

**PART FOUR**

**RULE MAKING**

## CHAPTER 13

# Practice and Procedure in the Making of Rules

### 1. Development of Rule-Making Activities

THE adoption of rules by administrative agencies to implement general provisions of statutes was a familiar part of the governmental process in America long before the development of the comparatively recent practice of entrusting substantial adjudicatory responsibilities to such agencies. The first Congress authorized the President to promulgate rules and regulations concerning trading with the Indian tribes.<sup>1</sup> The duty of the Secretary of the Treasury to prescribe regulations under internal revenue laws goes back to 1813.<sup>2</sup>

But until the twentieth century, administrative rule-making powers were ordinarily exercised only in connection with the conduct of the public business—customs, taxes, postal affairs, administration of the public lands, protection of the public health, and similar matters. It was only with the expansion of governmental controls over the fields of trade, business, and finance, and with the development of the now familiar technique of drafting regulatory statutes in purposely vague and broad terms, delegating to an agency the power to fill in the legislative details, that the problem of administrative legislation assumed its present importance. Today, the power to promulgate regulations having the force of law covers a vast range of activities which had long been comparatively immune from governmental control. For example, power is delegated to various agencies to legislate on

<sup>1</sup> 1 Stat. 137 (1790).

<sup>2</sup> 3 Stat. 26 (1813).

such diverse matters as maximum interest rates, margin requirements on security trading, minimum and maximum prices on commodities, and various elements of private employment contracts. The list could be extended indefinitely. It is in connection with the exercise of delegated legislative powers in fields regulating the conduct of private business that the problems as to the procedure to be followed in the promulgation of the rules, as to the legal effect of such rules, and as to their legal validity, become important.

## 2. Classification of Rules

Before considering the various types of rule-making activities, it is necessary to note at the outset the variable nature of the distinction between rule making and adjudication. This is but natural, for agencies often adopt adjudicatory techniques in making rules (e.g., a hearing before a public utility commission to fix electric rates); or adopt rule-making techniques in adjudicating cases (e.g., some licensing procedures). The distinction between rule making and adjudication is not fixed; it is largely a matter of emphasis. Under the Federal Administrative Procedure Act, a functional distinction is adopted, whereby "rule making" includes such matters as price fixing, wage fixing, approval of corporate reorganizations, et cetera, and other types of cases where only a single party is involved and adjudicatory techniques are often employed.<sup>3</sup> But in the classical or traditional sense, rule making is regarded as a function of laying down general regulations, as distinguished from making orders that apply only to named persons or specific situations. It is only in connection with this latter type of rule making that there arise the problems discussed in the following pages.

<sup>3</sup> Sec. 2. As to the distinction, under the act, between "rule making" and "adjudication," see 95 U. PA. L. REV. 621 (1947) and 61 HARV. L. REV. 389, 612 (1948).

Administrative rules and regulations of general application cover a wide range, from details of agency organization to legislative enactments having the force of law. Within these broad limits, there is a general line of division between procedural rules and those whose effect is primarily substantive.

(a) *Procedural rules.* The issuance and publication of procedural rules involve principally the development of a working compromise between the agency's interest in unregulated fluidity of procedure, and the public's interest in being able to ascertain in advance the mechanics which will govern the disposition of a case. As every lawyer knows, the rules of procedure are not infrequently determinative of the outcome of a case.

Even so simple a matter as a statement of an agency's organization may be important. If this is unpublished, it is in many cases almost impossible for persons interested in a matter pending before the agency to discover where to go in order to be heard, or whom to see—yet frequently there may be some particular branch within the agency which alone will lend an attentive ear to a certain plea. Recognizing this, Congress has required in Section 3 (a) of the Administrative Procedure Act that each federal agency publish a description of the agency's organization, including a statement of delegations of authority within the agency and the established methods whereby information may be secured and requests submitted.

The same is true as to rules of practice and procedure. Frequently, available statements covering these points are sketchy and incomplete, failing to reveal the whole process of administration, or the various alternative procedures which may in fact be utilized. Sometimes through mere inertia, and more frequently perhaps through a desire to avoid commitment to any set course of procedure (for once a definite rule

of procedure is established, a person appearing before the agency may justifiably complain of departures therefrom), many agencies have been loathe to adopt or publish detailed procedural rules. So far as federal agencies are concerned, the Administrative Procedure Act of 1946 serves to correct any such tendency. Section 3 of that act requires the publication of a description of the nature and requirements of all formal and informal procedures, together with forms and instructions. Promulgation of definite and explicit rules of practice helps substantially to improve the level of agency performance and to promote public confidence in the fairness and justice of administrative procedures. In the words of the Supreme Court, "The history of American freedom is, in no small measure, the history of procedure."<sup>4</sup>

(b) *Legislative regulations.* But the bulk of administrative rule making deals with regulations implementing the substantive provisions of statutory law. While these take many forms, from advisory opinions written in response to individual inquiries, to formal enactments written in the form and style of statutes, yet running through this heterogeneous mass of quasi-legislative activity there is one fairly definite dividing line. It involves the distinction between interpretative regulations and legislative regulations. The difference is in some respects a matter of form, but it is not without its consequences. If the statute provides a sanction for violation of the regulation, and it is written pursuant to specific delegation of power, then the regulation is legislative. If, on the other hand, the statute does not provide for such delegation of legislative power, and the regulation represents only the agency's opinion as to what the statute requires, then the regulation is interpretative.

(c) *Interpretative regulations.* An interpretative regulation frequently takes the form of an opinion construing the

<sup>4</sup> *Malinski v. New York*, 324 U. S. 401, 414, 65 S. Ct. 781 (1945).

applicable statute. In such cases, while a great deal of weight may be attached to the interpretation, particularly if it is of long standing and if it represents the results of accumulated experience and technical knowledge in a particular field, yet the regulation does not possess any greater authority than that of a well-supported argument in favor of a particular interpretation of a statute. Sometimes, however, a regulation which in legal effect is only interpretative is written as a positive legislative command. Perusal of a regulation may leave a doubt as to whether it is intended to have legislative effect or not. The answer in such cases may be ascertained by an examination of the statute. If the statute fails to delegate express power to make the regulation and provides no sanction for violation of the regulation, then it is merely interpretative, even though cast in the form of a positive requirement of designated action.

From this it is obvious that the general classification of interpretative regulations could be subdivided into many categories. At least three deserve particular mention.

(1) One is the type of regulation that requires the filing of reports, the keeping of records, or the taking of other steps designated to assist the agency in its task of administration. The agencies must depend on various informal and sometimes extralegal sanctions to enforce these requirements. While ordinarily the agency is given specific power to make such regulations (under a general grant of authority to make such regulations as may be necessary to carry the statute into effect) yet the regulation is properly classifiable as administrative or interpretative.<sup>5</sup>

(2) More obviously interpretative are such regulations as the Interpretative Bulletins issued by the Wage and Hour and Public Contracts Divisions of the Department of Labor,

<sup>5</sup> See F. P. Lee, "Legislative and Interpretative Regulations," 29 GEO. L. J. 1 (1940); Davis, "Administrative Rules—Interpretative, Legislative, and Retroactive," 57 YALE L. J. 919 (1948).

many of the income tax regulations, and other similar statements which in effect do no more than state the particular statutory interpretation which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.

(3) A third class of interpretative regulations are those which state general discretionary policies to be followed by the agency. For example, an agency given broad discretionary powers in respect to the granting of licenses may formulate a statement of the conditions which must be met in order to obtain a license. In many cases, agencies have thus worked out standards and policies, which in effect control the administrative decision in a wide variety of cases where the agencies have freedom of choice. These various alternatives do not reflect interpretations of a statute; rather, they represent extrastatutory policies.

Judicious use of the power to make interpretative rulings offers an opportunity to correct a woeful lack of adequate public information concerning both the procedure of administrative tribunals and the substance of administrative policies. Despite the flow of rules, regulations, press releases, and interpretative bulletins—which are issued in such abundance that a year's output of federal agencies' regulations may fill more pages than are required for the compilation of all federal statute law—lawyers and laymen alike are baffled by the difficulty of ascertaining from any official source, when confronted with the institution of agency proceedings, just what remedies are open to them, and what ruling the agency may be expected to make in the case. Inability to learn by what procedural rules the case will be heard, or by what process of decision the final determination will be made, breeds general dissatisfaction and leads to charges of unrestrained delegation of authority and star-chamber proceedings. The problem of public information is thus an important

one with the agencies, and it can best be solved by the careful preparation and publication of rules.

An agency of any size cannot very well function without rules of procedure, and it may be supposed that every agency has such rules, at least at a level of interoffice memoranda. But in too frequent cases, the only rules published and made generally available contain so little information as to the actual procedural steps, and the various alternative procedures which may be available, that a person having a case before the agency is at a loss as to how to proceed except upon seeking advice of a representative of the agency, and then because of the partisan position necessarily assumed by agencies in many matters, the person seeking information may entertain understandable doubts as to whether the advice he has received is entirely disinterested. It is for this reason that the Attorney General's Committee strongly urged <sup>6</sup> that each agency be required to make available, and to maintain current, statements describing both formal and informal procedures available in various types of cases, specifying among other things the officers and types of personnel, the various subdivisions of the agency, and the duties, functions, and general authority or jurisdiction of all divisions of the agency in each of the several types of cases handled.

Similar problems are presented in connection with administrative interpretations of the regulatory statutes administered by the agencies. It having become an accepted technique of statutory draftsmanship to establish legislative standards in broad, vague, and general terms, the office of interpretation and construction has become commensurately more important. Without it, those subject to the statutory regulation are at a loss to know what compliance will be deemed to require. For example, the term "employee" may under one statute

<sup>6</sup> Administrative Procedure in Government Agencies, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 195. Sec. 3 of the Administrative Procedure Act of 1946 requires federal agencies to conform to most of these suggestions.



be interpreted to include and under another statute to exclude, those who by common-law tests are independent contractors.<sup>7</sup> Only by the publication of interpretative statements can the public be advised in detail as to the requirements of the statute.

These first two functions of the administrative rule-making power, then, amount to little more than making available to all interested parties full information as to the methods of procedure and the standards of statutory interpretation which will be employed by the agency in making its decisions. The problem is relatively simple.

But greater difficulty is encountered in connection with a third function of administrative rules—i.e., enunciating administrative policies (as distinct from standards of legislative interpretation). In establishing these administrative policies (which, while perhaps in furtherance of a general legislative purpose, go quite beyond the realm of interpretation or construction and into the field of discretionary policy making) the agencies are ordinarily free to choose between the method of formulating a general policy in the form of regulations, and that of working out policy piecemeal by decisions in variant case situations.

In certain cases, the latter method serves important administrative purposes. In a new field, such as television, adjudication of a variety of cases may serve to clarify problems and avoid errors that might result from premature publication of a general rule. Further, the problems of policy presented to some agencies are too complex to permit of codification by quasi-legislation. For example, it would obviously be quite infeasible to provide by regulation under what circumstances

<sup>7</sup> In *Walling v. American Needlecrafts* (C.C.A. 6th 1943), 139 F. (2d) 60, certain homeworkers were held to be employees under the Fair Labor Standards Act; but similar homeworkers were held not to be employees for purposes of Social Security taxes in *Glenn v. Beard* (C.C.A. 6th 1944), 141 F. (2d) 376; and *cf.*, *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

a new utility operation would be licensed as being justified by the public interest, convenience, or necessity.

In some circumstances, perhaps, there are justifiable reasons for keeping confidential the criteria of decision. In cases where the agency regulates conduct in a field where temptation is offered to stray from highest moral standards (the regulation of liquor traffic might be mentioned) it has been suggested that announcement of the furthestmost reaches of permissible conduct would encourage some licensees to go right to that boundary line where the legal merges with the illegal.

But ordinarily, after having attained experience in its field, an agency is able to reach rather definite conclusions on most policy matters. Sometimes, an agency's arrival at this stage is followed by the enactment of regulations. The National War Labor Board, for example, in the early days of its World War II creation, at first decided applications for wage increases on an *ad hoc* basis. As some experience was gained, general regulations and statements of policies were enunciated; and as these were tested in the course of daily case decisions, various amendments and refinements were devised, until after some two years' experience it became fairly possible to ascertain from the agency's rules what its ruling would be in various situations.

The difficulty arises in cases where the agency does not choose to promulgate its fully developed internal criteria as regulations. Then, those dealing with the agency are in the unenviable position of being unable to ascertain the basis on which cases will be decided. The practical difficulties of attempting to bring one's course of conduct into compliance with an administrative policy which must be complied with, but the terms of which can be only guessed, scarcely require elaboration.<sup>8</sup> Lack of knowledge of these criteria, further, in-

<sup>8</sup> Handler, "Unfair Competition," 21 *IA. L. REV.* 175, 259 (1936); Maslow, "Poor Food and Drug Laws," 2 *NAT. LAW. GUILD Q.* 25 (1939).

terferes with the settlement of controversies in the preliminary, informal stage and thus often makes necessary the conduct of formal judicial proceedings which might otherwise be avoided. There are still broader reasons for the promulgation of such internal administrative policies. If cases are determined on the basis of such a criterion, rather than by the exercise of judgment in the particular case, both the parties and reviewing court are in fairness and justice entitled to know it.<sup>9</sup>

Aside from statutory provision, such as Section 3 of the Federal Administrative Procedure Act of 1946, there is little authority to require the promulgation into interpretative rules of such internal criteria.<sup>10</sup> But the cause of good administration is substantially furthered by the exercise of this function of the administrative rule-making powers.

### 3. Hearings in Connection with the Adoption of Rules

While the legal requirements as to giving notice and conducting hearings precedent to the promulgation of rules<sup>11</sup> are rather attenuated, save for specific requirements of occasional state statutes and the general requirement imposed on federal agencies by Section 4 of the Administrative Procedure Act, yet the actual practice recognizes the practical need of utilizing this device. There is general recognition that good administration requires an agency to obtain and consider the comments of all interested parties as to the contents of proposed rules.

It is further clear, and generally conceded, that the type of hearing which should precede the administrative promulgation of rules is quite different in character and scope than

<sup>9</sup> Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 296.

<sup>10</sup> But see *Heitmeyer v. Federal Communications Commission* (App. D. C. 1937), 95 F. (2d) 91.

<sup>11</sup> Discussed *supra*, Ch. 4.

the hearings conducted by legislative committees. The administrative agency, starting where the legislature left off, is necessarily concerned with minutiae that the legislature could not take time to consider; and there is accordingly a need for painstaking and detailed investigation, and assembling of facts, going far beyond the general statements and arguments of policy which are characteristic of legislative hearings on pending bills. Further, the fact that the administrative agency's personnel does not comprise a democratically elected group representing the diverse viewpoints of their constituents, but is rather an unrepresentative special interest group, further emphasizes the necessity of hearings. It is only in this way that the agency can obtain the breadth of view necessary to the most successful conduct of its work.

There are thus two prime objectives in the information-gathering activities that precede the adoption of rules by administrative agencies. The first is to assure wise administrative action. The second is to make sure that those whose interests will be directly affected by the rule are satisfied that their interests have received fair and adequate consideration. Granting opportunity to those primarily affected to participate in the rule-making process not only satisfies them of the fairness of the procedure, but is effective also to enlist their acquiescence and co-operation in carrying out the requirements of the rule as finally adopted.<sup>12</sup> Accordingly, the hearing procedures should be so devised as best to attain these two objectives.

The first step in the procedure should be, ideally, publication of notice of an intent to make a rule. This serves fair notice on those concerned, and gives them an opportunity to adjust themselves to meet new requirements. The giving of such notice, too, is frequently productive of suggestions which

<sup>12</sup> Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 297.

may be of value to the agency in the second step of the procedure, which is investigation.

Factual investigation by the agency, preparatory to the promulgation of a rule, is of all-embracing importance. Public hearings are not always productive of precise factual data; yet it is the duty of the agency to make sure that it has obtained full and accurate factual information as to all relevant factors. Only by careful investigation can this be achieved. Such investigation, further, often serves to formulate issues for further discussion.

After the information has been assembled, it is the best practice, wherever feasible, for the agency to publish a tentative draft of the proposed rule. This serves a fair warning of what may be expected, and serves to facilitate the execution of the next and crucial part of the task—exposing the proposal to the test of public criticism and comment, before the rule is formally put into effect.

The mechanics of this final step—obtaining participation in the actual rule-making process of those whose interests will be directly affected—must of course vary in different types of situations. In some cases, informal conferences may serve this purpose better than a formal public hearing. This may well be true where the group affected is small (as in the case of regulations of the Federal Reserve Board) or where the regulation involves primarily technical questions (as in the case of rules of the Federal Communications Commission relating to broadcasting, or the accounting rules promulgated by the Securities and Exchange Commission).<sup>13</sup> The Administrative Procedure Act of 1946, Section 4, requires federal agencies to afford interested parties an opportunity to participate in the rule-making procedure at least to the extent of submitting written data, and further requires that there be

<sup>13</sup> Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 64-68.

opportunity for oral participation where some other statute requires a hearing. An interesting device, sometimes employed very effectively by agencies operating in fields where broad arguments of social and economic policy are tempered by more or less technical considerations—as in the field of unemployment insurance—is that of an unofficial tripartite advisory committee. Composed so as to give equal representation to conflicting points of view—often industry, labor, and the public—it is the function of such a committee to work out technically acceptable solutions to problems complicated both by administrative difficulties and by emotional clashes between competing special interest groups. In devising rules by which it shall be determined, for example, whether an unemployed worker is “available for work,” or whether an employee injured at his job is “totally incapacitated,” such tripartite committees can frequently devise a formula which will be reasonably satisfactory to all affected groups and will at the same time be administratively feasible.

But even in cases where there is no unalterable need for a public hearing, it is still advisable to supplement informal conferences by such a hearing, in order to make sure that no one can justifiably complain that his special interests were overlooked. At some stage of the proceedings, therefore, a public hearing should be held in almost every type of case.<sup>14</sup>

The scope of such hearing, and the general manner of its conduct, is again a problem for the wise discretion of the individual agency. The practices of the federal agencies are discussed in the report of the Attorney General's Committee.<sup>15</sup> Where the regulation involves many broad problems, incapable of reduction to precise issues, a general informatory hearing is perhaps necessary (as if, for example, the question

<sup>14</sup> Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 301 *et seq.*

<sup>15</sup> “Administrative Procedure in Government Agencies,” Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 111 *et seq.*

is whether a utility commission should extend its field of regulatory activity to fleets of trucks operated by private carriers, and if so, how many aspects of their operations should be regulated—whether the rules should extend only to safety requirements or whether they should cover also such matters as maximum hours, overtime pay, minimum wages, et cetera). In such cases, it is ordinarily impractical to do more than to give all interested parties an opportunity to present their arguments. On the other hand, where the affected group is small, or where the issues involved can be formulated in fairly definite terms, much more satisfactory results can be obtained by utilization of adversary hearings, where witnesses are examined and cross-examined, and opportunity is given for the filing of formal briefs and full oral argument. A prime example is that of public utility rate hearings, where a quasi-legislative function is carried out by quasi-judicial procedure.

Another significant method of assuring effective public participation in rule-making procedures is to afford interested parties a statutory right to petition the agency for the adoption of a proposed rule, or the amendment of an existing rule. Section 4 of the Administrative Procedure Act of 1946 provides this as to the federal agencies.

Employment of these successive steps—first, announcement of the intent to formulate a rule; second, investigation; third, issuance in draft form of a proposed rule; fourth, exposing the proposed rule to the test of public examination and criticism—has been demonstrated by experience to be in most cases the best method by which to insure wise administrative action, even though not a matter of legal requirement, except as specific statutory provisions may so enact. There are cases, to be sure, where some of the steps may be omitted, as in the adoption of purely procedural regulations, where an agency

can sometimes proceed with safety on the basis of its own knowledge. But departures from this model procedure should not be sanctioned unless the desirability of the departure is clear.

#### 4. The Necessity of Findings

(a) *In absence of specific statutory provision.* Where the power of an administrative agency to make a certain type of order depends on the existence of particular facts, it is obviously necessary to determine that such facts exist before the order can properly be made. Initially and primarily, it is the duty of the agency to make its own finding and determination as to the existence of the requisite factual situation, before it takes any affirmative action.

As a matter of orderly procedure, it is obviously the preferable practice for the agency to make a formal determination and finding as to the existence of such facts, in support of its order. This has been laid down as a positive requirement in several cases wherein an administrative order or regulation has been held invalid because of the failure of the agency to make the necessary findings.<sup>16</sup>

Conversely, where the controlling statute does not condition the agency's regulatory power upon the existence of certain facts, there is no necessity for the agency to make any explanatory findings or declarations of policy in connection with the promulgation of its orders.<sup>17</sup>

Where the agency is authorized to make regulations of a generally applicable character, it is somewhat uncommon for

<sup>16</sup> *Wichita Railroad & Light Co. v. Public Utilities Commission of State of Kansas*, 260 U. S. 48, 43 S. Ct. 51 (1922); *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283 (1924); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935); *United States v. Baltimore & O. R. Co.*, 293 U. S. 454, 55 S. Ct. 268 (1935). See annotation in 146 A. L. R. 209.

<sup>17</sup> *Cf.*, *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 56 S. Ct. 159 (1935).



the legislature to condition the exercise of the power on the existence of particular facts. This requirement, as pointed out in the last-cited case, is more often found where the contemplated administrative order is directed primarily against a particular party or group. It is, therefore, sometimes said that when an agency acts in a legislative capacity by making a rule, regulation, or order of general application, it need not make findings. But it would seem that the distinction is not primarily the nature of the order; rather, it is a question as to what the legislature has required.

The requirement that express findings be made in support of the order, in those cases where the legislature has conditioned the agency's power to issue an order upon the existence of specified conditions, has been criticized,<sup>18</sup> and there is some suggestion that the doctrine requiring findings may in time be dropped as an unnecessary safeguard against hasty or ill-advised administrative action.<sup>19</sup> Tending in this direction are cases which insist that the doctrine may not be applied technically, so as to require a finding on every conceivable relevant factor,<sup>20</sup> and cases which hold that the proper remedy (in cases where the agency has failed to make the required findings) is not to set the order aside, but rather to remand it to the administrative agency and give it an opportunity to perfect its record by making formal findings.<sup>21</sup>

(b) *Statutory requirements.* Court-imposed requirements as to the making of findings to support administrative orders and regulations are far less rigorous than the requirement

<sup>18</sup> 61 A. B. A. REP. 720, 775 (1936).

<sup>19</sup> *Twin City Milk Producers Ass'n v. McNutt* (C.C.A. 8th 1941), 122 F. (2d) 564.

<sup>20</sup> *Andree & Seedman, Inc., et al. v. Administrator of Wage and Hour Division of United States Department of Labor* (App. D. C. 1941), 122 F. (2d) 634.

<sup>21</sup> *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C.C.A. 7th 1941), 120 F. (2d) 258; *Twin City Milk Producers Ass'n v. McNutt* (C.C.A. 8th 1941), 122 F. (2d) 564.

quite often imposed by legislatures,<sup>22</sup> providing that the rules and regulations issued by the agency must be based on definite findings, which must in turn be supported by evidence taken at a formal hearing. In this type of case, the findings concern not only the existence of a general factual situation on which the agency's power is conditioned, but must further demonstrate in detail the reasonableness of the order or regulation. Such provisions, it seems clear, require extensive participation in the rule-making procedure by the private parties affected (because they must have full opportunity to present evidence, cross-examine witnesses, et cetera) and further require clear and close thinking on the part of the administrative draftsmen, thus tending to promote carefully drawn rules. If it is necessary to have such statutory provisions to gain these results, the practice of putting such requirements into the statutes should be continued. But if, on the other hand, free public participation and careful, exacting administrative draftsmanship can be achieved without these requirements, there is but little need for their continuance. Such statutory requirements are burdensome, in requiring the application of the procedures of a judicial trial to administrative rule making. The effectiveness of these procedures is inevitably limited by distinctive characteristics of rule-making activities, where the issues are complex, numerous, and not clearly defined; where the interests of the parties concerned are so diverse as to be frequently incapable of alignment into classes; and where the final outcome involves essentially not a determination as to fact and law, but primarily a judgment as to the future consequences of proposed rules.

<sup>22</sup> For example, Food, Drug and Cosmetic Act, 52 Stat. 1055, 21 U.S.C. § 371 (e); Agricultural Marketing Agreements Act, 50 Stat. 246, 7 U.S.C. § 608 (c); Bituminous Coal Act, 50 Stat. 75, 15 U.S.C. § 829; Fair Labor Standards Act, 52 Stat. 1064, 29 U.S.C. § 208.

## 5. Drafting of Rules

While it is not unusual for administrative agencies to consult with representatives of the parties primarily affected as to the actual drafting of the administrative rules (and this is frequently done by submitting for comment and criticism a tentative draft of a proposed rule), yet the actual formulation of the text of the rule is ultimately the sole responsibility of the agency.

Because of the greater necessity for close attention to minute detail, drafting of administrative rules and regulations presents difficulties which can often be avoided in legislative draftsmanship. There is a greater danger that some obscure but nonetheless important contingency will not be provided for; and to meet this danger, a practice has evolved of providing a deferred effective date. This gives those affected a grace period in which to adjust their affairs to meet the new requirements, and also gives an important opportunity to correct any oversights which may have occurred. Legislation providing for the deferred effectiveness of regulations having statutory effect (with appropriate exceptions to prevent undue delay in emergency situations) is to be recommended.<sup>23</sup>

A somewhat more drastic provision which is occasionally encountered requires that the administrative regulations be laid before the legislature for its approval or disapproval. Several variants of this policy are found. It may be simply provided that the regulations be laid before the legislature for its information. As to this requirement, there is little room

<sup>23</sup> See "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 115. Sec. 4 of the Administrative Procedure Act of 1946 requires (in the case of federal agencies) that substantive rules (with some stated exceptions) must be published at least thirty days prior to the effective date, except "as otherwise provided by the agency upon good cause found and published with the rule."

for objection, although there is room for considerable scepticism as to the effectiveness of such procedure in encouraging legislative examination of the administrative activity; a more effective way of accomplishing this result would be to require the annual submission of detailed reports as to the agency's activities. Sometimes it is provided that the regulation shall be noticed for legislative review and possible amendment or annulment within a specified period. While of course the legislature always has this power, nevertheless such provision does have a very real effect, in that it brings the regulations before the legislative body, and facilitates the making of an attack by interested parties on the challenged regulation. A third type of proviso, far more stringent than the others, decrees that the regulation shall not remain in effect beyond a limited period unless within such period it is approved and ratified by the legislature. Where this requirement is adopted, no more than legislative procrastination is required to abolish a rule which might have met with overwhelming legislative approval.

While not unknown in American practice,<sup>24</sup> the theory of laying administrative regulations before the legislature has been far more popular in England than in this country. The English experience, particularly since the adoption of the Statutory Instruments Act of 1946,<sup>24a</sup> has demonstrated the great practical effectiveness of this simple device.<sup>25</sup>

<sup>24</sup> E.g., the Reorganization Act, 53 Stat. 562, 5 U.S.C. §§ 133 c-d.

<sup>24a</sup> 9 & 10 Geo. VI, c. 36; 39 Hallis. Stat. 783.

<sup>25</sup> Under the English practice, a Statutory Instruments Committee in the House of Commons (or its counterpart in the House of Lords) examines administrative regulations to determine whether the special attention of Parliament should be directed thereto on the grounds (among others) that the regulation is not open to challenge in the courts, or appears to make unusual or unexpected use of the powers conferred, or purports to have unauthorized retrospective effect. The accomplishments of this Committee are discussed in a provocative article by J. A. G. Griffith, "Delegated Legislation—Some Recent Developments," 12 MODERN LAW REV. 297 (1949).

## 6. Publication of Rules

The unavailability of administrative rules and regulations (many of which have, to a substantial degree, the force and effect of laws), has long been a source of practical difficulty. As early as 1920, John A. Fairlie wrote an article<sup>26</sup> urging the adoption of a uniform system for publication of rules, regulations, and orders adopted by executive agencies in the federal government. His arguments attracted the attention of other writers, and the subject received growing attention in periodical literature during the ensuing fifteen years.<sup>27</sup> Attention was directed to the contrast between the situation in the United States, where it was often impossible to ascertain the provisions of a governing regulation except by discovery of the original thereof within the offices of the issuing agency,<sup>28</sup> and in England, where rather comprehensive requirements for advance publication of administrative rules had been in effect since 1893.<sup>29</sup>

However, neither the growing literature on the subject nor the attention directed to the English situation led Congress to take any action. As late as 1933, the President rejected a suggestion by a group of government officials that a daily publication be instituted to print administrative rules, orders, and regulations.<sup>30</sup> The following year, however, official in-

<sup>26</sup> "Administrative Legislation," 18 MICH. L. REV. 181 (1920).

<sup>27</sup> See James H. Ronald, "Publication of Federal Administrative Legislation," 7 GEO. WASH. L. REV. 52 (1938) for a comprehensive survey of the studies which have been made. An outstanding article is that of Erwin N. Griswold "Government in Ignorance of Law—A Plea for Better Publication of Executive Legislation," 48 HARV. L. REV. 198 (1934).

<sup>28</sup> Erwin N. Griswold testified, for example, that in 1930 he found that certain Treasury Department bond regulations were available only in typed form in the Treasury Department's Bond Division. Hearings on H. R. 11337, 74th Congress, before subcommittee II of House Judiciary Committee, Feb. 21, 1936.

<sup>29</sup> See Cecil T. Carr, DELEGATED LEGISLATION (1921), 36; The English statute is 56 & 57 Vict., c. 66.

<sup>30</sup> Ronald, "Publication of Federal Administrative Legislation," 7 GEO. WASH. L. REV. 52, 65 (1938).

terest in the problem became at last aroused when it was discovered that a hapless individual had been arrested, indicted, and held in jail for asserted violation of an administrative regulation which had in fact (inadvertently, it appears, and without the knowledge of the prosecuting officials) been repealed prior to his arrest. The case involved a gentleman named Smith, who had been arrested for alleged violation of one paragraph of the N.I.R.A. Petroleum Code. The government appealed from an adverse decision in the lower courts, and shortly before the case was scheduled for argument in the Supreme Court, the Justice Department discovered that the paragraph in question had been dropped from the Code. The Justice Department moved, successfully, to dismiss the appeal.<sup>31</sup> Upon the argument of another case at the next term of court, involving the same Code,<sup>32</sup> the situation was referred to in the oral arguments, and Justice Brandeis extensively interrogated government counsel. Considerable newspaper publicity resulted, and in the same year the Federal Register Act was passed.<sup>33</sup>

The Federal Register Act, providing for the publication of presidential proclamations and such "classes of documents as the President shall determine from time to time to have general applicability and legal effect" has resulted in making widely available the rules and regulations issued by federal agencies. It has not, to be sure, eliminated the difficulty of locating the particular regulation with which one may be concerned, but at least it is now possible to make the search in any well-equipped library.<sup>34</sup>

<sup>31</sup> *United States v. Smith*, 293 U. S. 633, 55 S. Ct. 345 (1934).

<sup>32</sup> *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935).

<sup>33</sup> Act of July 26, 1935; 49 Stat. 500, 44 U.S.C. § 301.

<sup>34</sup> A very useful article, describing the most convenient methods of utilizing the wealth of administrative legislation printed in the *Federal Register*, is Wigmore, "The Federal Register and Code of Federal Regulations: How to Use Them—If You Have Them," 29 A. B. A. J. 10 (1943). In similar vein is Lavery, "The Federal Register—Its Present Day Meaning for the Practicing

The problem of locating the applicable regulations is facilitated by the publication of the Code of Federal Regulations, originally authorized by Section 11 of the Federal Register Act, and published periodically since 1939. In this publication, federal administrative regulations of current legal effect are codified under fifty titles, each of which is in turn divided into several parts.

Publication of the regulations of state agencies presents additional problems because in many states the promulgation of new regulations is comparatively infrequent, and the volume of new rules scarcely justifies frequent periodical publication. Provisions are found in several states for the publication of a state code, embracing all currently effective rules and regulations of state agencies; and in a number of instances, various expedients are adopted to make readily available, at quarterly or semiannual intervals, supplemental information.<sup>85</sup>

Lawyer," 7 F. R. D. 625 (1948). Other articles discussing the details of the act are found in 49 HARV. L. REV. 1209 (1936); 4 GEO. WASH. L. REV. 268 (1936); 31 ILL. L. REV. 357 (1936).

<sup>85</sup> *California*, Government Code, §§ 11371, 11380, 11409; *Connecticut*, Public Act No. 67, 1945; *Indiana*, Annotated Statutes, § 60-1505 (Burns Supp. 1946); *Michigan*, Annotated Statutes, §§ 3.560 (7)-(18); *Minnesota*, Annotated Statutes, §§ 15.045-7; *North Dakota*, Revised Code, §§ 28-3203-3; *Ohio*, Gen. Code Ann. §§ 154-65; *Wisconsin*, Statutes, §§ 35.93, 227.03. See N. L. Nathanson, "Recent Statutory Developments in State Administrative Law," 33 IA. L. REV. 252 (1948).