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ADMINISTRATIVE TERMINOLOGY AND THE
ADMINISTRATIVE PROCEDURE ACT*Bernard Schwartz**

"If you were a bright young law student walking down the corridor in your law school and saw a set of books labeled 'Treasury Decisions' you would probably pass them by if you were looking for Treasury regulations, because the word 'decisions' usually means determinations in particular cases. But in the Treasury Department they call a general rule a 'decision.' Similarly, if you read the Administrative Procedure Act and find that it calls a judicial decision by an administrative agency an 'order' and you pick up an administrative document and see at the top the word 'order,' do not be surprised if you find that it is a general regulation because nine times out of ten it will be. And, if you see something called a 'directive,' do not be surprised if it is either the one or the other."¹

The confusion of terminology in our administrative law is a natural result of the manner in which that branch of law has developed. "The use of terms in administrative law exemplifies its most characteristic element—that it did not spring from a single source but has its roots in many places."² The administrative process has not evolved according to a fixed plan; "thus far our Administrative Law has largely 'grewed' like Topsy."³ With the haphazard habit characteristic of our political life, individual administrative agencies have been created as and when the need for them arose, without any logical system. The form of agency chosen, the kinds of power delegated to it, and the safeguards imposed for the protection of private parties, appear often to have been dictated by opportunist considerations peculiar to the occasion. "As a natural consequence the choice of terminology has also been accidental";⁴ and the terms employed have been neither consistent nor scientific.⁵

Frequent proposals have been made to systematize administrative terminology. "It would obviously be desirable," asserted the British

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¹ Carl McFarland in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES*, Warren ed., 19-20 (1947).

² CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 27 (1948).

³ Frankfurter, "The Final Report of the Attorney General's Committee on Administrative Procedure," Foreword, 41 *COLL. REV.* 585 at 586 (1941).

⁴ See Report of the Committee on Ministers' Powers 16 (Cmd. 4060, 1932).

⁵ CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 27 (1948).

Committee on Ministers' Powers in 1932, "that Parliament . . . should for the future endeavour to call the same thing by the same name. Our Constitution is, under the influence of modern views of the functions of the State, becoming inevitably more complex, and new constitutional ideas are all the time being evolved. For that very reason careful choice of words is important."⁶

The most significant attempt to define basic administrative-law terms is that made by the Federal Administrative Procedure Act of 1946.⁷ Section 2 of that act prescribes the meaning of the following key terms for the purposes of the act: Agency; Person and party; Rule and rule making; Order and adjudication; License and licensing; Sanction and relief; Agency proceeding and action.

The definitions in section 2 are fundamental to the operation of the Administrative Procedure Act. The act is carefully drawn so as to subject to its requirements only those cases specified by the relevant section. In determining the effect of any portion of the act upon specific administrative action, one must refer back to the definitions in section 2 to determine the scope of any of the terms defined in that section as they are used in any subsequent portion of the act. The operation of the Administrative Procedure Act thus depends upon the definitions in section 2.

Of equal importance to the student of administrative law is the fact that section 2 of the Administrative Procedure Act seeks to standardize administrative terminology and thus to resolve the confusion of nomenclature that has been referred to above. One must, it is true, tread cautiously in seeking to estimate the effect of the act upon administrative practice in this respect. "To some extent the Federal Administrative Procedure Act has attempted to establish definitions of basic terms, but no mandate was given to the federal agencies to employ them, so that conflicting usage continues."⁸ Yet even with this caveat in mind, we will find it well worth our while to examine the definitions in section 2 of the Administrative Procedure Act. They represent the first comprehensive Congressional effort at systematization of administrative terminology. And though standardization is achieved only for the purposes of a single statute, the act in question happens to be a key one for the purposes of administrative law, for it represents the first important Congressional attempt to deal as a whole with the administrative process.

⁶ Report of the Committee on Ministers' Powers 18 (Cmd. 4060, 1932).

⁷ 60 Stat.L. 237, 5 U.S.C.A. (Supp. 1946) §1001.

⁸ CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 27 (1948).

*Agency*⁹

Section 2(a) of the Administrative Procedure Act represents the answer of the Congress to the important question of the applicability of the act. Shall it apply uniformly to the entire administrative process, or shall certain agencies be exempted from its requirements? Much of the legislation in the field has tended to follow the latter approach. Thus, the federal Walter-Logan Bill, which was vetoed by the President, excepted a number of agencies from its provisions,¹⁰ and the same is true of some of the recent state legislation analogous to the Administrative Procedure Act.¹¹ The Federal Administrative Procedure Act, on the other hand, applies to "each authority . . . of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." The Administrative Procedure Act is thus intended to apply, with certain exceptions to be considered shortly, to the entire executive branch of the Federal Government.

The applicability of the Administrative Procedure Act to the administrative process as a whole has been criticized by some—especially by those connected with particular agencies who thought that their agencies should not be subject to the requirements of the act. Thus, "[t]here has been some chagrin on the part of the Commission, and, too, on the part of some of the members of the Practitioners' Associa-

⁹ A.P.A. §2(a): "AGENCY.—'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: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944."

The following statutes have since been added to the exceptions at the end of section 2(a): Veterans' Emergency Housing Act of 1946, 60 Stat.L. 918; Sugar Control Extension Act of 1947, 61 Stat.L. 37; Housing and Rent Act of 1947, as amended, 61 Stat.L. 193 at 201, 62 Stat.L. 93. In addition the following statutes have provided exemptions from the Administrative Procedure Act of the functions performed under them: Second Decentral Act of 1947, 61 Stat.L. 323; Rubber Act of 1948, 62 Stat.L. 101; Selective Service Act of 1948, 62 Stat.L. 604; Export Control Act of 1949, Pub. Law 11.

¹⁰ This aspect of the bill was strongly criticized in Landis, "Crucial Issues in Administrative Law," 53 HARV.L.REV. 1077 at 1084 (1940).

¹¹ See e.g., Cal. Gov't. Code §§11500-01; Ohio Gen. Code (Page, 1946) §154-62; Wis. Stat. (1945) §227.01. Cf. §1(2) of the Model State Administrative Procedure Act, Nat'l Conf. Commrs. on Uniform State Laws (1946).

tion, on account of the failure of Congress to exempt the Interstate Commerce Commission from the provisions of the Administrative Procedure Act."¹² A consideration of the purposes of such an act, should, however, lead to the conclusion that the approach of the federal act is the proper one and that there should be no exceptions of particular agencies, as such. For, in the first place, on what basis would such exemptions be made? The Walter-Logan Bill, which excepted certain specified agencies from its provisions, seemingly did so by a differentiation between so-called "good" agencies, where procedural reform was not needed, and others, where such reform was needed. Yet this supposed differentiation is clearly unrealistic as a basis for exemptions. As stated by the Senate Committee on the Judiciary in reporting the bill which became the Administrative Procedure Act, "Manifestly, it would be folly to assume to distinguish between 'good' agencies and others, and no such distinction is made in the bill."¹³

An act such as the Administrative Procedure Act is, almost by definition, intended to apply to the administrative process as a whole. It distinguishes between different administrative functions, and not between agencies as such. Where exceptions are necessary, they too are drawn upon a functional basis. Exemptions from such a statute are undesirable unless the procedure of the agencies excepted are not subject to the deficiencies at which the act is aimed. But, in such cases, are the exemptions really necessary?

Exemptions based upon a distinction between so-called "good" and other agencies are equally redundant. A statute should not be drawn so as to except those likely to conform to its prescriptions. "... [L]aws are not so drafted as to exclude those who have never committed the offenses sought to be stopped. X is not exempted from the law punishing for murder because he had not been guilty of murder up to the time the law was passed."¹⁴

It is to be noted that section 2(a) of the Administrative Procedure Act defines agency as "each *authority* (whether or not within or subject to review by another agency)"¹⁵ of the executive branch of the government. This definition has been criticized because it defines with reference to the word "authority" without in any way defining that word.¹⁶

¹² C.A. Miller in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES*, Waiten ed., 310 (1947).

¹³ A.P.A., Legislative History, 79th Cong., 2d sess., p. 191 (1946).

¹⁴ C.A. Miller in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES*, Waiten ed., 311 (1947).

¹⁵ Italics added.

¹⁶ See CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 44, n. 32 (1948).

Yet, as explained by the Senate Committee on the Judiciary, "the word 'authority' is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization."¹⁷ The definition in section 2(a) recognizes that the executive branch is divided not only into department, commissions, offices, etc., but that these bodies, in turn, are further subdivided into constituent units which may have all the attributes of an agency.¹⁸ The term "authority" is thus used to mean "... any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority."¹⁹ "In short, whoever has the authority to act with respect to the matters later defined is an agency."²⁰

The key factor in determining whether or not a particular governmental unit is an "agency" for the purposes of the Administrative Procedure Act is the possession by it of "the power to determine, either by rule or by decision, private rights and obligations."²¹ If it possesses such power, it comes within the definition in section 2(a), even though it happens to be in form but a subdivision of a larger governmental unit. "For example, the Federal Security Agency is composed of many authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Thus, the Social Security Administration within the Federal Security Agency is in complete charge of the Unemployment Compensation provisions of the Social Security Act. By virtue of the definition contained in section 2(a) of the Administrative Procedure Act, the Social Security Administration is an agency, as is its parent organization, the Federal Security Agency."²²

The exclusion of "the courts" from the definition of agency in the Administrative Procedure Act can also lead to difficulties. Is the term "courts" as used in section 2(a) limited to the constitutional courts or

¹⁷ A.P.A., Legislative History, p. 196.

¹⁸ See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

¹⁹ A.P.A., Legislative History, p. 13.

²⁰ Rep. Walter, id. at 354.

²¹ I.e., the distinguishing feature of an administrative agency according to REP. ATTY. GEN., Committee on Administrative Procedure 7 (1941).

²² ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

does it include the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and other legislative courts? This question is of importance not only in determining whether these legislative courts themselves are subject to the procedures imposed by the Administrative Procedure Act, but bears also upon the question of the applicability of the procedural provisions of the act to the agencies reviewed by these courts. The adjudicatory procedures prescribed by section 5 of the Administrative Procedure Act do not apply "... to the extent that there is involved ... any matter subject to a subsequent trial of the law and the facts *de novo in any court*. . . ."²³ Tax decisions of the Bureau of Internal Revenue are triable *de novo* by the Tax Court and questions arising out of the administration of the customs laws are triable *de novo* by the Court of Customs and Patent Appeals. Consequently, if the Tax Court and the Customs Court are "courts" within the meaning of the Administrative Procedure Act, the procedural provisions of the act do not affect the agencies reviewed by them.²⁴

According to the Attorney General, the term "courts" in section 2(a) of the Administrative Procedure Act "includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure. . . ."²⁵ The opinion of the Attorney General in this respect was relied upon by the Commissioner of Internal Revenue in *Lincoln Electric Co. v. Commissioner*²⁶ in support of the argument that the Tax Court was not within the purview of the Administrative Procedure Act. This argument was rejected by Judge Simons, who held that the Tax Court was an "agency" and not a "court" within the meaning of section 2(a). According to him, the Tax Court is "an independent agency in the executive branch of the government,"²⁷ as was the Board of Tax Appeals, which became the Tax Court in 1942.²⁸ The *Lincoln Electric* case contains the only direct judicial holding upon the question of whether the Tax Court is an "agency" within the meaning of section 2(a) of the Administrative Procedure Act.²⁹ It can, however, be asserted that

²³ Italics added.

²⁴ See A.P.A., Legislative History, p. 22.

²⁵ Id. at 408. See, similarly, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 10 (1947).

²⁶ (C.C.A. 6th, 1947) 162 F. (2d) 379.

²⁷ Id. at 382, quoting 53 Stat.L. 158 (1939) 26 U.S.C. §1100.

²⁸ 56 Stat.L. 957 (1942) §504, 26 U.S.C. §1100.

²⁹ But see *Anderson v. Commissioner*, (C.C.A. 7th, 1947) 164 F. (2d) 870 at 874 where the court said, "We are unable to agree with the conclusion reached in the *Lincoln Electric* case." Cf. *In re Nathan's Estate*, (C.C.A. 9th, 1948) 166 F. (2d) 422; *Dawson v. Commr.*, (C.C.A. 6th, 1947) 163 F. (2d) 664; *Credit Bureau v. Commr.*, (C.C.A. 2d, 1947) 162 F. (2d) 7.

its holding is opposed to the general Congressional tendency in recent years to judicialize the Tax Court. This is shown, for example, in the legislative abrogation of the rule of *Dobson v. Commissioner*³⁰ in 1948 so that the Tax Court is now for purposes of review, treated as a district court.³¹ H.R. 3113, which is now before the Congress, would complete the judicialization of the Tax Court, for it makes that body a court of record. The enactment of that measure would wholly clarify the status of the Tax Court under section 2(a) of the Administrative Procedure Act.

Our discussion of the definition of "agency" in section 2(a) would not be complete without some mention of the exceptions contained in the last sentence of that section. That sentence makes a series of functional exemptions from the entire statute, with the exception of the public information requirements of section 3. These exceptions, in the act as it was passed in 1946, covered agencies composed of representatives of the parties, military tribunals, military or naval authority exercised in the field in time of war or in occupied territory, and certain other temporary "war functions." One should emphasize again that the approach of the Administrative Procedure Act in this respect is a functional one. "It has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions."³² It is true that a number of specific statutes enacted since the Administrative Procedure Act have exempted the functions conferred by them from the operation of section 2(a).³³ These statutes, however, relate mainly to external affairs or to measures enacted to meet problems growing out of the war, and do not militate against our assertion that the general approach of the Administrative Procedure Act is functional in nature.

Since the act was intended to apply to the administrative process as a whole, the exemptions at the end of section 2(a) should be construed as narrowly as possible. Thus, as stated by the Senate Judiciary Committee above, the exclusion of particular military functions was not intended to exempt the Army as such from the requirements of the act. *Kam Koon Wan v. E. E. Black, Ltd.*,³⁴ involved the question of whether the military government set up by the Army in Hawaii during the war

³⁰ 320 U.S. 489, 64 S.Ct. 239 (1943).

³¹ 62 Stat.L. 991 (1948), 26 U.S.C. §1141 (a).

³² A.P.A., Legislative History, p. 191.

³³ *Supra*, note 9.

³⁴ (D.C.Hawaii 1948) 75 F.Supp. 553.

was an "agency of the United States" within the meaning of the Portal-to-Portal Act of 1947.³⁵ It was argued that the term as used in that act must be taken to have the same meaning as it has in section 2(a) of the Administrative Procedure Act and that that section excludes the Army from being considered an "agency." The court refused to accept this argument, for, even assuming that the definition in the Administrative Procedure Act was applicable in the instant case, "the Army in Hawaii legally was not 'in the field' or in 'occupied territory', even though in fact it acted in that manner. Indeed, if this Act aids here at all, it supports the point that outside of the exceptions mentioned, the Army is an 'agency' of the United States."³⁶

Where one of the specific functions excluded in section 2(a) is directly before the court, a different result must, of course, be reached. Consequently, it has been held that section 10 of the Administrative Procedure Act confers no right to obtain review of court-martial proceedings,³⁷ and a like result has been reached with regard to a regulation promulgated under the Housing and Rent Act of 1947.³⁸

*Person and Party*³⁹

In his analysis before the House of the bill that became the Administrative Procedure Act, Representative Walter stated: "I think nothing need be said about the definition of 'person' and 'party' in section 2(b), since it is obvious on its face."⁴⁰

The problem of "persons" and "parties" in administrative law is actually more difficult than the above statement would seem to indicate. It arises most frequently where a right is asserted to intervene in an administrative proceeding or to obtain review of administrative action. Generally speaking, only so-called "persons aggrieved" or "parties" can assert such a right. It is difficult to lay down with any precision the degree of interest in the particular proceeding which an individual must have before he becomes a "person" or "party." As put by the Attorney General's Committee on Administrative Procedure with re-

³⁵ 61 Stat.L. 88 (1947), 29 U.S.C. §258.

³⁶ (D.C.Hawaii 1948) 75 F.Supp. 553 at 562. See *Snyder v. Buck*, (D.C.D.C. 1948) 75 F.Supp. 902 for a similar holding with regard to the Department of the Navy.

³⁷ *Brown v. Royall*, (D.C.D.C. 1949) 81 F.Supp. 767.

³⁸ *Koster v. Turchi*, (D.C.Pa. 1948) 79 F.Supp. 268.

³⁹ A.P.A. §2(b): "PERSON AND PARTY.—'Person' includes individuals, partnerships, corporations, associations; or public or private organizations of any character other than agencies. 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes."

⁴⁰ A.P.A., Legislative History, p. 355. See, similarly, *id.* at 13.

gard to judicial review, "proposals to define the class of persons who can attack acts of administrative agencies in general are either futile or dangerous: Futile because they can hardly go beyond the present generality of persons 'aggrieved' or 'adversely affected' or otherwise having 'legal standing'; dangerous if they go beyond it, unless the redefinition is based on detailed consideration of the specific judicial determinations made in the particular situation."⁴¹

The problem of "persons" and "parties" is basically statutory. "Whatever the situation and whoever the person may be, the relevant statute is of primary importance."⁴² Section 2(b) of the Administrative Procedure Act largely restates this principle. Under it, "the words 'person' and 'party' are defined as in many statutes and regulations."⁴³ The definition of "person" is a most general one. As stated by one commentator, section 2(b) does not define "persons" other than to make it immaterial what form an entity takes.⁴⁴

The definition of "party" is somewhat narrower, except that unlike "person" it includes an "agency." The term "party" is intended to include only those who are participants in the administrative proceedings—either because of their being named or admitted as parties or because of their right to be so admitted. It should, however, be noted that nowhere in the act are any criteria given by which to determine whether a particular person has a right to be admitted as a party. The practice of agencies to admit persons as parties "for limited purposes" is expressly preserved,⁴⁵ though the use of the term "party" in the act is apparently limited to a full participant in the proceeding.

*Rule and Rule Making*⁴⁶

The Administrative Procedure Act is based upon a fundamental dichotomy between rule making and adjudication.⁴⁷ "The basic scheme

⁴¹ REP. ATTY. GEN., Committee on Administrative Procedure 85 (1941).

⁴² MCFARLAND AND VANDERBILT, CASES AND MATERIALS ON ADMINISTRATIVE LAW 518 (1947).

⁴³ A.P.A., Legislative History, p. 13.

⁴⁴ C.C.H., Federal Administrative Procedure, 3169 (1946).

⁴⁵ A.P.A., Legislative History, p. 196.

⁴⁶ A.P.A. §2(c): "RULE AND RULE MAKING.—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

⁴⁷ Willapoint Oysters v. Ewing, (9th Cir., 1949) 174 F.(2d) 676 at 692. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947).

underlying this legislation is to classify all administrative proceedings into these two categories."⁴⁸ In general, "... we speak of rule or rule making whenever agencies are exercising legislative powers. We speak of order and adjudications when they are doing things which courts otherwise do."⁴⁹

The procedural provisions of the Administrative Procedure Act are grounded on the distinction between the legislative or rule making functions of administrative agencies, on the one hand, and their judicial or adjudicative activities, on the other. The procedure prescribed with regard to rule making is largely informal in character, although provision is also made in section 4(b) for the comparatively rare case of formal rule making, where the procedure is patterned upon that followed in the case of adjudications. The requirements imposed where administrative adjudications are concerned tend to be more formal in nature, modelled more or less upon the procedure of the judicial process.

The definitions of "rule" and "order" in sections 2(c) and 2(d) of the Administrative Procedure Act are thus of cardinal significance, for they determine whether, in any given case, the agency concerned must conform to the formal adjudicatory procedures prescribed in sections 5, 7, and 8 of the act or whether it need only comply with the antecedent publicity requirements of section 4. In this respect, the definition of "rule" in section 2(c) is the more important, since, as we shall see, the definition of "order" in section 2(d) is a residuary one—"other than rule making but including licensing"—and thus turns upon the meaning of "rule."

Prior to the Administrative Procedure Act, the distinction between the legislative or rule making functions of administrative agencies and their judicial or adjudicative functions was one which had caused a great deal of difficulty. The distinction here was not merely a semantic one, for, even before the Administrative Procedure Act, the courts had imposed much less onerous procedural requirements in cases which concerned the exercise of functions which were legislative in nature.⁵⁰

Probably the most famous pre-Administrative Procedure Act attempt to explain the difference between legislative and judicial functions is that made by Justice Holmes in *Prentiss v. Atlantic Coast Line*

⁴⁸ A.P.A., Legislative History, p. 225.

⁴⁹ Rep. Walter, id. at 355.

⁵⁰ See *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 53 S.Ct. 350 (1933); Schwartz, "Delegated Legislation in America—Procedure and Safeguards," 11 *Mod.L.Rev.* 449 at 462 (1948).

Company.⁵¹ "A judicial inquiry," said he, "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."⁵² The key factor in Justice Holmes' analysis is the element of time: A rule prescribes *future* patterns of conduct; a decision determines liabilities upon the basis of *present* or *past* facts.

The element of applicability has been emphasized by other commentators as the key in differentiating legislative from judicial functions. According to them, a rule is a determination of *general* applicability, "addressed to indicated but unnamed and unspecified persons or situations";⁵³ a decision, on the other hand, applies to *specific* individuals or situations. As expressed by Professor Dickinson, "what distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."⁵⁴

Both the approach of Justice Holmes and that of Professor Dickinson will enable one to distinguish between rule making and adjudication in the great majority of cases. There are, however, certain situations which cause difficulty. Thus, under Justice Holmes' test, an administrative determination which is future in effect is a rule. This would lead to the conclusion that licensing or the issuance of injunctive orders, such as a cease and desist order of the National Labor Relations Board, are instances of rule making, which would be undesirable from the point of view of the procedural requirements which should be necessary in such cases. On the other hand, if the test of applicability be adopted, a function such as rate making would be classified as judicial, although most of the authority on the point indicates that it is legislative in character.⁵⁵

⁵¹ 211 U.S. 210, 29 S.Ct. 67 (1908).

⁵² *Id.* at 226.

⁵³ Fuchs, "Procedure in Administrative Rule-Making," 52 HARV.L.REV. 259 at 265 (1938).

⁵⁴ DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 21 (1927). Compare the approach of Circuit Judge Bone in *Willapoint Oysters v. Ewing*, (9th Cir., 1949) 174 F.(2d) 676 at 693-694.

⁵⁵ See *United States v. Jones*, (U.S. 1949), 69 S.Ct. 787 at 793; *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 at 387, 52 S.Ct. 183 (1932); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 at 226, 29 S.Ct. 67 (1908); *Texas Co. v. Chicago & Alton R. Co.*, (C.C.A. 7th, 1941) 117 F.(2d) 210 at 215; *Oregon R. & Navigation Co. v. Campbell*, (D.C. Ore. 1909) 173 F. 957 at 973.

Section 2(c) of the Administrative Procedure Act seems to follow Justice Holmes in its definition of "rule." Under it, the key factor in determining the nature of any agency determination is that of "future effect." Aside from the element of time, a good part of the definition might be applicable as well to administrative adjudications. Thus, a judicial decision is normally of particular applicability and implements or interprets law. The difficulty noted above, under the time test, with regard to licensing and injunctive orders is, as we shall see, avoided by the express inclusion of them in section 2(d) of the act.

It should be emphasized that under the definition in section 2(c), rules are not limited to statements of *general* applicability. They also include statements of *particular* applicability—rules which apply only to specific individuals or situations. This is the portion of the definition of "rule" which, at first glance, causes the greatest difficulty, for particular applicability is usually thought to be the most characteristic feature of an adjudicatory decision. The original draft of the bill which became the Administrative Procedure Act limited rules to "statements of general applicability." "The change of the language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons."⁵⁶

It has been suggested that this change in wording "may have the effect of very greatly increasing the scope of what is included as rule making, and, since the definition of adjudication is residual, of correspondingly drastically narrowing the scope of adjudication."⁵⁷ The difficulty here is, however, largely avoided by the express limitation of section 2(c) to statements of "future effect." There can thus be no confusion with regard to the great majority of administrative adjudications, for, though particular in applicability, they do not meet the requirement of "future effect." The difficulty that arises with regard to certain types of adjudications which are future in effect is minimized by the express inclusion of injunctive and declaratory orders and licensing in the definition of "order and adjudication" in section 2(d).

Difficulties can, it is true, still arise with regard to certain types of administrative action. For example, any award requiring the payment of money is technically of future effect and hence a "rule." But

⁵⁶ A.P.A., Legislative History, p. 283, n. 1.

⁵⁷ Davis, "Separation of Functions in Administrative Agencies," 61 HARV.L.REV. 612 at 626 (1948).

a literal interpretation here is obviously undesirable. Indeed, as Professor Davis points out, the possible confusion inherent in section 2(c) can be avoided by assuming that, apart from the express examples given in that section, the term "rule" is intended by the Administrative Procedure Act to have its traditional meaning. "The words 'or particular' were not intended to change into rule making what has heretofore been regarded as adjudication; those words mean no more than that what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation."⁵⁸

*Order and Adjudication*⁵⁹

The definition of "adjudication" in section 2(d) of the Administrative Procedure Act is primarily a residuary one. "Order" (which is the end result of an "adjudication") means the final agency disposition "in any matter other than rule making but including licensing." The scope of the term "adjudication" in section 2(d) of the act is thus dependent upon the content of the term "rule" as defined in section 2(c). The logical approach in any particular case would be to determine first whether the function concerned comes within the definition of "rule making" in section 2(c). If it does not, then it must come within section 2(d), for adjudication under the Administrative Procedure Act is determined by what is not rule making.⁶⁰ As we have already discussed in some detail the scope of the definition in section 2(c) of the act, it will not be necessary to devote much space to section 2(d) at this time.

A word should, however, be said of the express inclusions in that section. Thus, it is expressly stated that an agency disposition comes within the definition of "order" whether it is "affirmative or negative . . . in form." The language here seems to be intended as a legislative restatement of the repudiation of the so-called "negative order" doctrine by *Rochester Telephone Corporation v. United States*.⁶¹ Under the Administrative Procedure Act, as under that decision, it is the effect rather than the form of administrative action that is determinative. If a matter before an agency is finally disposed of, and a rule making

⁵⁸ Id. at 627. Emphasis omitted.

⁵⁹ A.P.A. §2(d): "ORDER AND ADJUDICATION.—'Order' means 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. 'Adjudication' means agency process for the formulation of an order."

⁶⁰ A. Sellers in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES*, Warren ed., 526 (1947).

⁶¹ 307 U.S. 125, 59 S.Ct. 754 (1939).

proceeding is not involved, the disposition is an "adjudication," even though it is negative in form. "Any distinction, as such, between 'negative' and 'affirmative' orders . . . serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."⁶²

The other express inclusions in section 2(d) take care of cases which might otherwise come within the definition of "rule" in section 2(c). Thus, as we have seen, agency action that is injunctive in form, for example, a cease and desist order of the Federal Trade Commission, might otherwise be considered a rule, a result that would manifestly be undesirable from the point of view of procedural requirements. The express addition of the term "injunctive" to section 2(d) was "prompted by the fact that some people interpret 'future effect' as used in defining rule making, to include injunctive action, whereas the latter is traditionally and clearly adjudication. It is made even more necessary that this matter be clarified because of the amendment of section 2(c) to embrace clearly particularized rule making. . . ."⁶³ Like considerations apply to the express inclusion in section 2(d) of "declaratory orders," such as are authorized by section 5(d) of the Administrative Procedure Act, and "licensing." As we shall see, the question whether licensing is a legislative or an adjudicative function is one which has caused great difficulty.

The provisions of sections 2(c) and 2(d) of the Administrative Procedure Act represent an attempt to resolve one of the most troublesome problems of administrative terminology—whether a particular administrative function is legislative or judicial in nature. One may disagree with particular aspects of the act's definitions in this respect, but one must admit that they do result in consistency of nomenclature, if only for the purposes of the act itself. The effect of the Administrative Procedure Act in this respect is, of course, limited. Though the act employs the basic rule-order distinction, federal agencies continue to use the terminology to which they are accustomed, with confusing results such as have already been adverted to. "Thus, although the Act provides that wage and rate making determinations are 'rules,' the Wage and Hour Division and the Interstate Commerce Commission have designated them and continue to designate them as 'orders.' The Treasury Department uses the term 'decision' to describe amendments to its regulations."⁶⁴

⁶² Id. at 143.

⁶³ A.P.A., *Legislative History*, p. 284, n. 2.

⁶⁴ CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 31 (1948).

*License and Licensing*⁶⁵

One of the most important means by which regulation of an industry can be effectively carried out is through a scheme of licensing administered by the relevant administrative agency. The licensing power can be a very effective weapon of regulation, especially when it is coupled, as it almost always is, with the authority to revoke or suspend licenses which have been granted. It enables the scheme of administrative regulation to be applied, as it were, at the source, for those who do not conform are barred from participation in the industry. Its aim is preventive rather than punitive (although it can be used as a punitive device in connection with past misconducts): it is intended to prevent violations of the statute by denying the opportunity for such violations to those whom the administrative agency deems will be likely to commit such misdeeds. And the existence of the revoking or suspending power tends to cause continued compliance by those to whom licenses have already been granted better than almost any other type of sanction. "The strength of such a device is, of course, obvious, for the right to pursue a given livelihood, so important in these days of specialization, is dependent in its entirety upon the observation of prescribed standards of conduct."⁶⁶

From the procedural point of view, it is of cardinal importance to determine whether an agency exercising particular licensing powers is acting in a legislative or in a judicial capacity. For it is only in the latter case that the procedural safeguards that have developed in connection with the exercise of judicial functions need be adhered to, unless express requirements are imposed by the relevant enabling statute. Despite the importance of the problem, however, it was not clearly settled prior to the Administrative Procedure Act whether the exercise of the licensing power involved rule making or adjudication.⁶⁷

Under section 2(d) of the Administrative Procedure Act, as we have seen, licensing is expressly declared to be an adjudicatory function. "Licensing is specifically included to remove any possible question at the outset. Licenses involve a pronouncement of present rights of

⁶⁵ A.P.A., §2(e): "LICENSE AND LICENSING.—'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

⁶⁶ LANDIS, *THE ADMINISTRATIVE PROCESS* 118 (1938).

⁶⁷ See STASON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS*, 2d ed., 237, n. 17 (1947).

named parties although they may also prescribe terms and conditions for future observance."⁶⁸

The express inclusion of licensing within the definition of adjudication in section 2(d) has important effects, both from the point of view of procedural requirements and judicial review. This is shown by *Mid-Valley Distilling Corporation v. DeCarlo*,⁶⁹ where the supervisor of the Alcohol Tax Unit had sent a letter to petitioner stating that its basic permit under the Alcohol Administration Act⁷⁰ was "automatically terminated" because of the transfer of its stock. Looking at both the language of the Alcohol Act and section 2(d) of the Administrative Procedure Act, the court holds that "the Supervisor's letter of September 16 was an order subject to judicial review . . . for the contents of the letter must be deemed to be a final disposition by the Alcohol Tax Unit in a 'matter other than rule making but including licensing.'" ⁷¹ Since the notice and hearing required by the enabling act were not given in this case, the order (constituted here by the letter revoking petitioner's basic permit) is set aside. It would seem that in a case such as this, where notice and hearing are required by the enabling statute, the agency would have to follow the procedural requirements of sections 5, 7, and 8 of the Administrative Procedure Act, for the action involved comes within the definition of adjudication in section 2(d).

With regard to the definition of "licensing" itself in section 2(e), little need be said, aside perhaps from pointing out the breadth of the act's definition. Representative Walter stated in the House: "The definition of 'license' in section 2(e) is included in order to embrace every form of operation where a private party is required to take the initiative in securing the official permission of a governmental agency."⁷² The term thus embraces a large variety of administrative functions, that is, all those involving a grant of permission by an agency. The importance of the wide scope of the definition lies, of course, in the fact that by reference back to section 2(d) all of these cases involve adjudications for the purposes of the act.

One should note a possible difficulty in the inclusion in section 2(e) of "any agency . . . approval," which is also the term used with

⁶⁸ A.P.A., Legislative History, p. 197.

⁶⁹ (C.C.A. 3d, 1947) 161 F. (2d) 485.

⁷⁰ 49 Stat. L. 977 (1935), 27 U.S.C. §201.

⁷¹ (C.C.A. 3d, 1947) 161 F. (2d) 485 at 490.

⁷² A.P.A., Legislative History, p. 356.

regard to certain of the express examples of rule making in section 2(c), that is, "the approval . . . 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 foregoing." The ambiguity which some have seen in the use of "approval" in both sections 2(c) and 2(e)⁷³ can, it is believed, be avoided by assuming that "approvals" in the express cases mentioned in section 2(c) fall within the term defined in that section, while all other "approvals" involve licensing under section 2(e). Thus, the case put by Professor Davis—if a utility applies for an approval of a change in practice, does the proceeding involve licensing or rule making⁷⁴—would clearly come within the meaning of rule making in section 2(c).⁷⁵

It is important to bear in mind that the general definition of "licensing" in section 2(e) does not wholly solve the problems of terminology with regard to the licensing function, for later provisions of the Administrative Procedure Act distinguish between "applications for initial licenses" and other licensing proceedings. Thus, the provisions of sections 5(c), 7(c), and 8(a) do not apply with full effect to initial license proceedings. But nowhere in the act is the term "initial license" made more specific. "The crucial question here from a practical standpoint is whether an application for a modification of a license is an application for an 'initial' license."⁷⁶ The question has been of especial significance with regard to the work of the Federal Communications Commission, and that agency has treated applications to modify a license as applications for an initial license.⁷⁷

Related problems arise out of other aspects of licensing, which are not covered in the definition in section 2(e). Thus, section 9(b) of the Administrative Procedure Act requires that a licensee be given notice of alleged grounds for revocation of his license and an opportunity to demonstrate compliance, but nowhere in the act is the term "revocation" defined. The Federal Communications Commission has held that the requirement of section 9(b) is not applicable to proceedings for renewal of broadcast station licenses upon their expiration.⁷⁸

⁷³ See e.g., CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 34 (1948).

⁷⁴ Davis, "Separation of Functions in Administrative Agencies," 61 *HARV. L. REV.* 612 at 628, n. 37 (1948).

⁷⁵ Cf. *id.* at 638.

⁷⁶ *Id.* at 639.

⁷⁷ 47 *Code Fed. Reg.* §1.857. See L. G. Caldwell in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES*, Warren ed., 98 (1947).

⁷⁸ *In re Application of the Northern Corp.* (April 28, 1948), PIKE & FISHER, *ADMINISTRATIVE LAW*, 34b.63-1.

The holding of the commission can, it is true, be supported by a literal reading of section 9(b). One wonders, however, whether the result reached does not unduly limit the applicability of that section in proceedings under the Communications Act. Is not deprivation of a license by refusal to renew substantially like a revocation proceeding and should not the same procedural safeguards apply?

*Sanctions and Relief*⁷⁹

The definitions in section 2(f) of the Administrative Procedure Act are important mainly because of their effect upon the law of judicial review. Prior to the act, cases involving "benefits" or "gratuities" conferred by the state were not subject to judicial review in the absence of express statutory provision therefor. In such cases of grants by the government, the courts have felt that the private parties concerned were the recipients of "state bounties" and the courts have been reluctant to intervene where the right to resort to the courts has not been given by the legislature.⁸⁰ In these "gratuity" cases, the silence of Congress has been treated as barring review, as against the normal rule where property or personal "rights" are involved, that "the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them."⁸¹

Under section 10 of the Administrative Procedure Act, "agency action" is subjected to judicial review, and under the definitions in section 2(f), the term "agency action" would seem to be sufficiently broadened as to subject "benefit" cases of the type mentioned above to judicial review. The term "relief" in section 2(f), which as we shall note, comes within the meaning of "agency action" in section 2(g), includes the "grant of money, assistance, license, authority, exemption,

⁷⁹ A.P.A. §2(f): "SANCTION AND RELIEF.—'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person."

⁸⁰ See Black, "The 'Jurisdictional Fact' Theory and Administrative Finality," 22 CORN. L.Q. 515 at 519 (1937).

⁸¹ *Estep v. United States*, 327 U.S. 114 at 120, 66 S.Ct. 423 (1946).

exception, privilege, or remedy" and the "taking of any other action upon the application or petition of, and beneficial to, any person." Under this, the "gratuity" cases of the type we have been discussing should be treated as are cases dealing with other kinds of administrative action for the purposes of judicial review under the Administrative Procedure Act. In the "gratuity" cases, as in those involving "rights," the silence of Congress should not now be enough to bar review.⁸²

The definition of "relief" in section 2(f) of the Administrative Procedure Act may thus have the effect of greatly enlarging the availability of judicial review. The broad scope which is given to the term "sanction" in that section can have a similar effect, for all of the acts named in the definition of that term should now likewise be reviewable under section 10. It is because of their possible effect upon the availability of judicial review that the definitions in section 2(f) are significant. If the interpretation considered above is the correct one, it means that the principle of *Stark v. Wickard*⁸³—that the silence of Congress is not enough to preclude review—is now the basic one in the law of judicial review. Cases like *Switchmen's Union v. National Mediation Board*⁸⁴ are henceforth to be considered as deviations from the normal rule.

*Agency Action*⁸⁵

The definition of "agency action" in section 2(g) of the Administrative Procedure Act refers back to the terms defined in sections 2(c), (d), (e) and (f). What has been said above with regard to the definitions in those sections is thus of equal relevancy at this point. The term "agency action" is used in the act itself only in section 10.⁸⁶ The definition of the term in section 2(g) is of cardinal significance for the purposes of judicial review under the act, for section 10, generally speaking, subjects all final "agency action" to review.⁸⁷ As

⁸² For cases taking this view, see *Snyder v. Buck*, (D.C. D.C. 1948) 75 F. Supp. 902; *Unger v. United States*, (D.C. Ill. 1948) 79 F. Supp. 281; *Fischer v. Haerberle*, (D.C. N.Y. 1948) 80 F. Supp. 652. Cf. *United States ex rel. Margolin v. Shank*, (D.C. Conn. 1948) 83 F. Supp. 247.

⁸³ 321 U.S. 288, 64 S.Ct. 559 (1944).

⁸⁴ 320 U.S. 297, 64 S.Ct. 95 (1943).

⁸⁵ A.P.A. §2(g): "AGENCY PROCEEDING AND ACTION.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

⁸⁶ Cf. A.P.A., Legislative History, p. 284, n. 4.

⁸⁷ Subject, of course, to the exceptions in section 10.

stated by the Senate Judiciary Committee, "the term 'agency action' brings together previously defined terms in order to simplify the language of the judicial review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction."⁸⁸

In this respect, the wide scope given by the prior subdivisions of section 2 of the Administrative Procedure Act to the terms which are included in the definition of "agency action" in section 2(g) should be especially noted. This may have the effect of greatly enlarging the availability of judicial review, as was shown, for example, in our discussion of the terms "sanction" and "relief." One should also note that, under the act, "agency action" includes not only the taking of affirmative action with regard to the processes included in section 2(g) but also the "denial thereof, or failure to act." "Agency action" as defined in section 2(g) would thus seem to include agency inaction. Indeed, for the purposes of judicial review, the term can be construed as broad enough to subject to review practically anything done or refused to be done by any agency which affects a private person.

One should, perhaps, interpose a caveat here. Wide as is the scope of the term "agency action" for the purposes of judicial review, it is not unlimited. The particular action sought to be reviewed must come within the terms "rule, order, license, sanction, relief" as they are defined in sections 2(c), (d), (e) and (f) of the Administrative Procedure Act. And there is still a residuum of administrative activity, narrow though it may be, which is not covered by those terms. As the Court of Appeals for the District of Columbia pointed out in *Hearst v. Federal Communications Commission*,⁸⁹ the Administrative Procedure Act "does not provide for judicial review for everything done by an administrative agency." The basis of the action in that case was that the commission had libelled radio station WBAL in its report commonly referred to as the "Blue Book" and had exposed plaintiff, the station's owner, "to public shame, obloquy, contumely, odium, contempt, ridicule, aversion, degradation and disgrace."⁹⁰ The court refused to grant declaratory relief, although "we agree with the appellant that this complaint pictures a legal wrong."⁹¹ Review under section 10 of the Administrative Procedure Act is available only where legal wrong

⁸⁸ A.P.A., Legislative History, p. 197-198.

⁸⁹ (App. D.C. 1948). 167 F. (2d) 225 at 227.

⁹⁰ Id. at 226.

⁹¹ Ibid.

is suffered because of any "agency action," and, said the court, the definition of that term in section 2(g) of the act obviously does not cover an act such as the publication of the Blue Book. "Broad as is the judicial review provided by the Administrative Procedure Act, it covers only those activities included within the definition of 'agency action.'"⁹²

Conclusion

The definitions in section 2 of the Administrative Procedure Act which have been analyzed above are important chiefly because of their effect upon the operation of that act. But there is also the broader question of administrative terminology. Although the Administrative Procedure Act does not standardize nomenclature throughout the field of administrative law by requiring federal agencies to employ basic terms as they are defined in the act, it is still to be hoped that the act will have a beneficial effect upon the administrative practice in this respect. It is true, as Dr. Allen points out, that the inconvenience resulting from confusion in terminology in the existing administrative practice "is one of form rather than of substance" since there is no distinction in actual legal effect,⁹³ regardless of the term employed. Yet still there is much resulting confusion which can easily be avoided. Thus, there is no reason today why the Treasury Department should continue to label its regulations as "decisions," when the Administrative Procedure Act expressly defines such statements as "rules," or why so many agencies continue to label certain of their regulations as "orders," when the Administrative Procedure Act expressly reserves that term for the disposition of adjudicatory matters.

In other cases, the use of incorrect terminology may result in more than mere confusion. This is especially true of the basic distinction between legislative and adjudicatory functions. The terming of a particular function as "legislative" rather than "judicial" may have substantial effects upon the private parties concerned. If the function is treated as legislative in nature, there is no right to notice and hearing or to a reasoned decision, unless the enabling act expressly requires them. If a hearing is held in accordance with a statutory requirement it normally need not be a formal one, and the scope of judicial review is not as broad as it might otherwise be.⁹⁴ The characterization of a

⁹² Id. at 227.

⁹³ ALLEN, LAW AND ORDERS 46 (1945).

⁹⁴ See Schwartz, "Delegated Legislation in America—Procedure and Safeguards," 11 MOD. L. REV. 449 at 462 (1948).

particular administrative act as legislative instead of judicial is thus of great significance to the parties concerned.

The Administrative Procedure Act, in sections 2(c) and (d) seeks to resolve this key problem—whether a particular function is to be treated as legislative or adjudicatory. Its attempt here is probably adequate for the purposes of subsequent provisions of the act. However, if the definitions of the act in this respect are followed generally, there may be some undesirable consequences. Thus, if all agency determinations of particular applicability and future effect are henceforth to be considered as “rules” by the courts, it will mean a substantial lessening of the procedural safeguards which have heretofore been imposed in such cases. If such cases are to be treated solely as exercises of legislative power, there will be no requirement of notice and hearing, unless they are prescribed by the relevant enabling act.

In other respects, the legislation-adjudication distinction as defined by sections 2(c) and (d) of the Administrative Procedure Act could have a salutary effect if generally adopted. This is especially true insofar as the treatment of licensing as a judicial function is concerned. The confusion in the cases as to whether licensing is legislative or judicial in nature is one which should be resolved as far as possible. And the Administrative Procedure Act would clearly seem to adopt the proper approach in its treatment of licensing as a judicial function. From the point of view of those affected, it is desirable that the exercise of the licensing power should be conducted in conformity to the safeguards imposed upon administrative exercises of judicial power. The agency action in such cases affects the rights and obligations of particular individuals much as a court decision does.