigations are not pertinent in this Note. No further reference will be made to them.

48 48 Stat. 1074 (1934), 47 U.S.C. § 213(g) (1952).

49 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1958). "Rule means . . . any agency statement of general or particular applicability and future effect . . . and includes the approval or prescription for the future of . . . valuations. . . ."

50 60 Stat. 238 (1946), 5 U.S.C. § 1003(b) (1958).

of the APA. This would be in line with what the Federal Communications Commission requires by its own regulations in making the valuations.⁵¹

Under section 226 of the Interstate Commerce Act, the ICC is authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle⁵²

The ICC has laid down no special regulations in regard to these investigations. The results of this function do not fall under any of the specific or general terms in the definition of a rule in the APA. So, under the residual definition of an order in the Administrative Procedure Act, this function would be subjected to the formal adjudication procedures of sections 5, 7 and 8, unless it comes under one of the exceptions in the introductory clause of section 5. Exception three, "proceedings in which the decisions rest solely on inspections, tests, or elections," seems applicable to this function of the ICC since its report to Congress will depend upon inspections of motor carriers. Also, this investigation by the ICC would come under the congressional reason for the exception of these functions from the adjudicative procedure — that is, "because those methods of determination do not lend themselves to the hearing process."⁵³

Another non-adjudicative, non-rule-making investigation of the ICC is found in the directive

. . . to investigate and report on the use of and necessity for block-signal systems and appliances for the automatic control of railway trains in the United States. . . . In transmitting its report to the Congress the Commission shall recommend such legislation as to the Commission seems advisable.

To carry out and give effect to the provisions of this section the Commission shall have power to issue subpoenas, administer oaths. . . .⁵⁴

As such, the terms in the definition of a "rule" and "rule making" in the APA do not include this function of the ICC. This investigative function would logically fall under the residual definition of section 2(d) and hence require the formal procedure of section 5 of the APA. But this investigation and the resulting recommendations to Congress are not required by statute to be determined on the record after opportunity for an agency hearing. Even though this section does give the ICC the power to subpoena witnesses, the ICC may investigate without the hearings.⁵⁵ Therefore, in this purely investigatory function, the ICC should not be under the adjudication procedure of the APA even though the investigation falls under the definition of adjudication in the APA.

Another purely investigative function of the ICC is its investigation of

. . . all collisions, derailments, or other accidents in serious injury to person or to property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad.⁵⁶

Under this section, the Commission can subpoena witnesses, etc. It must cooperate with state commissions making such investigations, and the ICC can, when it deems it in the public interest, make public reports of such accidents. This investigative function is ostensibly not under the illustrative terms in the definition of rule in the Administrative Procedure Act, so it is logically under section 5. But the lack of a requirement of a record or a hearing removes it from the adjudication procedure of the APA. However, even if this section authorizing these investigations were construed to require a hearing and a record, it still would be excepted from section 5 by the first exception in the introductory clause — "any matter subject

51 47 C.F.R. § 1.214 (1958).

52 54 Stat. 929 (1940), 49 U.S.C. § 325 (1952).

53 S. Doc. No. 248, *supra* note 23, at 260-61.

54 34 Stat. 838 (1906), 45 U.S.C. § 35 (1952).

55 *Ibid.*

56 36 Stat. 351 (1910), 45 U.S.C. § 40 (1952).

to a subsequent trial of the law and the facts de novo in any court."⁵⁷ Section 4 of the Interstate Commerce Act which provides

... That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.⁵⁸

supports this interpretation.

These examples of the non-adjudicative, non-rule-making investigations of the ICC show that it is generally true that these investigations do not come under the adjudicative procedure set up by the Administrative Procedure Act even though such investigations come under the residual definition of adjudication.

(2) *The Federal Trade Commission*

The Federal Trade Commission was created by an act of Congress in 1914.⁵⁹ In addition to its general investigative functions in matters leading to adjudication or rule-making, the FTC was also given a number of additional investigatory functions in section 6 of the act.

- (a) To gather and compile information concerning and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. . . .
- (c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. . . .
- (d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.
- (e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with the law.
- (h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.⁶⁰

No matter which definition in the APA these investigations are governed by, presumably none are subjected to the formal adjudicative procedure of the APA. The reason is that none of these functions is required by statute to be determined on the record after opportunity for an agency hearing. The rules regulating these investigations are set out in detail by the FTC.⁶¹ In these regulations, the FTC emphasizes voluntary cooperation on the part of those subject to the particular investigation,⁶² and points out that investigational hearings, as distinguished from hearings in adjudicative proceedings, *may* be conducted in the course of an investigation under section 6.⁶³ Therefore, no opportunity for a formal agency hearing is required by this statute.

Under the Defense Production Acts Amendments of 1952, the FTC is em-

57 60 Stat. 239 (1946), 5 U.S.C. 1004 (1952). "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court"

58 36 Stat. 351 (1910), 45 U.S.C. § 41 (1952).

59 38 Stat. 717 (1914), 15 U.S.C. §§ 41-77 (1958).

60 38 Stat. 721 (1914), 15 U.S.C. §§ 46(a), (c), (d), (e), (h) (1958).

61 16 C.F.R. §§ 1.3-1.42 (Supp. 1959).

62 16 C.F.R. § 1.31 (Supp. 1959).

63 16 C.F.R. § 1.34 (Supp. 1959).

powered to make investigations for the Attorney General who turns reports over to the President and Congress periodically.

The President is authorized to consult with representatives of industry, business, financing, agriculture, labor, and other interests, with a view to encouraging the making by such persons with the approval by the President of voluntary agreements and programs to further the objectives of this Act. . . .

(e) The Attorney General is directed to make, or request the Federal Trade Commission to make for him, surveys for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power in the course of the administration of this Act. Such surveys, and the reports hereafter required, shall include studies of the voluntary agreements and programs authorized by this section. . . .⁶⁴

Although this is a non-adjudicative, non-rule-making investigation of the FTC, it is by statute specifically excluded from the operation of the Administrative Procedure Act except as to the requirements of section 3.⁶⁵ Here, Congress has demonstrated conclusively that it does not want these investigations subject to any of the more formal procedures of the Administrative Procedure Act.

(3) *The Federal Power Commission*

In 1920, under the Federal Water Power Act, the Federal Power Commission was established.⁶⁶ Today this Commission regulates development of water power and resources,⁶⁷ electric utility companies engaged in interstate commerce,⁶⁸ and natural gas companies.⁶⁹ Under those sections of the statute relating to the FPC's regulation of electric utility companies, the Commission has two purely investigatory functions. First, the FPC

. . . upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.⁷⁰

This type of investigation, although the FPC has no authority to implement it in the future, could be interpreted as coming under the illustrative terms in the definition of "rule" in the APA.⁷¹ But the statute does not in terms require the investigation to be on record after an opportunity for an agency hearing, so the investigations will not come under the formal procedure for adjudication.

In addition, the FPC may conduct investigations under the Federal Power Act to secure information

. . . regarding the generation, transmission, distribution, and sale of electrical energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission. . . . The Commission shall report to Congress the results of the investigations made under authority of this section.⁷²

This investigation is not under the adjudication procedure of the Administrative Procedure Act because again the statute does not require the investigations and resulting recommendations to be made on record after an opportunity for an

⁶⁴ 64 Stat. 818 (1952), as amended 69 Stat. 581 (1955), 50 U.S.C. App. § 2158 (Supp. V, 1958).

⁶⁵ 64 Stat. 819 (1950), 50 U.S.C. App. § 2159 (1952). "The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof. . . ."

⁶⁶ 41 Stat. 1063 (1920), 16 U.S.C. § 792 (1958).

⁶⁷ See 16 U.S.C. §§ 791a-823 (1958).

⁶⁸ See 16 U.S.C. §§ 824-825r (1958).

⁶⁹ See 15 U.S.C. §§ 717-717w (1958).

⁷⁰ 49 Stat. 852 (1935), 16 U.S.C. § 824e(b) (1958).

⁷¹ 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1958). "Rule means . . . any agency statement of . . . particular applicability and future effect . . . and includes approval or prescription for the future of costs . . ."

⁷² 49 Stat. 859 (1935), 16 U.S.C. § 825j (1958).

agency hearing. This is solely an investigation resulting in a report to Congress.

Under the 1938 Natural Gas Act,⁷³ the FPC has two non-adjudicative, non-rule-making investigative functions. The first one is identical with the first investigative function under the Federal Power Act discussed above.⁷⁴ The same reasons for its exemption from the formal adjudication procedure given above apply here.

The other non-adjudicative, non-rule-making investigation required of the FPC by the Natural Gas Act is:

- (a) In case two or more States propose to Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.⁷⁵

Again this function is in all essentials similar to the second investigative function of the FPC under the Federal Power Act, discussed above. It cannot logically come under the adjudication procedure of the Administrative Procedure Act because no opportunity for an agency hearing is required by this statute. Subsection

(c) of this section of the Natural Gas Act supports this conclusion because the FPC is directed to gather much of its material from files and records of other government agencies and bureaus.⁷⁶

(4) *The Securities and Exchange Commission*

The Securities and Exchange Commission was established in 1934 by the Securities Exchange Act.⁷⁷ Since then its power, functions, and independence have become quite pronounced under later acts, such as the Public Utility Holding Company Act of 1935.⁷⁸ Under the latter act, the SEC has two non-adjudicative, non-rule-making investigative functions. First,

The Commission, in order to obtain information to serve as a basis for recommending further legislation, shall from time to time conduct investigations regarding the making, performance, and costs of service, sales, and construction contracts with holding companies and subsidiary companies thereof and with public-utility companies, the economies resulting therefrom, and the desirability thereof. The Commission shall report to Congress, from time to time, the results of such investigations, together with such recommendations for legislation as it deems advisable. . . . Such recommendations shall be made available to State commissions, public utility companies, and to the public. . . .⁷⁹

Second,

The Commission is authorized and directed to make studies and investigations of public utility companies, the territories served or which can be served by public utility companies, and the manner in which the same are or can be served, to determine the sizes, types, and locations of public utility companies which do or can operate most economically and efficiently in the public interest, in the interest of investors and consumers, and in the furtherance of a wider and more economical use of gas and electric energy;

73 52 Stat. 821 (1938), 15 U.S.C. § 717 (1958).

74 52 Stat. 823 (1938), 15 U.S.C. § 717d(b) (1948).

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

75 52 Stat. 827 (1938), 15 U.S.C. § 717j(a) (1958).

76 52 Stat. 827 (1938), 15 U.S.C. § 717j(c) (1958).

77 48 Stat. 881 (1934), 15 U.S.C. § 78 (1958).

78 49 Stat. 838 (1935), 15 U.S.C. § 79 (1958).

79 49 Stat. 825 (1935), 15 U.S.C. § 79m(g) (1958).

upon the basis of such investigations and studies the Commission shall make public from time to time its recommendations. . . .⁸⁰

Neither of these investigative functions comes within the terms in the definition of rule-making, and neither logically comes under the adjudicative procedure of the Administrative Procedure Act because neither section requires an opportunity for an agency hearing.

In the regulations of the SEC, it is explicitly stated that its general practices and procedures for public hearings and proceedings

. . . shall not be applicable to investigations conducted by the Commission pursuant to . . . sections . . . 13g . . . and 30 of the Public Utility Holding Company Act of 1935. . . .⁸¹

(5) *The Federal Communications Commission*

The last of the older, tested agencies considered in this note is the Federal Communications Commission which was established by the Communications Act of 1934.⁸² Two sections of this statute give the FCC four types of purely investigatory functions. Section 215 of the act provides three of the four types of non-adjudicative, non-rule-making investigations.

- (a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this chapter, and shall report to the Congress. . . . The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted. . . .
- (b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.
- (c) The Commission shall examine all contracts of common carriers subject to this chapter which prevent the other party thereto from dealing with another common carrier subject to this chapter, and shall report its findings to Congress. . . .⁸³

Neither this section nor any other section of this statute requires in these particular investigations that the FCC provide an opportunity for an agency hearing. From the wording of subsection (a), Congress evidently intended that the FCC in this investigation would acquire much of its information from records, books, etc., which wouldn't necessarily require any hearing. Therefore, the adjudication procedure of the APA will not apply to these investigations of the FCC.

Section 220 of the Communications Act of 1934 is concerned with the regulation, by the FCC, of accounts, records and memoranda kept by the carriers subject to the Act.⁸⁴ In section 220(j), the FCC is authorized to investigate and report to Congress

. . . as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to which this section relates.⁸⁵

First, this investigative function does not come under the definition of a rule and rule-making in the APA, so it logically would fall under the residual definition of an order. But the adjudicative procedure of sections 5, 7 and 8 of the APA does not apply because again the statute does not require an opportunity for an agency hearing. Therefore, this purely investigatory function of the FCC does not come under either procedure of the Administrative Procedure Act.

80 49 Stat. 837 (1935), 15 U.S.C. § 79z-4 (1958).

81 17 C.F.R. § 201.20 (1949).

82 48 Stat. 1064 (1934), 47 U.S.C. § 151 (1952).

83 48 Stat. 1076 (1934), 47 U.S.C. § 215 (1952).

84 48 Stat. 1078 (1934), 47 U.S.C. § 220 (1952).

85 48 Stat. 1078 (1934), 47 U.S.C. § 220(j) (1952).

These investigations under sections 220(j) and 215 of the Communications Act again point up the statement in the House Report on the Administrative Procedure Act that the functional distinctions between procedures are not made just in the definitions in the act but also in the exceptions in the other sections of the Administrative Procedure Act.⁸⁶ The investigation required by section 220(j) would allow informality, especially since the FCC will be dealing with the state commissions.

(6) *The Immigration and Naturalization Service*

In 1940, the Immigration and Naturalization Service which prior to this time was under the Department of Labor, was reestablished in the Department of Justice.⁸⁷ The Service is actually one of the "arms" of the Attorney General, especially in the field of immigration and naturalization. By statute, the Attorney General is given power to delegate many functions to the Commissioner of Immigration and Naturalization, who is in full charge of the INS.⁸⁸ By the regulations of the INS, the Commissioner has been delegated the full authority of the Attorney General "to direct the administration of the Service and to enforce the act and all other laws relating to the immigration and naturalization of aliens."⁸⁹ Under the Immigration and Naturalization Act of 1952, the INS is given authority to examine and investigate a petitioner for naturalization and then to make recommendations to a naturalization court.⁹⁰ This is a non-adjudicative, non-rule-making investigation on the part of the INS. The results of these investigative functions do not come under the definition of a rule in the Administrative Procedure Act, so they fall under the residual definition of order and therefore under sections 5, 7 and 8 of

86 S. Doc. No. 248, *supra* note 23, at 251.

87 54 Stat. 1238 (1940), 5 U.S.C. § 342 (1952).

88 66 Stat. 173 (1952), 8 U.S.C. § 1103 (a), (b) (1952).

89 8 C.F.R. § 2.1 (Supp. 1958).

Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Board, there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General; and may redelegate any such authority to any other officer or employee of the Service.

90 66 Stat. 255 (1952), 8 U.S.C. § 1446(a), (b), (d) (1958).

(a) At any time prior to the holding of the final hearing on a petition for naturalization provided for by section 336(a) of this title, an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person petitioning for naturalization in the vicinity or vicinities in which such person has maintained his actual place of abode and in the vicinity or vicinities in which such person has been employed or has engaged in business or work for at least . . .

(b) The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes any such employee so designated is authorized to take testimony concerning any matter touching or in any . . . to administer oaths, . . . and to require by subpoena . . . The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing conducted by a naturalization court . . . (d) The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued, with reasons therefore. . . . The judge to whom such recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of each such lists shall thereafter be filed permanently of record in such court.

this act. There are no direct words in the statute that an opportunity for an agency hearing shall be afforded the petitioner, but the section specifies that "The record of the preliminary examination authorized by this subsection shall be admissible *as evidence* in any final hearing conducted by a naturalization court . . . (emphasis added)."⁹¹ A court might interpret the statutory section as requiring an opportunity for an agency hearing.⁹² From the regulations of the INS for the conduct of these preliminary examinations, it is evident that the Service felt that opportunity for a hearing is required by the statute.⁹³ Exceptions one⁹⁴ and five⁹⁵ in the introduction of section 5 of the APA should remove the investigations of the INS from the adjudicative procedure of the act. The reasons are: first, a subsequent section — section 336 in the Immigration and Nationality Act — provides for a final hearing in a court of law upon petitions for naturalization. Subsection (b) of section 336 further provides that

The requirement of subsection (a) of this section for the examination of the petitioner and the witnesses under oath before the court and in the presence of the court shall not apply in any case where an employee designated under Section 335(b) of this title has conducted the preliminary examination authorized by section 335(b) of this title, except that the court may, in its discretion, and *shall, upon demand of the petitioner*, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court. (Emphasis added.)

In other words, the preliminary examination carries full weight in the court of law only if the petitioner doesn't demand a trial, but even then the judge can accept the report or reject it at his discretion. It does seem from the cases that courts have given much weight to the findings of fact by the INS and their recommendations.⁹⁷ But, in September, 1958, a United States District Court hearing a petition for naturalization accepted the report of the INS although some findings were passed on hearsay evidence. The court held that the petitioner by the above subsection (b) was entitled to disprove the facts by a demand for a trial *de novo* before it.⁹⁸ The reason that this investigation is not under section 5 of the Administrative Procedure Act is in accord with the reason that Congress permitted exception one, that is, that "whatever judgment the agency makes is effective only in a *prima facie* sense at most and the party aggrieved is entitled to complete judicial retrial and decision."⁹⁹

(7) *The Atomic Energy Commission*

The Atomic Energy Commission was established by the Atomic Energy

91 66 Stat. 255 (1952), 8 U.S.C. § 1446(b) (1958).

92 See *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). In this case, the Supreme Court held that the deportation investigations, which resulted in the INS adjudication on the deportable status of particular immigrants, were impliedly required by statute to give persons an opportunity for a hearing. By the liberal construction of the deportation statute, the Supreme Court brought these deportation proceedings under the formal adjudication of the APA. However, the naturalization preliminary examination is probably not an adjudicative function on the part of the INS because naturalization is a "privilege" rather than a "right." See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

93 8 C.F.R. § 335.11(a) & (b) (1958). (The Commission rules require ruling on the admissibility of evidence, cross-examination, and written evidence).

94 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958). "(1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court . . ."

95 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958). "... (5) cases in which an agency is acting as an agent for a court . . ."

96 66 Stat. 257 (1952), 8 U.S.C. § 1447(b) (1958).

97 See *In re Hansen*, 148 F. Supp. 187 (D. Minn. 1957) (District Court granted petition for naturalization upon facts of examiner, but against examiner's recommendations; no full hearing); *Krause v. United States*, 194 F.2d 440 (2d Cir. 1952). (Naturalization did not examine witnesses under oath and denied petition; Court of Appeals reversed on facts of examiner submitted).

98 *Petition for Naturalization of Grete W—*, 164 F. Supp. 659, 662 (E.D. Pa. 1958).

99 S. Doc. No. 248, *supra* note 23, at 260-61.

Act of 1946,¹⁰⁰ which was completely amended in 1954.¹⁰¹ The AEC's functions are built around two purposes: development, use, and control of atomic energy for the advancement of the welfare of society; and development, use, and control of atomic energy for common defense and security.¹⁰² Among the many activities of the AEC, only one purely investigatory function is apparent:

After any nuclear incident which will probably require payments by the United States under this section, the Commission shall make a survey of the causes and extent of damage which shall forthwith be reported to the Joint Committee, and, except as forbidden by the provisions of Chapter 12 of this Act or any other law or Executive order, all final findings shall be made available to the public, to the parties involved, and to the courts. . . .¹⁰³

This investigation does not seem to fall under the definition of rule-making in the Administrative Procedure Act, so it falls under the residual definition of adjudication. Of course, the statute says nothing about requiring an opportunity for an agency hearing or a record, so the adjudicative procedure of sections 5, 7 and 8 of the act will not logically be applicable. However, this report of the causes and extent of damages is made available to the courts. Since this section was added to the Atomic Energy Act in 1957, there are no cases demonstrating the AEC's interpretation of their authority under this section. However, Congress must have felt that the courts could use the data collected in such reports in resulting claim litigation. Of course, the information in the trial would be no more than some evidence which either party could attack. Congress gave no more weight to the report than that the AEC make the report *available* to the courts. Congress did not require the AEC to give parties an opportunity for a hearing; Congress intended only that the procedure for the investigation should be at the discretion of the AEC.¹⁰⁴ In the Senate Report on the act, the reasons for the investigation are given.

This survey is an aid to the Congress in establishing the causes of a nuclear incident. It is in part, an aid to the parties in any action where it is unlikely that the public would be able to obtain the full amount of technical information which might be required.¹⁰⁵

So Congress anticipated the gathering of information by the AEC which was not obtainable by private parties and so excluded formal hearings.

(8) *The Federal Aviation Agency*

In August of 1958, Congress created the Federal Aviation Agency¹⁰⁶ as an independent group with power to regulate air commerce and to regulate both civil and military operations in the navigable airspace of the United States.¹⁰⁷ Under the Title VII of the Federal Aviation Act, the Civil Aeronautics Board, not the FAA, is given the duty of investigating civil aircraft accidents to determine the probable cause, to ascertain what will best prevent such accidents in the future, and to make recommendations to the Administrator of the FAA as to what will tend to prevent similar accidents in the future.¹⁰⁸ One notable feature of investigations by the Civil Aeronautics

100 60 Stat. 755 (1946).

101 68 Stat. 919 (1954), 42 U.S.C. §§ 2011-281 (Supp. V, 1958).

102 68 Stat. 921 (1954), 42 U.S.C. § 2011 (Supp. V, 1958).

103 71 Stat. 576 (1957), 42 U.S.C. § 2210(i) (Supp. V, 1958). (Chapter 12 which was referred to in the quote is the chapter on Restricted Data).

104 See, *United Electrical, Radio and Machine Workers, CIO v. Lilienthal*, 84 F. Supp. 640 (D.C. 1949).

105 S. REP. No. 296, 85th Cong., 1st Sess. 24 (1957).

106 72 Stat. 737 (1958), 49 U.S.C.A. §§ 1301-542 (Supp. 1958).

107 72 Stat. 740 (1958), 49 U.S.C.A. § 1303 (Supp. 1958).

108 72 Stat. 781 (1958), 49 U.S.C.A. § 1441(a) (Supp. 1958).

(a) It shall be the duty of the Board to—

(1) Make rules and regulations governing notification and reporting of accidents involving civil aircraft;

(2) Investigate such accidents and report the facts, conditions and

Board is that the Board can request the FAA to investigate an aircraft accident and report to the Board the facts, conditions, and circumstances thereof; then the Board uses the report to determine the probable cause of the accident upon which it makes a recommendation to the Administrator of the FAA.¹⁰⁹ As a result of this circuitous process, the original investigation by the FAA seems to result in rule-making by it. However, since the Civil Aeronautics Board determines the cause and makes the final recommendation, the cause determination results in the rule-making. Congress intended "that the Administrator or his representatives shall not participate in the determination of probable cause by the Board under this subchapter."¹¹⁰ Because of this intermediate step by the Board, the original investigation by the FAA, as such, does not result in rule-making by the FAA because if the Board determines that the probable cause is not within the control of the FAA its recommendation will not result in the promulgation of a new rule by the FAA. In many instances, the only result of the FAA's investigation will be a public report by the Civil Aeronautics Board.¹¹¹ Therefore, the investigation is a purely investigatory function. This investigation by the FAA does not come within the definition of rule and rule-making in the Administrative Procedure Act, so it falls under the definition of adjudication and the procedure of sections 5, 7 and 8 of the act. However, since the statute requires no opportunity for an agency hearing and does not permit the reports of such investigations to be used in any suit or action for damages growing out of the report, the exceptions of section 5 of the Administrative Procedure Act remove the investigations from the adjudication procedure.¹¹² The Civil Aeronautics Board, in its rules for investigations under Title VII of the Federal Aviation Act, agrees with this analysis.¹¹³

III. DISTINCT INVESTIGATORY AGENCIES

(1) *Presidential Board of Inquiry*

Under the Labor Management Relations Act of 1947 (Taft-Hartley Act), the President may, when a threatened or actual strike substantially affects an industry engaged in interstate commerce, thereby imperiling the national health or safety,

... appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. . . .¹¹⁴

circumstances relating to each accident and the probable cause thereof;

(3) Make such recommendations to the Administrator as, in its opinion, will tend to prevent similar accidents in the future;

(4) Make such reports public in such form and manner as may be deemed by it to be in the public interest. . . .

109 72 Stat. 781 (1958), 49 U.S.C.A. § 1441(f) (Supp. 1958).

110 72 Stat. 781 (1958), 49 U.S.C.A. § 1441(g) (Supp. 1958).

111 72 Stat. 781 (1958), 49 U.S.C.A. § 1441(a)(4) (Supp. 1958). "(a) It shall be the duty of the Board to . . .

(4) Make such reports public in such form and manner as may be deemed by it to be in the public interest. . . ."

112 72 Stat. 781 (1958), 49 U.S.C.A. § 1441(e) (Supp. 1958).

113 24 Fed. Reg. 2225-6 (1959), amending 14 C.F.R. § 303.2.

Aircraft accident hearings are held by the Board as a part of the investigation of accidents involving aircraft in order to determine the facts, conditions, and circumstances relating to each accident and the probable cause thereof and to ascertain measures which will best tend to prevent similar accidents in the future. It is purely a fact-finding procedure, and there are no formal pleadings or issues and no adverse parties. During the course of the hearing, no objections to any matter will be entertained from any party to the investigation or any other person. Aircraft accident hearings are not subject to the provisions of sections 4, 5, 7, 8 or 10 of the Administrative Procedure Act.

114 61 Stat. 155 (1947), 29 U.S.C. § 176 (1952).

Later,

... the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. . . .¹¹⁵

This Board of Inquiry is an agency within the definition of such in section 2(a) of the Administrative Procedure Act. Therefore, it falls within our problem since its function is purely investigative, with no quasi-legislative or quasi-judicial action on the part of the Board resulting from its investigation. This type of agency is last dealt with because it is typical of federal agencies of a temporary, limited character with one function only.

The above sections by which the President creates the Board of Inquiry do not require the Board to make its report on the record after an opportunity for an agency hearing. So the formal, adjudicative procedure of the Administrative Procedure Act will not apply to its investigations. The cases on this do not indicate any questioning of the different Boards' procedures used in the past.¹¹⁶ Under section 207(c), the Board is given the subpoena powers, etc., which the Federal Trade Commission has.¹¹⁷ The Board follows a procedure closely akin to the informal rule-making procedure of section 4 of the Administrative Procedure Act. The Board issues notices of its public investigations and permits interested persons an opportunity to participate in the investigations.¹¹⁸ In fact, as the very words of both sections in the Taft-Hartley Act indicate, the Board permits any party's statement of its position to be put in the report.

(2) *The Commission on Civil Rights*

In September, 1957, Congress created, under the Civil Rights Act, the Commission on Civil Rights, whose life was to extend until November, 1959.¹¹⁹ The life of the Commission has been extended for two more years by an act of Congress in September, 1959.¹²⁰ This agency is considered here for two reasons: first, it is a typical investigatory agency of a temporary, limited character with no "quasi" functions; and second, the *Larche v. Hannah* decision of October 7, 1959, recognized that the Commission's functions were purely investigatory and not under the formal adjudication procedure, but still went on to require the Commission to give subpoenaed witnesses "the traditional rights" of confrontation and cross-examination which are required in a formal judicial proceeding.¹²¹

The investigative functions of the Civil Rights Commission are: to

- (1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin;
- (2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

115 61 Stat. 155 (1947), 29 U.S.C. § 179 (1952).

116 See, *United States v. United Steelworkers of America*, 202 F.2d 132, 135 (2d Cir. 1953); *International United Mine Workers v. United States* 177 F.2d 29, 32 (D.C. Cir. 1949).

117 61 Stat. 155 (1947), 29 U.S.C. § 177 (1952).

118 60 Stat. 238 (1946), 5 U.S.C. § 1003(a), (b) (1958).

(a) General notice of proposed rule making shall be published in the Federal Register (b) 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

119 71 Stat. 635 (1957), 42 U.S.C. § 1975c(b), (c) (Supp. V, 1958).

120 Pub. L. No. 383, 86th Cong., 1st Sess. (Sept. 28, 1959). (Additional Appropriations for Commission on Civil Rights, Title IV).

121 *Larche v. Hannah*, Civil No. 7479, W.D. La., Oct. 7, 1959.

- (3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.¹²²

Under the APA definitions, exercise of these three functions do not result in agency rule-making, so they fall under the residual definition of adjudication. By the statute, a public hearing procedure with a record is set out in detail for these investigations.¹²³ But whether or not this investigation of allegations of denial of civil rights is required by statute to be made on record after an opportunity for an agency hearing, the purely investigatory functions of the Commission would be exempted from the adjudication procedure of the APA because any matter investigated would be subject to a subsequent trial of the law and the facts *de novo* in any court. The Commission can do nothing with its information except make reports to Congress. It cannot prosecute. It can make no rules except those for the regulation of its investigations.

Of interest is the fact that the Commission does not feel bound even by section 3 of the APA,¹²⁴ which requires publication by every agency of its rules of practice in the Federal Register.¹²⁵ The Commission may interpret the statutory language,

¹²² 71 Stat. 635 (1957), 42 U.S.C. § 1975c(a), (b) Supp. V, 1958).

¹²³ 71 Stat. 634 (1957), 42 U.S.C. §§ 1975a(a), (b), (c), (d), (e), (f), (g), (h) (Supp. V, 1958).

(a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses.

(f) Except as provided in sections 102 and 105(f) of this act, the Chairman shall receive and the Commission shall dispose of requests to subpoena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than \$1,000 or imprisoned for not more than 1 year.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

¹²⁴ The Federal Register, from 1957 to date, has not published any rules or regulations of the Civil Rights Commission.

¹²⁵ 60 Stat. 238 (1946), 5 U.S.C. § 1002(a) (1958).

Section 3. Except to the extent that 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 — (a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports or examinations; and (3) substantive rules adopted as authorized by law and statements

which only requires it to make its rules of procedure available to the witness when he appears before the Commission, to exempt it from the APA requirements of notice.¹²⁶

In *Larche v. Hannah*, the voting registrars in a number of parishes in Louisiana were subpoenaed to appear before the Commission in July. The registrars asked to know who their accusers were. The Commission refused to submit their names. The registrars sued out an injunction to restrain the Commission from investigating. The three-judge court held that this denial of the names plus the Commission's regulation that only members of the Commission could examine witnesses¹²⁷ denied the subpoenaed witnesses traditional rights. The court has subjected this purely investigatory function to a formal due process procedure, even though they impliedly recognized the nature of the Commission's investigations. This seems rather inconsistent since the very reason that the Commission's proceedings did not come under the formal adjudication of the APA was because nothing the Commission did had a binding or legal effect on any individual or group. Any matter before the Commission was subject to a trial de novo.

Conclusion

In illustrating the purely investigatory functions of an administrative agency by examples drawn from ten major agencies, it has been shown that these non-adjudicative, non-rule-making functions usually fall under the residual definition of adjudication in the APA. And, due to the exceptions in section 5 of the act, these purely investigatory functions are exempted from the formal procedures provided by the APA. Therefore, it appears that the drafters of the APA have capably excepted these investigations, which should not be brought under the more formalized procedure of adjudication. They have drafted the APA in such a way that its "several sections and subordinate provisions are closely knit."¹²⁸

This suggests that a literal interpretation, or strict construction, of the APA will produce a desirable result. Although the literal interpretation of the APA would seem sure to result in a formal procedure for non-adjudicative, non-rule-making investigations, such is not the case. The approach utilized in this Note has demonstrated how the desirable result may be achieved. With each purely investigatory function, this approach was to determine whether the investigations fell under the definition of rule-making, which they did not,¹²⁹ and then to apply the exceptions under section 5 of the APA. Either lack of a statutory requirement of an opportunity for an agency hearing or the subsequent requirement of a trial de novo were the exceptions in section 5 of the APA which in every instance removed the purely investigatory function from the formal procedure for adjudication under the APA. If Congress required hearings in the particular statute, or there was the possibility of such an interpretation by a court, Congress has in some instances specifically excluded such provisions from the provisions of the APA. This was true of the purely investigatory function of the FTC under the Defense Production Amendments Act. Thus, these investigations are always released to the procedure of the individual agency which can best provide the specialized methods necessary for an expert investigation.

of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

126 71 Stat. 634 (1957), 42 U.S.C. § 1975a(b) Supp. V, (1958).

127 105 Cong. Rec. 17923 (daily ed. September 14, 1959). Rule 3(i) "Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel."

128 S. Doc. No. 248, *supra* note 23, at 251.

129 There was one exception. The ICC valuations for the FCC fell under the definition of rule-making, and then because the statute required an opportunity for an agency hearing were subjected to the formal adjudicative procedure of sections 7 and 8 of the APA.

Most of the purely investigatory functions drawn from the ten federal agencies are, of course, not of a type easily subjected to formal adjudication. They usually require the discretionary approach of an expert in order to illuminate obscure areas. Of interest is the fact that each of the eight regulatory agencies examined have some non-adjudicative, non-rule-making investigations.¹³⁰ Although such agencies are normally recognized to be bodies with extensive regulatory power in the fields of trade, finance, transportation, and power, it is evident that their investigatory activity is not restricted to their own use, but includes expert gathering of information for the public and for other bodies.

In general, it is submitted that the APA is not the imperfect and ambiguous act it is often claimed to be. In the problem dealt with here, the APA, given a literal interpretation, does not burden non-adjudicative, non-rule-making investigations with a formal procedure. However, the APA has been frowned upon by the courts in its treatment of *adjudicative* functions of administrative agencies. In *Wong Yang Sung v. McGrath*,¹³¹ the Supreme Court of the United States subjected the adjudicative deportation proceedings of the Immigration and Naturalization Service to the formal adjudication proceedings of the APA, reasoning that, although the pertinent section of the Immigration Act did not explicitly require an opportunity for an agency hearing and so did not come under the adjudication procedure of section 5, this exemption was applicable only to hearings held by regulation, rule, custom or special dispensation, but not to those held by compulsion.¹³² Thus, the courts have found that the APA exempts certain adjudicative functions—where an individual's legal position and rights are affected—from the formal procedure of adjudication. These they have felt should not be exempted, and, by statutory construction as in the *Wong* case and by constitutional references to due process,¹³³ have subjected such adjudicative functions to the formal procedures of adjudication.

Now, in *Larche v. Hannah*, a court in effect has frowned upon the APA because it exempts the purely investigatory function of the Civil Rights Commission from the formal adjudicative procedure. The three-judge federal court reached its conclusion that the APA did not apply to the investigations of the Commission by holding that such investigations, because neither adjudication nor rule-making, did not come within the act. But failing to maintain a consistent position, the court imposed a formal procedure upon such investigations by the use of a due process argument like those used in the cases imposing a formal judicial procedure on adjudicative functions. They did not reach their conclusion that the APA does not apply by a literal interpretation of the APA. It is submitted that, had this been done, the very exception which exempted the Commission would have weakened their due process argument. The Commission has no power to prosecute and no power to punish or even make rules. Its sole function is to investigate and report. One who is investigated by the Civil Rights Commission is protected by a subsequent

130 *But see*, 105 Cong. Rec. 17923 (daily ed. September 14, 1959) Amicus curiae remarks of Attorney General of Arkansas which were used for complainants in the *Larche v. Hannah* case.

It is well to keep in mind that this Commission is greatly dissimilar to the great body of regulatory agencies which possess investigatory powers. These regulatory agencies investigate with a view to determining facts in relation to violations, compliance, etc., with the law they administer. The Civil Rights Commission investigates for the sake of investigation.

131 339 U.S. 33 (1950).

132 *Id.* at 50.

133 *Greene v. McElroy*, 360 U.S. 474, 502 (1959). The Supreme Court held that where Congress or an Executive Order has not specifically exempted one from the traditional safeguards of due process, an agency of the government cannot fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest.

trial de novo of both the law and the facts. This is the specific exception which removed the Commission's investigations from the formal procedure of the APA.

This attack by the courts on the APA's exemption of purely investigatory functions cannot in such an instance be based on constitutional grounds. The rationale of the *Wong* case and others should not apply here. In *Wong*, the function was adjudicative—a quasi-judicial activity—and the exception was a lack of a statutory requirement for a hearing. In the *Larche* case, the function is purely investigatory, affecting no one's life, liberty, or property, and the very exception provides the only real safeguard to the individual. If the person investigated can have a later trial de novo on the facts and the law, this would seem to provide adequate compliance with the due process requirements of the fifth amendment.¹³⁴ Therefore, it is submitted that this attack on the APA by the court through its constitutional interpretation and the resulting effect on the purely investigatory functions of administrative agencies will have a deleterious effect on the usefulness and reliability of the APA. Because of the failure of some courts to grasp the import of a non-adjudicative, non-rule-making investigation, exemptions of such from the APA can no longer guarantee that an agency "investigation for the sake of investigation" will remain free from the formal and burdensome procedural requirements of adjudication.

Thomas M. Clusserath

134 *Larche v. Hannah*, (Civil No. 7479, W.D. La., Oct. 7, 1959). Dissenting opinion at 3 (mimeo.). "Without exception, the courts have drawn a distinction between investigative and adjudicative proceedings. Witnesses in investigative hearings do not have the constitutional rights of a witness in an adjudicative hearing. The Fifth Amendment gives a witness protection in an investigation; the opportunity to assert all due process rights in any later adjudicative proceeding is a sufficient protection."