

MEMORANDUM IN SUPPORT OF STATEMENT OF THE
ADMINISTRATIVE CONFERENCE ON ABA RESOLUTION
NO. 1 PROPOSING TO AMEND THE DEFINITION OF
"RULE" IN THE ADMINISTRATIVE PROCEDURE ACT *
(NOV. 23, 1973)

INTRODUCTION

The ABA's Resolution No. 1, as implemented by the corresponding Recommendation, would amend the definition of "rule" contained in 5 U.S.C. §551(4) as follows (bracketed words would be deleted, italicized word would be added) :

"rule" means the whole or a part of an agency statement of general [or particular] applicability and future effect designed to implement, interpret or prescribe law or policy or [describing] *describe* the organization, procedure or practice requirements of an 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 on any of the foregoing.]

In approving the ABA proposal, the present recommendation urges the same course of action submitted to the Assembly by the Committee on Rulemaking and Public Information last June. The text of the proposed Statement has been considerably altered, however, to embrace some points that were then raised. Even this change does not reflect the intensive reconsideration that has been devoted to this subject by the Committee with the help of the Conference staff—reconsideration which led to rejection of any vastly revised approach for the reasons discussed below.

Of all the ABA proposals, Recommendation No. 1 most naturally invites a reexamination of the fundamental structure of the Administrative Procedure Act. The main purpose of the APA's definition of "rule" and "order" is to establish which of the APA's two principal classes of procedural requirements is applicable to the various types of agency action. Some question this basic approach on the ground that the classes of standardized required procedure should be more than two. Some assert, even more fundamentally, that the nature of the required procedure should be fixed

* Prepared by the staff of the chairman's office.

not by the applicability and effect of the agency action in question, but by the nature of the issues involved. (Conference Recommendations 71-6 and 72-5 arguably support this approach.)

The present proposal in no way intends to foreclose examination of such fundamental questions by the Conference in the future. However, after considerable exploratory investigation, the Committee on Rulemaking and Public Information concluded that such examination was not feasible in connection with the Conference's Statement on ABA Recommendation No. 1. Last June, in speaking to the various provisions of the APA addressed by other portions of the ABA "package," the Conference necessarily took as a given the basic framework of the Act upon which those provisions rested. That course remains sound in light of the purpose of the Conference Statement, which is to provide a formal Conference position with respect to legislative proposals expected to reach the Congress in the near future. Within that context, the Committee deems the issue to be not whether the ABA Recommendation No. 1 establishes the optimum structure for the administrative process, but whether it makes a discernible improvement within the structure that already exists. On that basis, the Committee believes ABA Recommendation No. 1 should be approved.

PRINCIPAL PURPOSE OF ABA RECOMMENDATION NO. 1

The aim of the ABA proposal, as the Committee views it, is a modest one. It seeks to bring the present definitions of "rule" and "order" into accord with what is in fact the commonly understood meaning of those terms.

The principal change is the elimination of the words "or particular" from the present definition of rule. Early drafts of the Act defined "rule," in accordance with the accepted meaning, as "any agency statement of general applicability." The words "or particular" were added at the eleventh hour—after enactment by the Senate. H. Rep. No. 1980, 79th Cong., 2d Sess. App. A, p. 283 note 1 (1946). The House Judiciary Committee explained that the "change of language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rulemaking addressed to named persons." The phrase was added, in Professor Davis's view, "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." Davis, *Administrative Law Treatise* §502, at 296 (1950). The phrase has remained a source of puzzlement to prac-

tioners and students of administrative law. As Professor Davis has observed, under a literal application of the words almost every agency process would qualify as rulemaking; "adjudication" would cover nothing but licensing, and that only because the statute specifically says so. Davis, *Administrative Law Treatise* §502, at 295 (1958). Whatever fears may have prompted the insertion of this confusing phrase when the new legislation was being enacted, there is nothing to justify its retention. The fact that the Act's present definition of "rulemaking" technically embraces much more than the term commonly connotes confuses intelligent professional discourse concerning administrative procedures; it may also distort Congressional dispositions concerning them; and may encourage the recent tendency of the courts to blur the practical distinctions between rulemaking and adjudication requirements. See, e.g., *Mobil Oil Corp. v. FPC*, 483 F.2d, 1238, 1250-54 (D.C. Cir. 1973).

The second major change in language effected by the ABA Recommendation is the elimination of the specifying clause at the end of the definition which asserts that all agency statements (of future effect) on certain subjects are rules—notably, all prescriptions of rates. This deletion, in accord with the fundamental rationalizing principle sought to be achieved by the amendments, would make agency statements on those subjects either rules or orders, depending upon whether they are in general or of particular applicability. Some members of the Committee consider this at least a small step towards making the choice between rulemaking and adjudicatory procedures turn on the nature of the issue involved rather than the nature of the action contemplated. The deletion would not, in fact, require that different issues within a single proceeding be given varying treatment (rulemaking or adjudication) according to their character; but it would at least add an element of selectivity to the existing provision, which indiscriminately accords the same procedural treatment to all proceedings that happen to involve the subjects specified in the second clause of Section 551(4).

PROCEDURAL EFFECTS

The "understandings" numbered (1) through (5) set forth at the end of the first paragraph of the proposal are self-explanatory and require no discussion here. They are clarifying rather than operative provisions, designed to forestall any misunderstanding of the import of the Conference endorsement. The last two para-

graphs of the proposed Statement, on the other hand, do constitute separate Conference action, and to explain them it is necessary to consider in some detail and procedural effects of the definitional change approved in the first paragraph.

(1) *Formal Agency Action*

Agency action of particular applicability and future effect required by statute to be taken on the basis of a record hearing is now formal *rulemaking*, the procedures for which are governed by APA Sections 553 (except subsection (c) thereof), 556 and 557. ABA Recommendation No. 1 converts such action to formal *adjudication*, the procedures for which are governed by APA Sections 554, 556 and 557. The principal difference, therefore, will be exchanging Section 553 (except subsection (c)) for Section 554. This has the following practical effects:

(a) The exemptions of Section 553(a) will be replaced by the exemptions of Section 554(a)—the principal loss in the exchange being the exemption for matters relating to public property, loans, grants, benefits or contracts, which the Conference has already disapproved (Recommendation 69-8).

(b) The notice requirements of Section 553(b) will be replaced by those of Section 554(b). This will not destroy an existing right to broad public notice, since, even under Section 553(b), in rulemaking of particular applicability "personal service" or "actual notice" to the named persons will suffice.

(c) The *ex parte* prohibitions of Section 554(d) will apply to the redesignated proceedings. The Conference has already approved this—and more—in its endorsement of ABA Resolution No. 4.

(d) The separation-of-functions requirements of Section 554(d) will apply to the redesignated proceedings. The Conference has already asserted the desirability of extending these requirements in modified form to *all* formal rulemaking, whether of general or particular applicability. See the Statement concerning ABA Resolution No. 3 adopted last June. The effect of the present proposal is to extend the requirements *in unmodified form* to all rulemaking of particular applicability (redesignated "adjudication") except ratemaking, which is specifically left subject to the modification by virtue of the next-to-last paragraph of the proposal.

In addition to shifting them from Section 553 to Section 554, the proposed amendment would also affect formal proceedings of

particular applicability and future effect by rendering inapplicable to them certain references to rulemaking contained elsewhere in the APA, notably (a) the provision of Section 556(d) authorizing agencies to require in rulemaking that evidence be submitted in writing, and (b) the provision of Section 557(b) authorizing the omission of the presiding officer's initial decision in rulemaking. The next-to-last paragraph of the present proposal seeks to preserve this special treatment for ratemaking, but not for any other redesignated proceedings of particular applicability.

(2) Informal Agency Action

It is evident from the above that the practical procedural effects of the redesignation with respect to formal agency proceedings are relatively minor. With respect to informal proceedings—that is, proceedings not required by statute to be conducted on the record—the effects of the redefinition are substantial in theory but (at least if the last paragraph of the proposal is adopted) not in practice.

The adoption of an agency statement of particular applicability and future effect not required by statute to be based on a record hearing is, under the present definitional structure, informal rulemaking—subject to the procedural protections of Section 553 of the APA. Under the ABA's proposal it will be converted to informal adjudication, for which there is no minimum procedure established by the APA. It appears, therefore, that the proposal will result in a deprivation of all statutory procedural protection. In point of fact, however, it is rare that the notice-and-comment procedures of Section 553 are used to develop informal statements of particular applicability and future effect—perhaps for the very reason that the statute's technical definition of rulemaking does not comport with common understanding.

But to be sure of creating no procedural void where one does not now exist, the last paragraph of the proposed Statement contains a recommendation that agencies continue to provide the protections they currently accord. The proposal submitted last June went further than this, and urged the agencies "to accord informal action of particular applicability and future effect (though reclassified as adjudication) the procedural protections prescribed for informal rulemaking by 5 U.S.C. Section 553." The Committee withdrew from this position because it was not convinced that the notice-and-comment procedures would in fact be appropriate for those reclassified proceedings in which they are not now used.