Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners

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Appendix — Legislative History of Section 8(a) of the Administrative Procedure Act

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I. INTRODUCTION

In his Report on the Regulatory Agencies submitted to the President-Elect on December 21, 1960, Dean James M. Landis urged that agency heads be authorized to delegate functions to subordinates so that they might concentrate upon program planning and policy formulation.\(^1\) Dean Landis pointed out that current workloads made it impractical to expect the heads of most agencies to read the records of hearings, the briefs of counsel, or even the findings of hearing examiners, let alone write their own opinions.\(^2\) He recommended a broad grant of powers to delegate and, to this end, proposed:

1. A revival of the President’s power to submit reorganization plans, which Congress had permitted to expire on June 1, 1959.\(^3\)

2. The exercise of this presidential power (a) to authorize the ICC, CAB, FCC, FPC, NLRB, FTC, and SEC to delegate adjudicatory functions to panels of agency members, single agency members, hearing examiners, or boards of employees, “subject only to discretionary review by the agency en banc on petition by a party in interest”\(^4\) and (b) to make clear, in the case of these same agencies, “that the Chairman’s authority extends to all administrative matters within the agency, including responsibility for the preparation and review of its budget estimates, the distribution of appropriated funds according to major programs and purposes, and the appointment of all personnel, except (i) those whose appointment is by statute vested in the President, (ii) division heads whose appointment must be confirmed by a majority of the agency members, (iii) special assistants, not in excess of three, to each of the members, which appointments shall be made by the respective members.”\(^5\)

3. The creation of an Office for the Oversight of Regulatory Agencies that would generally assist the President “in discharging his responsibility of assuring the efficient execution of those

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2. Id. at 19–20. Data on current workloads of the principal regulatory agencies are set forth in the congressional hearings and reports cited in note 61 infra.
3. Id. at 36–37, 84.
4. Id. at 85.
5. Ibid. Dean Landis also recommended that the reorganization plans should assure that the chairmen of the ICC and FPC would serve at the President’s pleasure, as do the chairmen of the other named agencies. Id. at 84–85.
laws that these agencies administer" and, in particular, "prepare for the President detailed reorganization plans for the regulatory agencies, with prime emphasis on the FPC, ICC, CAB, and FCC."76

Under the Reorganization Act of 1949, a reorganization plan submitted by the President could be disapproved only by a majority of the authorized membership of either house of Congress. A 1957 amendment permitted a simple majority of those present in either house to disapprove a plan. Although Dean Landis suggested that a reorganization plan should be subject to veto only by concurrent resolution of both houses of Congress7 and the Bureau of the Budget requested the restoration of the 1949 constitutional majority requirement,8 a few months after President Kennedy took office Congress extended the Reorganization Act of 1949, as amended in 1957. The President was empowered to submit reorganization plans until June 1, 1963.9

As soon as the Reorganization Act was extended, President Kennedy informed Congress that he would transmit a series of recommendations embodying the Landis proposals for intra-agency delegation of authority.10 Dean Landis, now a Special Assistant to the President, played a major role in the preparation of the reorganization plans that were transmitted to Congress in 1961.

6. Id. at 86–87. (Agencies abbreviated.)
7. Id. at 84.
8. See H. Rep. No. 195, 87th Cong., 1st Sess. 1, 3 (1961). Dean Landis also recommended that the power to propose reorganization plans should be available to the President for a minimum of two, but preferably four, years. LANDIS REPORT 84. The Budget Bureau took the position that "the reorganization plan device should be permanently available to the President and the Congress," but if not, that it should be made available for at least four-year periods. H. Rep. No. 195, op. cit. supra at 3. The Congress voted a two-year extension.
10. Address by President Kennedy, Message to Congress, April 13, 1961, printed in Hearings Before the Subcommittee of Senate Banking and Currency Committee on Reorganization Plan No. 1 of 1961 (SEC), 87th Cong., 1st Sess. 37 (1961). The President stated that he would seek (1) to centralize responsibility for the managerial functions of each regulatory agency in the chairman; (2) to make the chairman responsible for the discharge of these functions to the President, at whose pleasure he would serve; and (3) to authorize "a far wider range of delegations to smaller panels of agency members, or to agency employee boards, and to give their decisions and those of the hearing examiners a considerable degree of finality [subject to] a discretionary right of review of all such decisions, exercisable either upon its [the agency's] own initiative or upon the petition of a party demonstrating to the agency
This Article is concerned primarily with those aspects of the reorganization plans that affect the role of the hearing examiner in proceedings subject to the provisions of sections 7 and 8 of the Administrative Procedure Act (APA). Since the plans do not purport to diminish any authority to delegate provided by the APA, the Article also examines the extent to which the APA authorizes agencies to accord administrative finality to the initial decisions of hearing examiners. Finally, it should be remembered that the statutes governing an agency also determine its authority to accord finality to examiners' decisions. Such statutes may grant broader, or if enacted after the APA narrower, authority than that found in the APA. In the main, the Article does not deal with these statutes.

II. AUTHORITY TO DELEGATE UNDER THE REORGANIZATION PLANS OF 1961

A. PROVISIONS OF PLANS

Six reorganization plans, affecting the SEC, FCC, CAB, FTC, NLRB, and Federal Maritime Commission (FMC), were submitted to Congress during 1961. The six plans conferred identical authority to delegate. For example, the first section of Plan No. 3 for the CAB — the first to become effective — provides that the CAB, in addition to its existent authority, shall have "the authority to delegate . . . any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board," but the grant of this authority that the matter in issue is of such substantial importance that it calls for determination at the highest agency level." Id. at 41, 42.


is not to supersede the requirements of section 7(a) of the APA. The Plan required the Board to retain "a discretionary right to review the action" of its delegate "upon its own initiative or upon petition of a party to or an intervenor in such action." A majority of the Board less one, however, may bring any delegated action to the Board for review. In the absence of any review, the delegated action is deemed to be the Board's action "for all purposes, including appeal or review." The second section of the Plan empowers the CAB chairman to assign Board personnel, including Board members, to perform any functions that the Board may delegate to such personnel or members.\textsuperscript{13}

The plans for the SEC, FTC and FMC were identical with the plan for the CAB in every respect. The plan for the NLRB differed from these plans only in that it did not seek to enlarge the powers of the chairman. The plan for the FCC contained two additional provisions. The first, designed to remove any possibility of conflict between the plan and existing statutes, abolished "the functions of the Commission with respect to the filing of exceptions to decisions of hearing examiners and the function of hearing oral arguments on such exceptions before the entry of any final decision, order or requirement as set forth in subsection (b) of section 409 of the Communications Act of 1934, as amended."\textsuperscript{14}

The second additional provision abolished the FCC review staff created by section 5(c) of the Communications Act of 1934.\textsuperscript{15} Nevertheless, only the plans for the CAB, FTC, and FMC became effective; the plans affecting the SEC, FCC and NLRB were disapproved.\textsuperscript{16}

B. THE PLANS IN CONTEXT OF THE ADMINISTRATIVE PROCEDURE ACT

With specified exceptions that are not presently pertinent, sec-

tions 4, 5, 7, and 8 of the APA, taken together, prescribe the following alternative courses of hearing and decision if the relevant enabling statute requires an agency to make rules or adjudicate cases "on the record after opportunity for an agency hearing":18

(1) The agency may itself preside at the taking of the evidence or it may delegate this task (a) to one or more agency members, (b) to one or more examiners appointed pursuant to section 11 of the APA, 19 or (c) in "specified classes of proceedings," to "boards or other officers specially provided for by or designated pursuant to statute."20

(2) If the agency itself presides at the hearing, the APA permits it to dispense with any intermediate decision and decide the case, with or without the prior submission by the parties of proposed findings and conclusions, oral argument or written briefs. Or the agency may issue a tentative or proposed decision and give the parties an opportunity to file exceptions to it. In most cases, of course, agency heads do not preside at hearings but delegate this function.

(3) If the agency itself does not preside at the hearing and does not, in a specific case or by general rule, require the entire record to be certified to it for initial decision, the presiding officer must decide the case initially. In cases not subject to the separation-of-functions provisions of section 5(c) of the APA (i.e., rule making, "determining ... applications for initial licenses," and "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers"21), any other officer qualified to preside at hearings pursuant to section 7 may make the

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initial decision. The initial decision of the presiding officer (or other officer authorized to make it) may become the final decision of the agency, unless (a) a party appeals from the decision to the agency or (b) the agency reviews the decision on its own motion. On appeal from or review of the initial decisions, the agency has "all the powers which it would have in making the initial decision," except as "it may limit the issues upon notice or by rule."22

(4) If the agency itself does not preside at the hearing but requires the record to be certified to it for initial decision, (a) the officer presiding at the hearing (or other officer authorized to do so) must recommend a decision, except that (b) in rule making or determining applications for initial licenses, the agency may (i) issue a tentative decision or any of its responsible officers may recommend a decision in lieu of a recommended decision by the presiding (or other qualified) officer;23 or (ii) dispense with any intermediate decision "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."24 Neither the recommended decision of the presiding officer or other responsible agency officer nor the tentative decision of the agency can become the agency's "final" decision, even in the absence of an appeal to or review by the agency; it must be followed by an "initial" decision of the agency which, in effect, is final.

By stating that they are not to be taken to supersede the provisions of section 7(a) of the APA, the reorganization plans of 1961 prohibit the CAB, FTC, and FMC from delegating the function of presiding over a section 7 hearing except as that section permits. Clearly, the plans do not purport, thereby, to limit the agency to the alternative courses of decision making available to it under section 8. Thus, for example, the agency may delegate the function of reviewing the initial decision of the hearing examiner to "an employee or employee board." Or, if it requires the record to be certified to it for initial decision, it may delegate the function of making the initial decision to "an employee or employee board." At the same time, of course, the reorganization

23. The Attorney General's Manual explains that exception (b)(i) permits the continuation of the [then] widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency report, a report prepared by the staff of specialists and technicians normally engaged in that portion of the agency's operations to which the proceeding in question relates.

plans may be used to accord a greater degree of administrative finality to the initial decisions of the hearing examiners. In any case, the agency must comply with the procedural requirements of section 8(b) of the APA and the requirement of the reorganization plan that it “retain a discretionary right to review the action of” its delegate.25

C. Nature of Review of Initial Decisions Authorized by Plans

1. Certiorari Review and Mandatory Review

In his Message on the regulatory agencies, President Kennedy explained that a party asking the agency to exercise its discretion to review the decision of its delegate would be required to demonstrate to the agency that “the matter in issue is of such substantial importance that it calls for determination at the highest agency level.” “A similar procedure — the petition for certiorari — succeeded in clearing up the overburdened docket of the Supreme Court of the United States . . .”26

Rule 19(1) of the Supreme Court states that “review on writ of certiorari is not a matter of right, but of sound judicial discretion” and goes on to specify the factors that the Supreme Court will consider in exercising its discretion to grant or deny certiorari.27 For present purposes, it is important to stress that these factors do not bear on the merits of the particular case; rather, they illustrate the “special and important reasons” that may

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26. Address by President Kennedy, supra note 10, at 42.
27. U.S. Sup. Ct. R. 19(1) provides:
   A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of reasons which will be considered:
   (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
   (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court’s power of supervision.
justify review. Chief Justice Vinson elucidated these reasons in an address before the American Bar Association, in which he emphasized that the Supreme Court is not, and never has been, "primarily concerned with the correction of errors in lower court decisions." Its function is "to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts." "To remain effective," the Chief Justice concluded, "the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

In this Article, the term certiorari review will be used to describe a system under which the parties to a proceeding governed by sections 7 and 8 of the APA do not have a right to agency review of the hearing examiner's initial decision, in the sense that agency action refusing review is not itself subject to judicial review, and under which the exercise of the agency's discretion to review depends on the general importance of the questions decided by the hearing examiner and not the merits of his decision. By contrast, the term mandatory review will be used to describe a system under which the agency is obligated by statute to review the merits of the initial decision at the request of a party adversely affected by it, even if the questions decided by the hearing examiner have no importance "beyond the particular facts and parties involved."

2. Appellate Review and De Novo Review

The term appellate review will be used to describe a system under which the agency reviews the initial decision in the manner that an appellate court reviews the decision of a trial court sitting without a jury; the agency will uphold the hearing examiner's findings of fact unless they are shown to be clearly erroneous. By contrast, the term de novo review will be used to describe a system under which the agency, in reviewing the initial decision, itself determines which way the evidence preponderates. Mandatory review may thus take the form of an appellate, or a de novo, re-

29. Fed. R. Civ. P. 52(a), applicable to actions tried upon the facts without a jury, provides:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .
view. Once the agency decides to review under a system of certiorari review, it may afford an appellate, or a de novo, review.

3. Summary Review and Plenary Review

The term *summary review* will be used to describe a system under which the agency requires the party seeking review of an initial decision to make a preliminary showing that there are substantial substantive or procedural grounds to doubt its soundness. By contrast, the term *plenary review* will be used to describe a system under which the agency gives plenary consideration to any exceptions taken to an initial decision without requiring a preliminary showing that they are substantial.

Mandatory review may thus take a summary or plenary form; and summary or plenary review may follow certiorari review, once the agency decides to review. In turn, summary review may be followed by further review of an appellate or de novo nature. If further review is of an appellate nature, the party seeking review will be required to make a preliminary showing that there are substantial grounds for claiming that the hearing examiner’s findings or conclusions of fact are clearly erroneous. If further review is de novo, the party must show that there are substantial grounds for claiming that the evidence preponderates in its favor. In all likelihood, however, an agency interested in according greater administrative finality to the initial decisions of hearing examiners will accompany summary review with appellate, rather than de novo, review. It is also clear that summary review itself will impose a greater burden upon agency members if they have to decide whether a substantial, preliminary showing has been made that the evidence preponderates the way the party claims rather than that the hearing examiner’s findings of fact are clearly wrong.

In either case, summary review is not comparable to denial of a petition for certiorari by the Supreme Court; it is comparable to the Court’s dismissal of an appeal or affirmance of a judgment for lack of a substantial federal question. If the agency denies

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It should be noted that the term *appellate review* is not being used to describe a system under which the relationship between hearing examiner and agency would be like that between agency and reviewing court. (It is thus assumed that the “clearly erroneous” standard gives the reviewing officials broader authority to reverse the findings of fact of the hearing examiner than would the “substantial evidence” standard.) It would be appropriate, of course, to use the term to describe such a system also.

30. U.S. Sup. Ct. Rs. 15(1)(e), (f) require the appellant from a state or federal court to include in the jurisdictional statement “the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.” U.S. Sup. Ct. R. 16(1)(b) authorizes the appellee to file a motion to dismiss an appeal
DELEGATION OF DECISION MAKING

further review because it is satisfied that the required preliminary showing has not been made — and that, consequently, the filing of further briefs on the merits, oral argument, and further agency study of the record will serve only the purpose of delay — it will affirm the initial decision summarily. Such action is not tantamount to a refusal to adjudicate, but constitutes an adjudication on the merits, albeit in summary form.

The reorganization plans authorize the use of any of the above described systems of review of initial decisions, in any of the combinations indicated.

D. ACTION TAKEN BY FMC, FTC AND CAB UNDER PLANS

The authority granted by the reorganization plans for the FMC, FTC, and CAB has not been exercised uniformly.

FMC. To date, the FMC has not used its authority at all; it continues to use a mandatory, plenary, and de novo system of review.\textsuperscript{31}

FTC. For two years, the FTC experimented with a set of rules which, while not without ambiguity, did not seem to inaugurate certiorari review but rather a mandatory, summary, and, depending upon the case, appellate or de novo system of review.\textsuperscript{32} As I have reported elsewhere, the new system of review was never given a chance to function because at least two of the commissioners opposed the system in principle and exercised their right under Reorganization Plan No. 4 to vote for plenary review in every case.\textsuperscript{33} In August, 1963, the full Commission amended its rules to make them conform with the realities of its internal practice. So once again, any party to a proceeding may appeal any initial decision to the Commission and secure a plenary, de novo

from the state court on the ground that “it does not present a substantial federal question.” U.S. Sup. Ct. R. 10(1)(e) authorizes the appellee to file a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that “it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.” For present purposes, the apt analogy is the appeal to the Supreme Court from a federal court.

\textsuperscript{31} See FMC Rules of Practice and Procedure, 46 C.F.R. §§ 201.224, 226, 228, 229, 241 & 242 (1968). The FMC docket is not crowded and its need to delegate is not as great as that of the other regulatory agencies.

\textsuperscript{32} See FTC Rules of Practice for Adjudicative Proceedings, 19 C.F.R. §§ 4.1–22 (Supp. 1968). These rules were subsequently modified in minor respects. It is significant that the new rules were issued and announced publicly on July 6, 1961, before Reorganization Plan No. 4 became effective on July 8, 1961.

review of it by the Commission. So far as the FTC is concerned, the struggle for the passage of the 1961 reorganization plans was in vain.

CAB. Only the CAB rules, affecting both economic and air safety proceedings governed by sections 7 and 8 of the APA, inaugurate certiorari review. The rules for economic proceedings state that review of a hearing examiner’s initial decision “is not a matter of right but of the sound discretion of the Board.” A petition for discretionary review may be filed only upon one or more of the following grounds:

(i) A finding of a material fact is erroneous;
(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules or precedent;
(iii) A substantial and important question of law, policy or discretion is involved; or
(iv) A prejudicial procedural error has occurred.

The Board “will exercise its right of review if it finds that the public interest so requires, or when two or more Board members vote in favor of such review.” Its order granting review will then specify the issues to which review will be limited.

The Board explained that it was adopting a review procedure

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35. See CAB Delegation of Function to Hearing Examiners, 14 C.F.R. § 301.47 (1963). The rules for air safety proceedings are essentially the same as those for economic proceedings and, for illustrative purposes, the text will refer only to the latter. New Organisational Regulations were also issued to provide a similar procedure for the discretionary review of delegated staff action that does not have to be taken on the basis of an evidentiary record. See 26 Fed. Reg. 12942 (1961). See generally Administrative Conference of the United States (submitted by Chairman of Senate Judiciary Committee’s Subcommittee on Administrative Practice and Procedure), Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, 88th Cong., 1st Sess. 405–08 (1963) [hereinafter cited as S. Doc. No. 24].
37. Ibid. In air safety proceedings, the rules require the party seeking review to file a notice of intent to petition for discretionary review before the party actually petitions for review. 14 C.F.R. §§ 302.45(a), (c) (1963). Petitions for the discretionary review of staff action must make a reasonable showing that one of the following grounds for review exists—(1) a finding of material fact is clearly erroneous; (2) a legal conclusion is contrary to law, Board rules, or precedent; (3) a substantial and important question of policy is involved; (4) a prejudicial procedural error has occurred; or (5) the staff action is substantially deficient on its face. 14 C.F.R. § 385.51(b) (1963). Ground (5) is intended to include such errors as the omission of necessary findings or the failure to dispose of issues properly raised.
39. Ibid.
"similar to the traditional practice of the United States Supreme Court concerning petitions for writ of certiorari." Accordingly, it rejected the suggestion that the Board "review its examiners' judgments in any case having a significant impact upon the parties thereto without regard to whether the questions involved are significant to the administration of the Federal Aviation Act." Thus, the "major purpose" of the new rules is to substitute certiorari review procedures for the present practice in which the Board gives "de novo consideration to each and every issue which any party may elect to raise by exception to an examiner's decision without regard to the substantiality or importance of such issues." The Board emphasized that it "remains free to decline to exercise its right of review if it believes that review is not required in the public interest," even where one or more of the grounds for review enumerated above may be shown to be present. Yet, it remains to be seen whether the Board will actually use the new rules to deny review of an initial decision for the sole reason that the case does not have significant impact upon the overall administration of the Federal Aviation Act.

In announcing the new rules, the CAB indicated that a petitioner for review may "ask the Board to exercise its discretion by reviewing issues which have an important economic impact upon the petitioner although they are not necessarily significant in the formation of Board policy." It is reasonable to assume that such a request will be granted; and not merely because two Board members can be expected to call for review in such a case.

It is not likely that the Board will refuse to review any case in which it becomes apparent that an error may have been committed by the hearing examiner that could result in the reversal of the decision on judicial review, e.g., if a finding of material fact is not supported by substantial evidence, or a necessary legal conclusion is erroneous, or a procedural ruling is erroneous and prejudicial. To refuse to review such a case because the questions decided by the examiner are not of general importance to the administration of the statute will merely impose an unfair burden on the persons adversely affected by the examiner's decision — and the courts — without relieving the agency. The agency will have to deal with the case again on remand. This is the core difficulty with certiorari review of initial decisions; the analogy

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41. Ibid.
42. Ibid.
43. Ibid.
44. Ibid. (Emphasis added.)
with the petition to the Supreme Court for a writ of certiorari is not apt. When the Supreme Court denies such a petition—for whatever reason—the decision below becomes final. Not so with an initial decision; once the agency refuses to review the initial decision, it becomes the final agency decision, but it is still subject to judicial review.

Thus, if any of the grounds enumerated above are claimed to exist in a petition for review, the Board may be expected to use a summary review followed, if the petitioner’s claim is that “a finding of material fact is erroneous,” by a de novo consideration of the alleged error. As the Board itself emphasized, it retains the power adequately to “protect the rights of parties to its proceedings against unsound decisions of an examiner . . . .”

Certiorari review by the Board would seem to be appropriate only if the exclusive ground for review relied on is that “a substantial and important question of . . . policy or discretion is involved.” In probably most of the cases in which initial decisions are rendered in economic proceedings, questions of policy or discretion are involved, the administrative determination of which is not likely to be upset by the reviewing court. Yet certiorari review is of doubtful wisdom even in this category of cases, for the following reasons advanced by the Administrative Conference’s Committee on Licenses and Authorizations:

The feeling among practitioners before the Board is that the delegation is too broad and sweeping; that the kinds of policy choices involved in major route cases should be made by the Board and not by the hearing examiner, and that, to the extent that the Board reviews the merits in passing on petitions for review, the new procedures are inappropriate in that they impose narrow time and page limits upon petitions and

45. The rules that accompanied the CAB’s Notice of Proposed Rule Making provided that the petitioner could seek review on the ground that the finding of material fact was “clearly erroneous.” 26 Fed. Reg. 8943 (1961). An appellate review was thus indicated. But the rules as finally adopted omitted the word “clearly.” (Compare the rules for review of delegated staff action, note 37 supra.) The Board explained that it was its intention to broaden the “permissible grounds upon which petitions for discretionary review may be filed.” 27 Fed. Reg. 854 (1962). The other enumerated grounds for review would also require de novo consideration.


47. This is the judgment of the Administrative Conference’s Committee on Licenses and Authorizations. S. Doc. No. 24, at 406 n.340.

48. A petition for review in an economic proceeding must be filed within 25 days after the initial decision is served upon the petitioner. It may not exceed 20 pages in length. The party opposing review must file an answer within 15 days after the petition for review is served upon it. The answer may not exceed 15 pages in length, unless it is in reply to two or more peti-
easy expedient in avoiding decisions on highly controversial matters, or in succumbing to political pressures favoring the result reached by the initial decision.49

Taking account of these feelings and fears, the Administrative Conference approved the recommendation of its Committee on Licenses and Authorizations that the Board should

adopt procedures, supplementary to its recent delegation of decisional authority to hearing examiners, which would provide for issuance of notices of review in major route cases at the time of the Board's consolidation order (or similar procedural step); such notices should make Board review available, at the option of a disappointed party, in all major route cases, while reserving the Board's discretionary authority to review, or decline to review, other route matters.50

The Committee explained that at the time of the CAB's consolidation order or other order issued at the outset of the proceeding, the Board would know the dimensions of the proceeding and "be in a position to determine, reasonably accurately, whether it would be a major or a minor route proceeding."51 The Committee envisaged the possibility of summary review in major route cases and certiorari review in minor route cases.52 The fact that a route case is minor, however, does not obviate the difficulties of certiorari review explained above. The Committee itself recognized this fact when it pointed out that even in minor route matters, "review could be granted where important policy issues unexpectedly arose or where the examiner committed a blatant error . . . ."53

Conclusions as to the nature of the system of review actually being practiced by the CAB cannot be drawn from a reading of its orders disposing of petitions for review. During the period from February 2, 1962, when the Board's rules implementing its reorganization plan became effective, until October 8, 1963, the date on which the latest statistics were compiled, 42 initial decisions subject to discretionary review were rendered by hearing examiners in economic cases.54 Petitions for review were filed in 28

52. Ibid.
53. Ibid.
54. For these and the following data, I am indebted to Mr. Whitney Gilliland, CAB Member, who set them forth in a letter dated December 8, 1963.
cases; in only one of these cases was the petition filed by the CAB’s Bureau of Economic Regulation, which acts as a party in these proceedings. The Board declined to exercise its right of review in six cases (including the case in which the Bureau filed the petition) and granted partial review in eight cases and full review in nine cases. Five petitions for review were still pending on October 8, 1963. The Board also took the initiative to review four of the 14 cases in which no petitions for review were filed.

Where it either declines or undertakes review, in whole or in part, the Board’s order merely announces the fact but states no reasons for its action. Some of the cases reviewed were decided summarily (i.e., without further written or oral argument); the Board announced its decisions in the orders granting review.

To date, judicial review has not been sought in any economic case in which the Board has declined to review the hearing examiner’s initial decision.

E. Disapproval of Plans for SEC, FCC and NLRB

As Dean Landis has said, the reasons for the disapproval of

55. The six cases are CAB Order E-19116, E-19266, E-19617, E-19745, E-19759, & E-19907. The petition for review in E-19759 was filed by the Bureau of Economic Regulation.

56. The eight cases are CAB Order E-18339, E-19138, E-19296, E-19392, E-19349, E-19359, E-19566, & E-19880.

57. The nine cases are CAB Order E-19128, E-19203, E-19796, E-19821, E-19938, E-19976, E-20000, E-20011, & E-20085.

58. The four cases are CAB Order E-18324, E-19484, E-19732, & E-19888.

The situation with respect to safety cases is as follows: From February 2, 1962 until October 8, 1963, 92 initial decisions subject to discretionary review were rendered by hearing examiners in safety cases. Petitions for review were filed in only 31 of these cases. The Board declined to exercise its right of review in 17 cases (S-1155, S-1157, S-1162, S-1163, S-1164, S-1167, S-1172, S-1174, S-1176, S-1178, S-1188, S-1191, S-1194, S-1196, S-1202, S-1207, & S-1211), granted partial review in three cases (S-1200, S-1205, & S-1205) and full review in four cases (S-1165, S-1168, S-1170, & S-1181). Petitions were still pending in seven cases on October 8, 1963. The Board did not take the initiative to review any of the 62 cases in which no petitions for review were filed.

To date, judicial review has been sought in two safety cases in which the Board has declined to review the hearing examiner’s initial decision. In Brown v. CAB, 324 F.2d 523 (6th Cir. 1963), affirming S-1176, the Board had refused to review a decision of a hearing examiner suspending a pilot’s certificate for four months; consequently, the decision became the final decision of the Board. The court affirmed the Board’s decision on the ground that there was substantial evidence to support the crucial findings. In Sabinske, No. 21133, CAB, Dec. 18, 1963, the Board declined review of a hearing examiner’s initial decision suspending a pilot’s certificate for 30 days. The appeal is still pending.

the plans affecting the SEC, FCC and NLRB are "various."

In the case of the FCC, he charged, "you were dealing with a concentrated and well-knit industry with enormous propaganda potentials — an industry that had only recently been riled by the threat of enforcement of Congressional standards theretofore long ignored." Dean Landis finds it "difficult to assay" the reasons for the defeat of the plan affecting the SEC, but attributes it primarily to "opposition more factitious than real from the New York Stock Exchange, whose position on this point was strongly supported by the Senior Senator from New York" (The Honorable Jacob K. Javits). The failure of the plan for the NLRB is attributed, by Dean Landis, "to one cause, namely the absence of any desire on the part of the conservative elements of the Congress to make of the [Labor-Management Relations Act] a workable act."

Indeed, it is difficult to explain why the plans for the FTC, CAB and FMC were approved but those for the SEC, FCC and NLRB were disapproved. A reading of the congressional committee hearings and debates on the plans reveals that the disapproved plans would have had a better chance of approval if they had been drafted to authorize a mandatory but summary, appellate system of review of initial decisions, rather than a certiorari system. Critics of the plans were hesitant to authorize agencies to delegate to hearing examiners the power to render final, unreviewed administrative decisions. Once this possibility was foreclosed or minimized — by a statutory requirement that an employee board should review on a plenary, de novo, basis every initial decision which the agency elected not to review or that the agency itself review specified categories of cases— Congress, as we shall see, was more disposed to authorize the delegation of the decision-making function in proceedings governed by sections 7 and 8 of the APA.


1. *By FCC*

The congressional attitude described was first reflected in Public Law 87–192, which was enacted after Reorganization Plan 60. Address by Dean James M. Landis, Southeast Regional Meeting of the American Bar Association, Birmingham, Alabama, Nov. 9, 1961. The quotations that follow are from this address.

No. 2 was disapproved.\textsuperscript{62} This statute authorizes the FCC to delegate its function of reviewing the decisions of hearing examiners in cases of adjudication as defined by the APA to a panel of commissioners, an individual commissioner, or an employee


Reports and debates on Plan No. 7 (FMC): There were no reports on the House and Senate resolutions disapproving this plan. For the debates, see 107 Cong. Rec. 12746–47, 13018–22, 13084–97, 14656–59, 15446–58, 16400–01 (1961).

62. 75 Stat. 420 (1961) [hereinafter cited as Pub. L. No. 87–102]. Like Reorganization Plan No. 2, the new statute abolished the “review staff” called for by the Communications Act of 1934, § 5(c), 48 Stat. 1064, as amended, 47 U.S.C. § 155(c) (Supp. IV, 1962). Unlike Plan No. 2, Pub. L. No. 87–102 contains no provision transferring to the FCC Chairman the Commission’s functions with respect to the assignment of Commission personnel, including commissioners. As the Senate Commerce Committee pointed out, however, “section 5(a) of the Communications Act now gives the Chairman broad authority to coordinate and reorganize the work of the Commission. Your committee agrees with the Commission that any additional specification of authority, such as to assign personnel, should be accomplished by Commission rule.” S. Rep. No. 576, 87th Cong., 1st Sess. 6 (1961) [hereinafter cited as S. Rep. No. 576].
board consisting of three or more employees. In all other cases, the FCC is authorized to delegate any of its functions to an individual employee as well as to the eligible delegates already named, except that it may not delegate the function of presiding at a hearing governed by section 7 of the APA to any person not qualified to do so under that section.

In every case of adjudication designated by the Commission for hearing, any party to the proceeding “shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision,” which must be ruled on by the Commission or its delegate performing the review function. The


The Senate Commerce Committee explained that Reorganization Plan No. 2 was disapproved because (1) it would have amended substantive provisions of the Communications Act, which it was thought should be done by the legislative process rather than a reorganization plan and (2) it would have concentrated too much power in the FCC Chairman. S. Rep. No. 576, at 5.

Interestingly enough, the resulting concentration of more power in the hands of the Chairmen did not induce Congress to disapprove the reorganization plans for the CAB, FTC, and FMC or prevent enactment of the statute, which will be considered shortly, giving the SEC Chairman the powers he would have had under Reorganization Plan No. 1 of 1961. On the other hand, the fact that the plan for the NLRB did not seek to concentrate power in the hands of the Chairman did not suffice to save it in the House.


65. Communications Act of 1934, § 409(b), 48 Stat. 1096 · (1934), as amended, 47 U.S.C. § 409 (Supp. IV, 1962). Prior to Pub. L. No. 87–192, §§ 409(a), (b) permitted only the full Commission or a § 11 hearing examiner to conduct the hearing in every case of adjudication and required the presiding officer or officers to render an initial decision, “except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.”

Under § 409(a), as amended by Pub. L. No. 87–192, any persons qualified
decision of the delegate may be administratively final. Public Law 87–192 does not expressly provide for any kind of Commission review of the decision of its delegate in such a case, although of course the Commission may institute any system for review it deems appropriate.

In all other cases, including cases of adjudication that are not designated for hearing, any person “aggrieved by any... order, decision, report, or action” or the delegate “may file an application for review by the Commission,” which “the Commission may grant, in whole or in part, or deny... without specifying any reasons therefor.”

The FCC has provided for the designation of an individual commissioner or a panel of commissioners to review initial decisions of hearing examiners, but in no case to date has such a designation been made. The Commission has established a permanent Review Board composed of three or more employees who will serve indefinitely on a full-time basis. Unless the Commission specifies otherwise, the Board will review initial decisions of hearing examiners in specified classes of cases, which exclude the major matters that come before the Commission, and in any other case to preside at a § 7 hearing under the APA (e.g., a single Commissioner) are also qualified to preside at a hearing under the Communications Act. The presiding officer must render an “initial, tentative or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.”

Finally, prior to Pub. L. No. 87-192, § 409(b) provided that in all cases of adjudication, “the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement.” This requirement has been eliminated.


67. For the delegations of authority by the FCC, see generally 47 C.F.R. §§ 0.201—0.341 (Supp. 1963). The provision mentioned in the text is § 0.218. I am indebted to Mr. Max Paglin, General Counsel of the FCC, for information about the FCC’s experience under Pub. L. No. 87–192.

68. 47 C.F.R. §§ 0.206(a), (e) (Supp. 1963).

69. 47 C.F.R. § 0.207 (Supp. 1963). The classes of cases specified are (1) television translator proceedings; (2) standard AM and FM broadcast proceedings, except (a) revocation, renewal, cease-and-desist, and forfeiture proceedings, (b) proceedings which involve § 319(c) of the Communications Act of 1934, as amended, and (c) proceedings which involve initial application for
referred to it by the Commission. In turn, the Board may certify any matter within its province to the Commission "with a request that the matter be reviewed by the Commission, if in the Board's judgment the matters at issue are of such a nature as to warrant Commission review of any decision which the Board might otherwise have made." The matter will be reviewed by the Commission if a majority of its members vote to grant the Board's request. If a majority of its members determine that a matter pending before the Review Board involves a novel or important issue of law or policy, the Commission, on its own motion, may direct that the matter shall be certified to it for decision, but it will not entertain a petition from a party requesting that it take such action.

Whenever the Commission takes a matter otherwise within the province of the Review Board, it will review the hearing examiner's initial decision directly and the Review Board will no longer participate in the case. The Commission has also provided that any aggrieved person may ask it to review any action of its delegate in a nonhearing matter or any "final decision" of the Review Board on review of a hearing examiner's initial decision. The Commission may also institute such review on its own motion. To warrant Commission consideration, the application for review must specify that one or more of the following factors are present in the case:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent or established Commission policy.
(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
(iii) The action involves application of a precedent or policy which should be overturned or revised.

construction permit for a class II-A station on clear channel frequencies; (8) proceedings on applications of communications common carriers filed under Title III of the Communications Act; (4) proceedings involving complaints against communications common carriers for recovery of overcharges; (6) safety and special radio services proceedings; and (6) proceedings involving suspension of operator licenses or permits.

70. 47 C.F.R. § 0.206(a) (Supp. 1963).
71. 47 C.F.R. § 0.206(b) (Supp. 1963).
72. Ibid.
73. 47 C.F.R. § 0.206(c) (Supp. 1963).
75. 47 C.F.R. § 1.86 (Supp. 1963).
(iv) An erroneous finding as to an important or material question of fact.
(v) Prejudicial procedural error.\footnote{76}

The Commission "may grant the application for review in whole or in part, or may deny the application, without specifying reasons for the action taken."\footnote{77} Apparently, this provision is not intended to institute certiorari review. In a note accompanying the rule specifying the grounds for an application for review, the Commission explained:

If the Commission grants an application for review of a final decision of the Review Board, it will, as the usual practice, permit the parties to file briefs and present oral argument. The Commission will rarely dispose of the merits of a case upon the basis of the application for review and related proceedings. Thus . . . the application for review should be prepared with the understanding that its purpose is not to obtain a Commission decision on the merits of the issues but rather to convince the Commission to review those issues.\footnote{78}

It would seem that the Commission contemplates a summary review under which it will undertake further review only if the applicant makes a reasonable showing that one or more of the specified grounds for review exist in the particular case. Furthermore, the action of the Commission on such review (or its action denying an application for review, unless taken without any specification of reasons therefor) may, in turn, be the subject of a petition for reconsideration, in which, once again, the petitioner may cite the findings of fact and conclusions of law which he believes to be erroneous.\footnote{79}

During the period from August 1, 1962 (the date on which the Review Board was established) until December 19, 1963, the Review Board issued 36 final decisions. Petitions were filed asking the Commission to review only 11 of these cases; in no case did the

\footnote{76. 47 C.F.R. §§ 1.85(b)(1), (2) (Supp. 1963). These provisions, it will be noted, are applicable to delegated actions in nonhearing matters as well as to decisions by the Review Board, an individual commissioner, or panel of commissioners on review of initial decisions.}
\footnote{77. 47 C.F.R. § 1.85(g) (Supp. 1963).}
\footnote{78. 47 C.F.R. § 1.85(b)(4) Note (Supp. 1963). So, applications for review and oppositions thereto must not exceed 25 double spaced typewritten pages.}
\footnote{79. 47 C.F.R. §§ 1.84(b), (d)(1), 1.85(g) (1963). It will be recalled that an application for review may be denied without specifying reasons therefor only in cases other than adjudication.}
\footnote{The filing of a petition for reconsideration is not a condition precedent to judicial review, "except where the person seeking such review was not a party to the proceeding resulting in the action, or relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." 47 C.F.R. § 1.84(m) (1963).}
Commission undertake review on its own motion. As of December 19, 1963 the Commission denied eight of the petitions for review; three petitions were still pending. Seven of the eight involved applications for construction permits; the eighth involved the revocation of a radio station license. In six of the eight cases, the petition for review was filed by the broadcaster adversely affected; in one case, the Commission's Broadcast Bureau was the sole petitioner for review, and in one case, the Broadcast Bureau joined two private parties in seeking review of a Review Board decision favoring the broadcasting company which applied for the construction permit.

The Commission denied the eight petitions for review without specifying any reasons for its action. In only one case did a single commissioner dissent from its action. From the content of the dissent, it may be inferred that the Commission did consider the merits of the Review Board's decision in passing upon the petition for review. By denying a petition, the Commission, of course, affirms the final decision of the Review Board summarily.

2. By ICC

No reorganization plan for the ICC was proposed by the President. Nevertheless, Public Law 87–247 was enacted to give the ICC additional authority to delegate decision-making functions. The new law amended section 17(5) of the Interstate Commerce Act to add:

> When deemed by the Commission to be appropriate for the efficient and orderly conduct of its business, it may authorize duly designated employee boards to perform, under this paragraph, functions of the same character as those which may be performed thereunder by duly designated divisions.

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There are no published hearings on H.R. 8033, 87th Cong., 1st Sess. (1961), the bill which became Pub. L. No. 87–247; the bill was reported favorably by the House Committee on Interstate and Foreign Commerce and the Senate Committee on Commerce. The Subcommittee on Regulatory Agencies of the House Committee on Interstate and Foreign Commerce held hearings on June 12, 1961, on H.R. 6716, 87th Cong., 1st Sess. (1961), which was introduced at the request of the ICC. H.R. 8033 "evolved from consideration of H.R. 6716 and the testimony developed." H.R. Rep. No. 750, supra at 1. The Surface Transportation Subcommittee of the Senate Commerce Committee held a hearing on H.R. 8033, at which only the Chairman of the ICC appeared as a witness. For the Chairman's Statement, see S. Rep. No. 839, supra at 9–11.
The Interstate Commerce Act authorizes the Commission to divide its 11 members into as many divisions of not less than three members each as it deems necessary. Any of the Commission's "work, business, or functions under any provision of law" may "be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission," i.e., "examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys."\textsuperscript{82}

If the matter so assigned or referred involves the taking of testimony at a public hearing, the delegate must recommend an order and state in writing the reasons therefor. Any interested party, then, is entitled to file exceptions thereto and the Commission, or a duly designated division thereof, must "reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof."\textsuperscript{82} The new legislation empowers an employee board to perform the review function that, previously, the Commission, or a division thereof, had to perform in these cases.

Whether the function of reviewing recommended orders is performed by the Commission, a division thereof, or an employee board, an interested party may apply "for rehearing, reargument, or reconsideration" and the application may be granted "if sufficient reason therefor be made to appear."\textsuperscript{84} If the review function is performed by the Commission or a division thereof, however, the right to apply for rehearing, reargument, or reconsideration may be confined to "proceedings, or classes of proceedings, involving issues of general transportation importance."\textsuperscript{85} (It should be noted that this second, certiorari review may not be employed if the initial review function is performed by an employee board.)\textsuperscript{86}


On January 9, 1961, the ICC issued a rule making all decisions of its divisions administratively final, "except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division." 49 C.F.R. § 1.101(a)(2) (1961).

86. The House Committee on Interstate and Foreign Commerce explained that since "it is assured that an appeal would lie in every board-decided case to an appellate division of three Commissioners, or to the entire Commission in certain cases, the rights of the parties would be fully protected." H.R. REP. No. 750, 87th Cong., 1st Sess. 3 (1961). Similar assurance was given to the Senate Commerce Committee. S. REP. No. 839, 87th Cong., 1st Sess. 2 (1961).
If the application for rehearing, reargument, or reconsideration is granted, the Commission is authorized to reverse or modify the decision being reviewed if it "is in any respect unjust or unwarranted."\(^8\)

The ICC has used Public Law 87–247 to create a Finance Review Board, an Operating Rights Review Board, and a Rates and Practices Review Board to review the decisions of examiners involving the "taking of testimony at a public hearing or the submission of evidence by opposing parties in the form of affidavits."\(^8\)

The Finance and Rates Boards are authorized to review the decisions of examiners only in the cases or types of cases specified from time to time by the Chairman of the ICC division responsible for the matters in question. The Operating Rights Review Board has been authorized to review decisions in all cases within its general purview, except those which have been specifically excluded from its jurisdiction by the Commission.\(^9\) In addition, the chairman of the Division retains authority to refer cases or types of cases within the excluded categories to the Board for review.

Applications for review of the decisions of the Operating Rights, Rates and Practices, and Finance Review Boards will be passed on by Divisions 1, 2, and 3 respectively.\(^9\) Such an application must be "based on an allegation of error on the merits, in whole

\(^{89}\) 28 Fed. Reg. 198 (1963). The exceptions include the following eight categories of cases:

1. Those proceedings in which a Commissioner or a member of the Board has presided at the hearing or has issued a report and recommended order.

2. Those proceedings which, after due consideration, are found to be susceptible to *per curiam* treatment without issuance of an explanatory report.

3. Those proceedings orally argued before Division 1.

4. Those proceedings which, after due consideration, are found to involve broad questions or issues of administrative policy.

5. Those proceedings involving matters of rule making.

6. Those proceedings involving investigations instituted by Division 1 or the Commission under the provisions of the Interstate Commerce Act and related acts.

7. Those application proceedings involving the fitness of an applicant seeking a certificate, permit, or broker's license in which evidence is presented by the Bureau of Inquiry and Compliance of the Interstate Commerce Commission.

8. Formal complaint and answer proceedings.

or in part” by the Review Board. The “decisions or orders of the appellate division shall be administratively final and not subject to review by the Commission.” If the appellate division reversed, changed, or modified the decision of the Review Board, however, a party to the proceeding adversely affected by the decision of the appellate division may file a petition for reconsideration by the same appellate division.

3. By SEC

On June 22, 1961, the day after Reorganization Plan No. 1 was disapproved by the Senate, S. 2135 was introduced to effectuate the plan’s major purposes and yet obviate the principal objections voiced against it, namely, that it authorized the SEC to delegate rule making and important adjudicatory functions subject only to “discretionary” review by the Commission. The bill, modified in the course of passage, became Public Law 87–592.

The basic grant of authority in Public Law 87–592 is identical with that in Plan No. 2, except that the SEC is expressly precluded from delegating the function of making (a) general rules, although not rules of particular applicability, and (b) any rule, regulation, or order pursuant to section 19(b) of the Securities Exchange Act of 1934. Section 19(b) permits the SEC “to alter or supplement the rules of an exchange with regard to matters such as financial responsibility of members, trading in certain securities during specified periods, and the fixing of reasonable commission rates.”

The SEC itself suggested the amendment limiting its authority to delegate rule making; it sought only authority to delegate the

91. Ibid.
92. Ibid.
93. 49 C.F.R. § 1.101(g) (1963).
96. 48 Stat. 881, 15 U.S.C. §§ 77, 78 (1958). This section, like Plan No. 1, precludes the SEC from delegating the function of conducting hearings subject to the requirements of § 7(a) of the APA to any persons other than commissioners or hearing examiners.
making of rules of particular applicability that it had considered to be an adjudicatory function prior to the APA but that might fall within the APA's definition of rule making. The Commission explained:

An example of the type of situation we have in mind may be helpful. Thus an investment company registered under the [Investment Company Act of 1940] might apply for an exemption from a provision of the act which, absent the granting of an exemption by the Commission, would prevent a particular transaction which the investment company proposed to enter into. In an on-the-record proceeding the Commission would determine whether, under the applicable standards of the act, the particular transaction should be permitted and would enter an order granting or denying the application for an exemption accordingly.

The mere statement of the foregoing example demonstrates that it does not involve rule making in the ordinary or general sense of that term. It, nonetheless, might be so classified by reason of the broad definition of the word “rule” as contained in section 2(c) of the APA which includes “the whole or any part of any agency statement of general or particular applicability” and the definition in that same section of “rule making” to mean “agency process for the formulation, amendment, or repeal of a rule.”

The proposal to preclude the SEC from delegating its function under section 19(b) of the 1934 act was first made by the New York Stock Exchange and was not objected to by the Commission, which stated that it had “no thought of delegating its power to compel changes in the stock exchange rules and practices.”

Like Plan No. 2, the new law vests in the Commission “a discretionary right to review the action” of its delegate, but it differs from the plan in two important respects. The vote of one Commissioner, rather than two, is made sufficient to bring the action of the delegate before the full Commission for review. And persons adversely affected by delegated actions falling into the following categories of cases are entitled to review by the entire Commission:

(i) denial of requests for action pursuant to section 8(a) or 8(c) of the Securities Act of 1933 or the first sentence of section 12(d) of the Securities Exchange Act of 1934;
(ii) suspension, denial or revocation of a broker-dealer registration pursuant to section 15(b) of the Securities Exchange Act of 1934;102

(iii) suspension, denial, or withdrawal, of any registration or suspension or expulsion of a member of a national securities exchange pursuant to section 19(a) of the Securities Exchange Act of 1934;103

(iv) suspension of trading on an exchange pursuant to section 19(a) of the Securities Exchange Act of 1934.

The SEC approved the provisions of the new law requiring mandatory review by the entire Commission of the specified categories of delegated actions. It pointed out that in the case of a denial of acceleration, “the right of an aggrieved person to go directly from delegated action within the Commission to the Federal courts is largely illusory” because “under section 8(a) if the Commission does not accelerate effectiveness, a registration statement becomes effective in 20 days unless stop-order proceedings are meantime instituted by the Commission” and there is no possibility of getting final court review within the 20 days.104 The Commission did not consider it wise to permit a delegate to take action that, in practical effect, “might in many instances cause a renegotiation of financing terms or loss of an underwriting.”105

The Commission explained that the New York Stock Exchange suggested the other categories for mandatory review that “cover

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for the most part areas in which the Commission contemplates delegation, if any, only to a limited extent.\textsuperscript{106}

Pursuant to Public Law 87–592, the SEC has delegated important functions to the Directors of its Divisions of Corporation Finance, Corporate Regulation, and Trading and Exchanges and to its Regional Administrators and Secretary.\textsuperscript{107} The Commission has not sought to delegate any additional authority to its hearing examiners. As was the case prior to Public Law 87–592, the hearing examiner will continue to prepare a recommended decision and not render an initial decision, and the Commission will give plenary, de novo consideration to any exceptions taken to the recommended decision.\textsuperscript{108}

The Commission has provided that it may review any determinations of its delegates on its own initiative and has authorized any party or intervenor to petition the Commission to review such determinations only in certain specified categories of cases.\textsuperscript{109} The petition for review must contain “a clear and concise statement of

\textsuperscript{106} Id. at 5.

\textsuperscript{107} 28 Fed. Reg. 2853–57 (1963), effective March 25, 1963. Among the matters delegated to the division directors, the following might be considered adjudicative: the authority to determine that indenture trustees are qualified where hearing is waived, 28 Fed. Reg. 2854 (1963); the authority to pass upon certain applications and declarations under the Public Utility Holding Company Act and the Investment Company Act where no hearing is requested, 28 Fed. Reg. 2855 (1963); and the authority to cancel the registration of broker-dealers and investment advisers when they are no longer in business, 28 Fed. Reg. 2856 (1963).

\textsuperscript{108} 17 C.F.R. §§ 201.16–21 (Supp. 1963). During the passage of S. 2185, 87th Cong., 1st Sess. (1961), however, the SEC informed Congress that “looking ahead and taking account of the intervening continued rise in workload, we now foresee that at some point the Commission might consider more extensive use of initial decisions by hearing examiners.” H.R. Rep. No. 2043, 87th Cong., 2d Sess. 7–8 (1962).

\textsuperscript{109} 28 Fed. Reg. 2837 (1963). The specified categories consist of (1) determinations regarding the filing of financial statements in addition to, or in substitution for, the statements required in certain forms and (2) denial of applications by brokers and dealers for time extensions for filing certain reports.

Mr. David Ferber, Associate General Counsel of the SEC, points out that for the most part the Commission has delegated discretion to grant requested relief and, therefore, “it would be a rare instance where review by the Commission would be sought and the delegation rules were drafted with the assumption that the enumerated categories in 17 C.F.R. § 201.27(b) [28 Fed. Reg. 2837 (1963)] are the only ones where a participant could be adversely affected.” To date, Mr. Ferber adds, the Commission has not been asked to review any delegated action. Letter From David Ferber, Associate General Counsel of the SEC, to Carl A. Auerbach, Dec. 23, 1963.
the issues to be reviewed and the reasons review is appropriate.\footnote{110} Presumably, in all other cases the determinations of the delegates will be final.

While Public Law 87–592 authorizes the Commission to institute certiorari review of delegated actions in those categories of cases in which it does not impose mandatory review, it is doubtful whether the Commission intends to use such a system of review. In the course of passage of the new law, the SEC expressed concern that the language of section 1(c) of S. 2135,\footnote{111} which is identical with the language of section 1(c) of Reorganization Plan No. 1,\footnote{112} might be construed to authorize a person adversely affected by a delegated action that the Commission had not reviewed on its own initiative to secure judicial review without first petitioning for Commission review.\footnote{113} The Commission withdrew its objection to the language of section 1(c) only after realizing that section 10(c) of the APA would preclude such a possibility.\footnote{114}

The SEC pointed out that section 10(c) authorized it to provide, by a rule which also stayed the action taken by the delegate, that the delegated action shall not be final for purposes of judicial review unless the person adversely affected by it first sought review by the Commission.\footnote{114} It would seem clear that the Commission was satisfied by section 10(c) only because that section makes it

112. The language of the section follows:
Should the right to exercise such review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, shall, for all purposes, \textit{including appeal or review thereof}, be deemed the action of the Commission.

114. Id. at 7–8. Section 10 (c) of the APA provides:
agency action otherwise final shall be final for the purposes of this subsection [i.e., shall be reviewable judicially] whether or not there has been presented or determined any application . . . for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

115. H.R. Rep. No. 2043, 87th Cong., 2d Sess. 8 (1962). The Commission also pointed out that § 12 of the APA, 60 Stat. 244 (1946), 5 U.S.C. § 1011 (1958), provides that no "subsequent legislation shall be held to supersede or modify . . . [the provisions of this] Act except to the extent that . . . [such
possible for the SEC to pass on the merits of any administrative action that might be subjected to judicial review and thus assure that it will withstand judicial scrutiny.

III. AUTHORITY TO "LIMIT THE ISSUES" ON APPEAL FROM OR REVIEW OF INITIAL DECISIONS UNDER THE APA

A. Need for Authority

The agencies empowered to institute certiorari review (the CAB, FTC, FMC and, to a limited extent, the SEC) may also resort to a mandatory, summary, appellate system of reviewing the initial decisions of hearing examiners or to a system of employee review boards. Providing for these four agencies alone, however, does not satisfy the need to authorize agencies to give a greater degree of administrative finality to the initial decisions of their hearing examiners. Together, these four agencies employed only 59 of the 505 section 11 hearing examiners on July 20, 1962.116

The remainder of this Article will deal with the question of the extent to which the following provision of section 8(a) of the APA authorizes agencies to make initial decisions administratively final:

On appeal from or review of the initial decisions of such officers [section 11 hearing examiners or other officers qualified to preside at hearings under section 7(a) of the APA] the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.117

The legislative history of this section is set forth, in full, in the Appendix to this Article. Before presenting the conclusions drawn from its study, it should be recalled that the scope of the authority of a particular agency to accord administrative finality to the decisions of its hearing examiners also depends upon its legislation shall do] so expressly” and that § 1(c) of the new law did not expressly modify § 10(c) in any way. H.R. Rep. No. 2045, op. cit. supra at 8.

Because of the discretionary nature of the authority so far delegated by the Commission, it has apparently not deemed it necessary to invoke § 10(c) of the APA.

116. As of July 20, 1962, the Department of Health, Education and Welfare employed 165 § 11 hearing examiners; ICC, 123; NLRB, 72; Department of the Interior, 20; FPC, 18; FCC, 17; Treasury Department, 16; Department of Agriculture, 5; Post Office Department, 3; AEC, 8; Department of Labor, 2; Department of Justice (Alien Property Division), 1; and FMA, 1. Comm. on Personnel, U.S. Administrative Conference, Report 9 (1962) (unpublished report). The CAB employed 21 § 11 hearing examiners; FTC, 22; FMC, 8; and SEC, 8. Ibid.

organic statutes which, in the main, are not considered in this Article.

B. Authority To Require Specification of Issues

The legislative history of the APA clearly indicates that section 8(a), at the very least, authorizes an agency (1) to require a party appealing to the agency from a hearing examiner's decision to specify the alleged errors of the examiner and the portions of the record allegedly supporting the specifications of error, with such particularity as the agency may prescribe, and (2) to confine agency review to the specified errors and portions of the record.118

C. Authority To Use Certiorari Review

Little in the legislative history indicates that when Congress granted power to "limit the issues" it intended to authorize certiorari review. It is true that section 8 of the APA does not expressly require the agency to review an initial decision whenever a party to the proceeding appeals from it to the agency. It may be argued that the agency's obligation in this respect is delineated only by its organic statute and that the "reasonable opportunity" to submit exceptions to the initial decision prior to decision upon agency review, afforded by section 8(b), is guaranteed only if the organic statute imposes an obligation to review.

Yet, it is a fair inference that the APA did not expressly impose the obligation of agency review when a party appealed from an initial decision only because it was assumed there would be agency review in such a situation as a matter of course. The draftsmen of the APA and its predecessor bills concentrated on the effort to enhance the role of the hearing examiner by making his initial decision administratively final, without further administrative action or consideration, "in the absence of either an appeal to the agency or review upon motion of the agency." Prior thereto, agencies were accustomed to subject the decisions of hearing officers to de novo review as a matter of course, even if no party had appealed to the agency.119

There is evidence in the legislative history that the APA draftsmen took it for granted that there would be agency review if a party appealed. Thus, the Senate Judiciary Committee, explaining that the last clause of section 10(c) of the APA was designed to implement the provisions of section 8(a), stated:

118. See App. notes 18, 18, 38, 46, & 65 infra and accompanying text. For an example of agency reliance on § 8(a) to require specification of the issues, see Veterans Broadcasting Co., 29 F.C.C. 1105 (1960).

Pursuant to [section 8(a)] an agency may permit an examiner to make the initial decision in a case, which becomes the agency's decision in the absence of an appeal to or review by the agency. If there is such review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter.120

The House Judiciary Committee used identical language in commenting on the same clause.121 Explaining the provisions of section 8(a), the Attorney General's Manual states: "Parties may appeal from the hearing officer's initial decision to the agency, which must thereupon itself consider and decide the case."122

The following sentences from the House Judiciary Committee Report might be used to argue the contrary:

Agency rules must prescribe a reasonable time for appeals from initial examiners' decisions. Where the agency determines to review such a case, it should, so far as possible, specify the issues of law, fact or discretion for review with particularity.123

Arguably, the use of the phrase "where the agency determines to review such a case" [an appeal from an initial decision] implies that the agency may determine not to review such a case. This argument is not persuasive. It assumes that the House Committee intended to effectuate a most significant result in a most off-handed and indirect manner. Other readings of these sentences are more plausible: (a) "such a case" refers to any initial decision, whether agency review is occasioned by an appeal or the agency's initiative, and the sentence in question is intended only to emphasize the specification-of-issues objective mentioned in the same sentence; or (b) "such a case" refers only to an initial decision that the agency takes the initiative to review in the absence of an appeal and is intended to emphasize the need for specification in such a case because, presumably, the agency would require a party appealing to specify the issues it is asking the agency to decide. From the fact that the House Judiciary Committee compared the agencies' review powers with those of courts under section 10(e) of the bill,124 it is also plausible to infer that it intended to authorize summary, not certiorari, review, followed if necessary by appellate review.

120. Legislative History, 79th Congress 1944–1946, Administrative Procedure Act, 79th Cong., 1st Sess. 11, 218 (1946) [hereinafter cited as APA Leg. Hist.]. For the text of § 10(e), see text accompanying notes 114–15 supra.
121. Id. at 277.
122. ATT'Y GEN. MANUAL 68.
123. APA Leg. Hist. 272–73.
D. Authority To Use Plenary, De Novo Review

It is beyond dispute that section 8 of the APA empowers the agency — on its own motion if necessary — to engage in plenary, de novo review of the initial decisions of hearing examiners. In reaching its decision on such review, the agency has "all the powers which it would have in making the initial decision."

The Supreme Court has interpreted this last provision of section 8(a) of the APA in deciding what weight to give to the findings of the NLRB trial examiner in the Universal Camera case. Speaking for the Court, Mr. Justice Frankfurter explained that the Attorney General's Committee on Administrative Procedure sought to enhance the status and function of the trial examiner and, therefore, had recommended:

In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

But Mr. Justice Frankfurter pointed out that the Committee's bill did not impose this relationship; its bill "required only that hearing officers make an initial decision which would become final in the absence of further agency action, and that agencies which differed on the facts from their examiners give reasons and record citations supporting their conclusion." Even the proposal embodied in the Committee's bill, the Justice added, was "further moderated" by the APA, which permits "agencies to use examiners to record testimony but not to evaluate it and contains the rather obscure provision that an agency which reviews an examiner's report has 'all the powers which it would have in making the initial decision.'"

For its decision in Universal Camera, the Court did not have to rest upon this "obscure provision"; it relied upon section 10(c) of the Labor-Management Relations Act. The Court concluded:

125. See 2 Davis, Administrative Law § 10.03, at 11-18 (1958).
128. Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951). The Justice cited §§ 308(1) & 309(2) of the Committee's bill and pp. 200, 201 of its report, for which see App. notes 9, 10, & 15 infra and accompanying text.
129. 340 U.S. at 494.
The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner’s findings only when they are “clearly erroneous.” Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.\textsuperscript{131}

Subsequently, the Supreme Court held that the APA, like the Taft-Hartley Act, does not limit agencies to appellate review of initial decisions. In \textit{FCC v. Allentown Broadcasting Corp.},\textsuperscript{132} the Court reversed the judgment of the Court of Appeals for the District of Columbia because that court had relied on the Second Circuit decision in \textit{Universal Camera} on remand after the Supreme Court decision for the view that a hearing examiner’s findings based on the demeanor of a witness are not to be overruled by an agency without a “‘very substantial preponderance in the testimony as recorded.’”\textsuperscript{133} “We think,” said the Court, “this attitude goes too far. It seems to adopt for examiners of administrative agencies the ‘clearly erroneous’ rule of the Fed. Rules Civ. Proc., 52(a), applicable to courts.”\textsuperscript{134} Then the Court

\textsuperscript{29} U.S.C. § 160(c) (1958) provides:

\begin{quote}
If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue ... an order requiring such person to cease and desist from such unfair labor practice. ... If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. ... In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue ... a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, ... such recommended order shall become the order of the Board and become effective as therein prescribed.
\end{quote}

Although § 10(c) requires the officer presiding at the taking of evidence to issue “a proposed report, together with a recommended order,” his report and order have the effect of an initial decision under the APA, the “recommended order” may become “the order of the Board” if no exceptions are taken thereto.

Effective as of September 3, 1963, the Board amended its rules to eliminate references to the trial examiner’s “intermediate report” and substitute therefor the trial examiner’s “decision.” 28 Fed. Reg. 7978 (1963).

\textsuperscript{131} 340 U.S. at 492.
\textsuperscript{132} 349 U.S. 358 (1955).
\textsuperscript{133} Id. at 364. The quotation is from NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951).
\textsuperscript{134} 349 U.S. at 364.
quoted the paragraph above from *Universal Camera* interpreting section 10(c) of the Taft-Hartley Act and concluded: "That comment is here applicable. See also § 8 of the Administrative Procedure Act."  

E. **Authority To Use Appellate Review**

Does the power to "limit the issues" include authority to resort to appellate review? The bill proposed by the Attorney General's Committee expressly authorized, if it did not require, appellate review. The Senate and House Judiciary Committees intended to carry out the recommendations of the Attorney General's Committee with respect to the agency-examiner relationship, except insofar as they permitted agencies the greater flexibility of using recommended, as well as initial, decisions. The crucial question, then, is whether the failure of the congressional bills and the APA expressly to authorize appellate review, which the bill proposed by the Attorney General's Committee did, must be taken to reflect an intent to preclude the agencies from using it. It is reasonable to answer this question negatively and to conclude that the grant of power to "limit the issues" was intended to replace the express grants of authority, contained in the bill of the Attorney General's Committee, to require the specification of issues and to use appellate review.

This conclusion may be buttressed, arguably, by pointing to the fact that the bill as reported by the Senate Judiciary Committee in November, 1945 extended the agencies' power to limit the issues to cases "on appeal from" as well as on "review of" initial decisions. But this argument is very weak. The term "review" was often used in this and prior bills to describe the agency's scrutiny of a subordinate's action, whether that scrutiny was impelled by an appeal of a party to the proceeding or by the exercise of the agency's initiative. Indeed, the term is so used in section 8(b) of the May, 1945 draft and the APA as enacted. Section 8(b) of the APA refers to "agency review of the decision awarded by an examiner ..., whether such review is on appeal from or in the exercise of the agency's initiative."

135. *Ibid.* The Court did not rest its decision upon any particular provision of the Communications Act.

A discussion of the weight a reviewing court will give to an examiner's decision in deciding whether the agency's findings are supported by substantial evidence and the effect this has on the scope of agency review will not be attempted because it would take us too far from matters of immediate concern. On these questions, see *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 388 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); 2 Davis, *Administrative Law* § 10.04, at 18–26 (1958).

136. See App. notes 8 & 15 infra and accompanying text.

137. See App. notes 29, 62 & 63 infra and accompanying text.

138. See App. note 52 infra and accompanying text.
of subordinate officers,” but it is clear that it means also to cover an appeal from such a decision, including an initial decision. Certainly, by not mentioning “appeal,” the May, 1945 draft could not have meant that the agency, on appeal from an initial decision, would not “have all the powers which it would have in making the initial decision.” Similarly, this omission in the May, 1945 draft could not have meant that the agency, on appeal, would not have the authority to “limit the issues.” It seems that the addition in the reported bill was not necessary, but was a contribution to clarity. It is significant that the Senate Judiciary Committee did not consider it important to comment on this addition to the bill.

It is significant, too, that the Attorney General expressed the opinion that section 8(a) authorized, but did not require, appellate review not only in his Manual on the APA,139 but also in his memorandum explaining the bill reported by the Senate Judiciary Committee, which ultimately became the APA.140 His view was shared by the House Judiciary Committee.141

In the light of this history, the conclusion that the power to “limit the issues” was intended to authorize agencies, although not to require them, to employ appellate review of initial decisions can be avoided only by showing that the APA was intended to impose upon agencies the responsibility for de novo decision in every case. Yet, the legislative history shows that the Attorney General’s Committee and the Senate and House Judiciary Committees found it necessary to defend the grant of power to agencies to make de novo judgments in reviewing initial decisions.142 They did so by pointing out that initial decisions would nevertheless have effect, particularly where factual determinations depended upon the credibility of witnesses. And, of course, the Supreme Court gave effect to initial decisions in Universal Camera. It is not persuasive, therefore, to maintain that Congress did not intend to confer upon agencies the authority to give initial decisions the weight appellate courts accord the findings of trial courts.

139. ATT’Y GEN. MANUAL 84.

140. See App. note 56 infra and accompanying text. The Attorney General here thought that the agency, in an appropriate case, might review the initial decision in the same manner that a court reviewed an agency decision. But in the Manual the Attorney General used the analogy of trial court and appellate court. ATT’Y GEN. MANUAL 84.

141. See App. note 65infra and accompanying text. The Committee compared the agency’s power to review initial decisions with the power of courts under § 10(e) of the bill.

sitting without juries — whenever the agencies deem it appropriate to do so.

F. Authority To Use Summary Review

Whether or not the power to "limit the issues" includes the power to use appellate review, the conclusion is reasonable that the APA authorizes summary review to accompany any other system of review. Indeed, the possibility of summary affirmance of a decision below may reasonably be said to inhere in the process of review by a higher authority. Such summary affirmance is consistent even with an agency's obligation to reach independent conclusions.

It would seem that this is what the Supreme Court held in NLRB v. Duval Jewelry Co.148 The Court there decided that the provision in section 11(1) of the Labor Act144 giving a person served with a subpoena duces tecum the right to "petition the Board to revoke" the subpoena and the requirement that "the Board shall revoke . . . such subpoena if in its opinion" the statutory conditions are not satisfied, did not prohibit the Board from adopting rules requiring that (1) the persons to whom subpoenas duces tecum are addressed shall move the hearing officer to revoke them; (2) the hearing officer shall rule on these motions initially; and (3) the hearing officer's rulings shall not be appealed directly to the Board (except by its "special permission"), but shall be considered by the Board when it reviews the entire record. The Court explained that the Board was not abdicating its statutory responsibility to rule on motions to revoke subpoenas by adopting this procedure. It acknowledged that there was "a degree of delegation of authority" in the Board's rules, but added:

We are advised that in practice the aggrieved party asks the Board for leave to appeal, stating the grounds relied upon. The Board in deciding whether to grant the appeal considers the merits. If no substantial question has been raised, leave to appeal is denied. If a substantial question is presented, leave to appeal is granted. Sometimes when leave to appeal is granted, action is forthwith taken on the merits, the ruling of the hearing officer being reversed or modified. Or where an immediate ruling . . . is not required, the Board defers its ruling until the entire case is transferred to it in normal course.

While there is delegation here, the ultimate decision on a motion to revoke is reserved to the Board not to a subordinate. All that the Board has delegated is the preliminary ruling on the motion to revoke. One who is aggrieved by the ruling of the regional director or hearing officer can get the Board's ruling. The fact that special permission of the Board is required for the appeal is not important. Motion for leave

to appeal is the method of showing that a substantial question is raised concerning the validity of the subordinate's ruling. If the Board denies leave, it has decided that no substantial question is presented. We think that no more is required of it under the statutory system embodied in section 11. No matter how strict or stubborn the statutory requirements may be, the law does not "preclude practicable administrative procedure in obtaining the aid of assistants in the department." See Morgan v. U.S., 298 U.S. 468, 481; Eagles v. Samuel, 329 U.S. 304, 315, 316.\footnote{145. 357 U.S. at 5-7. It should be noted that neither in this case, which involved a representation proceeding, nor the companion case, Lewis v. NLRB, 357 U.S. 10 (1958), which involved an unfair labor practice proceeding, did the Court rely on any provision of the APA for its conclusions. In addition to the explanation quoted above, the Court in Duval Jewelry also relied on §§ 5 & 9(c)(1) of the Labor Act, 49 Stat. 449 (1935), 29 U.S.C. §§ 141-88 (1947). 357 U.S. at 8. For authority to make the revocation procedure applicable to subpoenas ad testificandum, the Court in Lewis relied on § 6 of the act. 357 U.S. at 14. Section 11(1) of the act refers only to subpoenas duces tecum.}

It is clear, too, that the Court does not think that the issuance and revocation of subpoenas present a special case. "Ultimate decision on the merits of all the issues coming before the [hearing officer]," the Court reiterated in Duval Jewelry, "is left to the Board. That is true of motions to revoke subpoenas duces tecum, \textit{as well as other issues of law and fact. That degree of delegation seems to us wholly permissible under this statutory system.}"\footnote{146. 357 U.S. at 8.}

G. RECOMMENDATIONS OF ADMINISTRATIVE CONFERENCE

The Administrative Conference made the following recommendations:

In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate unnecessary delay in the administrative process of deciding contested matters:

1. Section 8 of the Administrative Procedure Act should be amended to make it clear that:
   a. Every agency which is under a statutory duty to promulgate rules or adjudicate cases on the record after a hearing and does not either itself preside at the prescribed hearing or require the entire record to be certified to it for initial decision —

   (1) may require the party seeking administrative review of the initial decision rendered by the officer who presided at the hearing (or by any other officer authorized by law to make it) to specify the alleged errors in the initial decision and the portions of the record...
supporting the allegations of error with such particularity as the agency may prescribe, and
(2) may confine its administrative review of the initial decision to the specified errors and portions of the record.
2. Section 8 of the Administrative Procedure Act should be amended to make it clear that:

a. When a party to a proceeding seeks administrative review of an initial decision rendered by the officer who presided at the hearing (or by any other officer authorized by law to make it), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes
   (1) a prejudicial procedural error was committed in the conduct of the proceeding; or
   (2) the initial decision embodies
      (a) a finding or conclusion of material fact which is clearly erroneous; or
      (b) a legal conclusion which is erroneous; or
      (c) an exercise of discretion or decision of law or policy which is important and which the agency should review.

Nothing in this paragraph shall be construed to limit the powers of delegation of any agency under any other statute or reorganization plan.

b. The agency's decision to accord or not to accord administrative finality to an initial decision in accordance with recommendation 2a above shall not be subject to judicial review. If, however, the initial decision becomes the decision of the agency because the petition for review of the initial decision is denied or because the initial decision is affirmed summarily, such agency decision, of course, will be subject to judicial review in accordance with the standards for judicial review of agency decisions established by law. 147

These recommendations were intended to remove any current doubts that the APA empowers agencies to exercise the authority the recommendations would confer and to supersede the provisions of organic statutes governing particular agencies that might be construed as precluding them from exercising this authority. 148 For example, NLRB rules require exceptions taken to the trial examiner's decision to be set forth with great particularity and authorize the Board to consider only those exceptions taken with the required degree of specificity. 149 Yet, it seems that Board officials

148. S. Doc. No. 24, at 158.
149. NLRB Rules and Regulations, 28 Fed. Reg. 7973 (1963) provides: Each exception (1) shall set forth specifically the questions of pro-
read the provisions of section 10(c) of the Labor-Management Relations Act, as amended subsequent to the enactment of the APA, 150 and the "whole record" test imposed by *Universal Camera* to preclude them from enforcing these rules and to require complete de novo review of the entire record in every case. Thus, Mr. Boyd Leedom, then a Board member, explained to a Senate Committee:

> Under the present method [of agency review] it is sufficient that the parties seeking review take exception to the trial examiner's findings by referring in broad and conclusionary language to matter being relied upon to indicate a contrary result. Adequate treatment of such exceptions often calls for a perusal of the entire record, and, especially where the record is lengthy, this procedure leads to waste of untold hours and lends itself to purposeful delay. 151

Whether or not the NLRB officials are justified in their views is not crucial for present purposes. Doubt can be dispelled under existing law only by litigation that may risk private interests and public objectives. In seeking to dispel doubt regarding agency authority to require specificity in exceptions taken to an initial decision, the Administrative Conference echoed views expressed more than 20 years ago by the Attorney General's Committee. 152 The path of administrative reform is indeed circuitous. But accomplishment of even this modest reform will remove unnecessary burdens some agencies may think they are forced to carry.

28 Fed. Reg. 7974 (1963) adds:

Where exception is taken to a factual finding of the trial examiner, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

150. See note 190 *supra*.


Similarly, NLRB officials have also expressed doubt about the propriety of their use of a summary, appellate review in light of the provisions of section 10(c) of the Labor-Management Relations Act, which are read to require a plenary, de novo review. The recommendations of the Administrative Conference would also dispel this doubt.

IV. CONCLUSIONS

To accord greater administrative finality to the initial decisions of hearing examiners in proceedings subject to the requirements of sections 7 and 8 of the APA is one way to help achieve President Kennedy’s stated objective to relieve agency members “from the necessity of dealing with many matters of lesser importance and thus conserve their time for the consideration of major matters of policy and planning.” Unfortunately, there is no completely satisfactory way of accomplishing this objective.

153. See note 151 supra; 29 C.F.R. § 101.12(a) (1963). There is language in NLRB v. Stocker Mfg. Co., 185 F.2d 451 (9th Cir. 1950) to nourish the Board’s doubts. But see NLRB v. Duval Jewelry Co., 357 U.S. 1 (1958); note 145 supra and accompanying text. In Stocker the court upheld the procedural regularity of having an examiner who had not heard the case prepare the decision because the presiding examiner died before he could do so. The court held this procedure was proper because the “functions and significance” of the decision were “limited” since, exceptions having been taken to it, the Board “retains its normal obligation to examine the record and reach its own independent conclusions.” 185 F.2d at 454.

On the particular question it decided, the Stocker case may be a sport. Professor Davis asserts that it is “out of line with the usual principle” that “when demeanor of witnesses is a substantial element, deciding without taking that factor into account is undesirable and may be unfair . . . .” 2 DAVIS, ADMINISTRATIVE LAW § 11.18, at 113, 115–16 (1958). The fact that the Board reached its own independent conclusions on the record would not make this principle inapplicable.

On the question that primarily concerns us, the language in Stocker is not decisive. Since the Board elected to resort to a plenary, de novo review in the case, the court was not called upon to decide what is the Board’s “normal obligation.” That question would demand an answer only if the Board used summary, appellate review.

Language similar to that used by the court in Stocker is found in a number of other cases in which the agency also elected to “reach its own independent conclusions.” See, for example, the following cases cited in 2 DAVIS, ADMINISTRATIVE LAW § 10.08 (Supp. 1963): Hoffman v. Ribicoff, 305 F.2d 1, 7 (8th Cir. 1962); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80 (9th Cir. 1961), cert. denied, 366 U.S. 968 (1962); NLRB v. WTVJ Inc., 268 F.2d 846, 848 (5th Cir. 1959); Robbins v. United States, 294 F. Supp. 78, 81 n.5 (E.D. Pa. 1961); Burlington Truck Lines, Inc. v. ICC, 194 F. Supp. 31, 50 (S.D. Ill. 1961), judgment rev’d on other grounds, 371 U.S. 156 (1962).

154. This was the language used by President Kennedy to justify the Reorganization Plans of 1961. Address by President Kennedy, Message to
It seems clear that neither Congress nor the agencies wish to delegate decision-making functions to subordinate officials if the decisions of the delegates are to become administratively final without any kind of review by superior agency authority. Yet each system of such review has its deficiencies.

Certiorari review of initial decisions is the least satisfactory system of all. If the agency thereunder concludes not to review the initial decision because the questions decided by the hearing examiner are not significant for the development of overall agency policy, the party adversely affected by the decision is relegated to the sole remedy of judicial review. This remedy is restricted by the accepted doctrines governing the scope of judicial review, although it would be interesting to see whether these doctrines would survive a widespread practice of certiorari review. Whether they did or not, certiorari review would shift burdens now assumed by agencies to courts and convert the problem of administrative delay into one of judicial delay. Nor, in the long run, will agencies serve the public interest by permitting a decision of a hearing examiner to become administratively final without taking steps to assure that the decision will withstand judicial review. An increasing rate of judicial reversal may shake confidence in the agency and harm its general program.

The use of employee boards to review the decisions of hearing examiners overcomes many, but not all, of these potential difficulties created by certiorari review. At the least, it assures the party adversely affected by the examiner's decision that a responsible group of agency officials will fully consider his objections to the merits of the decision. Since employee boards are able to spend full time, if necessary, in performing the review function, there is every reason to expect that they will examine records more carefully than will agency members and their personal staffs. Yet, if the actions of employee boards are subject, in turn, only to certiorari review, the possibility remains that the agency may deny review because of the lack of importance of decisions that they would, after full consideration, disapprove on the merits and that could not withstand judicial review. On the other hand, if the merits of all the decisions of employee review boards are reviewed by the agency, even under a summary, appellate system of review, a three-stage decisional process (hearing examiner-employee review board-agency) may be created that could aggravate the problem of delay.

The use of employee review boards has the added, potential, psychological disadvantage of diminishing the stature and hurting the morale of the hearing examiner corps, which prefers to have its decisions reviewed only by agency members. 155

Mandatory but summary and appellate review, as recommended by the Administrative Conference, would eliminate most of the objections to certiorari review and the use of employee review boards. Yet, it would not be without potential drawbacks of its own. In the first place, it would not ease the burdens of review imposed upon agency members and their staffs to the extent possible with certiorari review or the use of employee review boards. Furthermore, if the burdens it imposed proved to be heavy, agency members (and their staffs) might be tempted to transform it into certiorari review by giving only cursory consideration to the merits of cases that lack general importance. An employee review board would then be preferable.

There has not been sufficient experience with different systems of agency review of hearing examiners' decisions to eliminate conjecture in evaluating their respective advantages and disadvantages. Yet, reflection on the controversies that surrounded the Reorganization Plans of 1961, the 1961-1962 legislation discussed above, and the recommendations of the Administrative Conference points to the need to permit agencies to experiment with different ways of delegating the decision-making function and reviewing the decisions of their delegates.

The conclusion that the problems of different agencies are different and that no single solution is likely to solve them all is not novel, 156 but it is often ignored. For example, recently proposed legislation seeks to confine all agencies, when reviewing initial decisions, to the use of appellate review and to exclusive, limited grounds of review. 157


156. It was stressed once again in the 1962 COMM. ON AGENCY ADJUDICATION, SEC. OF ADM. LAW, AMERICAN BAR ASS'N ANNUAL REPORT 26 (undated mimeo). (The Report deals with employee review boards.)

To expand the role of the hearing examiner even further, one of these bills proposes to require an initial decision by the hearing examiner in every case of adjudication or rule making in which the agency itself does not preside at the hearing. This requirement may be justified in proceedings that call primarily for the decision of questions of fact involving the credibility of witnesses or the application of more or less fixed policies to particular fact situations. Hearing examiners with whom I have discussed the question maintain that the requirement is justified even where technical data must be evaluated or questions of law or policy must be decided. In these situations, they argue that (a) a hearing examiner's decision will expedite final agency decision more than even the action of an agency dispensing with such a decision altogether; and (b) an agency's tentative decision or a staff-recommended decision serves no function which a hearing examiner's decision cannot serve.

Point (a) is supported by the argument that even where a hearing examiner's decision is dispensed with, the agency heads must rely on personal assistants or agency staff to analyze the record and expose the issues of fact, law, and policy involved. This function, it is claimed, can be performed more expeditiously by the examiner who presided at the hearing. As to point (b), it is contended that in lieu of an agency's tentative decision or a staff-recommended decision, the staff should be asked to offer testimony and argument at the hearing as to the facts and the legal and policy considerations that it thinks should govern disposition of the particular proceeding.

To evaluate these arguments, it is necessary to know (1) whether the agency is or should be ready, in every case, to pre-

M. Benjamin, testifying as Chairman of the ABA Special Committee on Code of Federal Administrative Procedure, also opposed this feature of S. 1734. Id. at 8, 10.

While it is somewhat ambiguous on the point, S. 1663, 88th Cong., 1st Sess. (1963), also imposes appellate review and otherwise limits the grounds of agency review. S. 1663 proposes far-reaching amendments to the APA as a whole and is presently being considered by the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure.

158. S. 1734, 87th Cong., 1st Sess. (1961). S. 3410, 87th Cong., 2d Sess. (1962), introduced after Recommendation No. 9 was made public, would also impose such a requirement, except in cases in which the agency requires the entire record to be certified to it for decision, in which case no provision for any intermediate decision seems to have been made. S. 3410 would also give any party the right to appeal the initial decision, on specified grounds, to an "agency appeal board" consisting of "one or more panels each composed of one or more agency members or one or more hearing examiners" placed on an "appellate roster" by the Civil Service Commission.
sent all pertinent legal and policy considerations at the time of
the hearing; (2) what channels of informal communication be-
tween the hearing examiner and agency members and staff are
authorized by law and exist in fact or should be permitted to exist;
and (3) whether it is desirable to require the agency to filter its
views on law or policy through the hands of the hearing exami-
ner. These questions, of course, go to the heart of the internal
process of decision making and beyond the confines of this
Article.

Few would disagree, however, that hearing examiners' deci-
sions do not always reflect current agency thinking on law and
policy. (Some would also contend that procedures to ensure that
they did would threaten the hearing examiner's "independence.""
To the extent that they do not, the decisions will not perform
the function of an agency's tentative decision, or the staff's rec-
ommended decision, either of which affords the parties an oppor-
tunity to get at official agency thinking prior to final agency
decision.

Furthermore, all the arguments outlined above for a hearing
examiner's decision in every case would be satisfied if it took the
form of a recommended decision. Is there any reason why it
should always take the form of an initial decision? If it did, the
hearing examiner's "stature" might rise. Moreover, it is difficult
to see what is gained when an agency has the record certified to
it for initial decision only to ask the hearing examiner to recom-
mend a decision but not to render an initial decision. In practice,
there may be little difference between a hearing examiner's "ini-
tial" decision and his "recommended" decision. The agency is
required by section 8(b) to consider and determine all issues
properly presented to it after an initial or recommended decision
is handed down. Unless some other statute prevents it from do-
ing so, it may provide that it will consider only such objections
to an initial or a recommended decision as are made with the
required degree of specificity. And the agency may, if it so de-
cides, adopt as its final decision, in whole or in part, the findings,
conclusions, and basis therefor stated in a recommended, or an
initial, decision.

S. 1663, 88th Cong., 1st Sess. (1963), would amend § 8 of the APA
to require an initial decision by the hearing examiner in every case of adjudica-
tion (but not rule making) in which the agency does not preside at the hear-
ing. S. 1663 would also give any party the right to appeal to an agency appeal
board composed in the same fashion as under S. 3410.

S. 1734 required a hearing examiner's initial decision even in a case in
which the affected parties were willing to waive it in order to expedite mat-
ters, but S. 1668 permits the parties to waive the requirement.
It has been argued, however, that use of the initial decision, rather than the recommended decision, would compel the agency to give priority to the consideration of all initial decisions—lest they become final in the absence of an appeal—even though other matters should have a prior claim upon the attention of agency members. An agency, of course, could stay the effective date of an initial decision until it decided whether to permit it to become administratively final without more ado.

It is difficult to become excited about the question whether the hearing examiner’s decision, when called for by the agency, should be an initial decision or a recommended decision. However, agencies wishing to “limit the issues” on appeal from or review of hearing examiners’ decisions will have to see that they take the form of initial decisions because the APA authority to do so may be exercised only in connection with “initial” decisions.

Agency members have objected to the proposed requirement that the hearing examiner should initially decide every case.159 Certainly those who are held responsible for the effectuation of statutory objectives should be trusted to call for initial decisions when they think this is the proper course without being deprived of alternative processes of reaching final decisions that they think may better accomplish the statutory purpose in particular cases and be just as fair to the affected parties.

In short, agencies should be permitted to use—and experiment with—any course of decision making and any system of review of hearing examiners’ decisions that they think will culminate in the fairest and most effective discharge of their statutory responsibilities in a particular case or classes of cases. But agency heads should also be held to strict account for the overall performance of their agencies, including the performance of delegated functions. No appreciable reason should then exist to fear that agencies will abuse their freedom to experiment.

159. Hearings on S. 1734, at 213 (Frank L. McCulloch, NLRB Chairman), 80 (Alan S. Boyd, CAB Chairman), 118–20, 131–33 (William L. Cary, SEC Chairman), 160–61 (Nicholas de B. Katzenbach, Deputy Attorney General), 106 (John C. Mason, then FPC General Counsel). Everett Hutchinson, then ICC Chairman, agreed with these agency officials. Letter From Chairman Hutchinson to Senator James O. Eastland, Chairman, Senate Judiciary Committee, June 20, 1961.
Appendix

LEGISLATIVE HISTORY OF SECTION 8(a)
OF THE ADMINISTRATIVE PROCEDURE ACT

A. RECOMMENDATIONS OF ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE

1. The Bill Proposed by the Committee

The genesis of the APA may be found in the bill which embodied the recommendations of the Attorney General's Committee. This bill authorized every agency

to delegate to its responsible members, officers, employees, committees, or administrative boards, power to manage its internal affairs, to dispose informally of requests, complaints, show-cause orders, or other moving papers, and to govern matters of preliminary, initial, intermediate, or ancillary procedure.¹

This authority was subject to "such supervision, direction, review or reconsideration as [the agency] may prescribe." The proposed bill also authorized every multiple-headed agency to "delegate to one or more of its members, subject to review or reconsideration by it, the power to decide cases after hearing or on appeal."²

The proposed bill provided that every case which was required by law to be adjudicated on the basis of a record made in the course of a prescribed hearing (and which did not fall within any of the excepted classes of cases specified in the bill) should be heard by one or more "hearing commissioners."³ The hearing commissioner was to "find the facts, formulate the conclusions of law, and enter a decision in the case."⁴ But the agency could call for the transmittal of the entire record to it for decision (omitting the hearing commissioner's decision) in any case in which the hearing commissioner certified that novel or complex questions were raised or a private party showed good cause why this should be done.⁵

The hearing commissioner's decision was to become the final decision of the agency, without further proceedings, unless (a) a

party appealed to the agency or (b) the agency, on its own motion, decided to review it. A party appealing from the hearing commissioner's decision was required to "set forth with particularity each error asserted, and only such questions as are specified by the appellant's petition for review and such portions of the record as are specified in the supporting brief need be considered by the agency." If the appellant asserted that the hearing commissioner's findings of fact were "against the weight of the evidence," the agency might "limit its consideration of this ground of appeal to the inquiry whether the portions of the record cited disclose that the findings are clearly against the weight of the evidence." But the agency was empowered "to affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, or itself to make any finding which in its judgment is proper under the record." If, however, its findings differed materially from those of the hearing commissioner, the agency was required to explain "the grounds of its determinations, with appropriate references to the record.

2. The Committee's Explanation of Its Bill

The Attorney General's Committee was disturbed by the then-existing divorce of responsibility for the conduct of the hearing from responsibility for decision. It sought to alter the status of the hearing officer from that of a "monitor" to that of an officer who must "initially" decide the case. So it proposed the addition to each agency of officials called "hearing commissioners," to be appointed, removed, and paid as the Committee specified. The hearing commissioners were to have "no functions other than those of presiding at hearings or pre-hearing negotiations and of initially deciding the cases which fall within the agency's jurisdiction."

The Committee envisaged the following relationship between hearing commissioner and agency:

The Committee contemplates that [the hearing commissioner's] decision will serve as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court.

8. Ibid.
10. Ibid.
12. Id. at 44, 50.
13. Id. at 46-50.
14. Id. at 50.
Accordingly, an integral part of the Committee's recommendations is that, in the absence of appeal, the decision of the hearing commissioner be final and effective without further action or consideration by the agency. But to preserve uniformity of decision and effective supervision of an agency's work, the Committee recommends not only that the parties, including the agency's trial attorney, be permitted to appeal, but also that the agency heads may, within the period for appeal, take up any decision for review upon their own motion.

In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown. And in the event that the agency does find facts contrary to those found by the hearing commissioner, the agency's opinion should articulate with care and particularity the reasons for its departures, not only to disclose the rationale to the courts in case of subsequent review but to assure that the agency will not carelessly disregard the decision of the hearing commissioner.15

Nevertheless, the Committee made it clear that agencies "should have the authority, when reviewing a hearing commissioner's determinations, to affirm, reverse, modify (including the power to make the finding which they deem required by the record), or remand for further hearing."16 "At the same time, it should be open to them to adopt, wholly or partially, the findings, conclusions, decision, or order from which appeal has been taken."17

The Committee thus explained the burden it would impose upon a party appealing from a hearing commissioner's decision:

The specific grounds of appeal should be required to be stated, so that the review of a hearing commissioner's decision may be limited accordingly. Because of differences in the subject matters involved in cases before the several agencies, the scope of review should be left for later definition by the agencies; but it should be made plain by statute that where an appeal is based upon allegedly erroneous determinations of fact by the hearing commissioner, the agency may permissibly, but is not required to, confine its examination of the record to the portions cited and may reject that ground of appeal unless those portions disclose that the finding is clearly wrong. In other words, mere allegations of error without convincing support should not impose on the agency heads the duty of reading an entire record.

The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commi-

15. Id. at 51.
16. Id. at 53.
17. Ibid.
sioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal.

If limited as the Committee recommends, the process of review should rarely involve the heavy burden now assumed by many agencies. If the appeal, the briefs, and the oral argument are prepared with the care and precision upon which the agencies should insist, even factual issues may be determined by means of reference to the papers filed by the parties and to such portions of the record as may have been specifically indicated by them.\(^8\)

3. Conclusions

It is apparent that the Attorney General's Committee proposed to authorize, but not require, appellate review of the hearing commissioner's decision which, in every case, was to be an "initial" decision, in the sense the APA uses that term. If an appellant claimed that the hearing commissioner's findings of fact were against the weight of the evidence, the Committee authorized and expected the agency ordinarily to limit its inquiry to determining whether these findings were clearly wrong. But the agency could, if it wished, employ a de novo review and "make any finding which in its judgment is proper under the record."\(^9\)

The Committee contemplated that the agency would review, de novo, "conclusions, interpretations, law and policy."

In accordance with the Committee's recommendations, the agency would have been obliged to review a hearing commissioner's decision whenever a party appealed to the agency from such a decision. But whether the agency could have resorted to summary review is not expressly considered in the Committee's bill or in its final report. The bill required the appellant to "set forth with particularity" each error the hearing commissioner allegedly committed and authorized the agency to consider only the errors thus set forth and only such portions of the record specified by the appellant as supporting his exceptions. There are intimations in the excerpts from the final report quoted above that summary review would have accorded with the Committee's views. Indeed, it is sensible to accompany appellate review, which the Committee expressly authorized, with summary review.

\(^8\) Id. at 51-52.

B. CONGRESSIONAL HISTORY

1. The McCarran-Sumners Bill

The immediate forerunner of the APA was the bill introduced in January, 1945 by Senator McCarran, then Chairman of the Senate Judiciary Committee, and Representative Sumners, then Chairman of the House Judiciary Committee. The bill provided, with certain specified exceptions, that if an agency was required by statute to make rules or adjudicate cases on the basis of a record made in the course of a prescribed hearing, a hearing “examiner,” to be appointed as specified in the bill, was to preside at the hearing. Officers qualified to preside at such hearings were to “initially decide the case,” but the agency was empowered to request certification of the entire record to it for initial decision. In the latter event, such officers would recommend a decision to the agency. A hearing examiner’s initial decision would become the decision of the agency without further proceedings “in the absence of either an appeal to the agency or review upon motion of the agency.”

So far as agency review of the initial decision was concerned, the bill provided only that the agency was to consider the exceptions thereto and the “supporting reasons for such exceptions” and to accompany its decision with a statement of “the findings of fact, conclusions of law, and reasons therefor upon all relevant issues of fact, law, or agency discretion presented.”

2. The Senate Judiciary Committee Print of May, 1945

After considering the views of the agencies and interested private organizations and with the aid of representatives of the Attorney General, the Senate Judiciary Committee published a revised version of the McCarran-Sumners bill in May, 1945. It was this revised draft that first added the following provision to section 8(a) of the original bill:


23. Ibid.

24. Ibid.

25. Ibid.

On review of the initial decisions of such hearing officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.27

Like the original bill, the revised draft required the agency, when reviewing an initial decision, to consider the exceptions thereto and the “supporting reasons for such exceptions” and to accompany its decision with a statement of “the necessary findings and conclusions, and the basis therefor, upon the material issues of fact, law or discretion.”28

The Senate Judiciary Committee did not explain the significance of the power to “limit the issues upon notice or by rule.”29

3. Action by House Judiciary Committee

The House Judiciary Committee held hearings during June, 1945 on six House bills dealing with administrative procedure, in the course of which the Senate Judiciary Committee's revised draft of May, 1945 was also considered.30 (a) H.R. 184, introduced by Congressman Celler, was intended to carry out the recommendations of the majority of the Attor-

27. Rev. McCarran-Sumners Bill § 8(a), printed in APA Leg. Hist. 32. The revised draft also authorized the agency to require the entire record to be certified to it for initial decision either “in specific cases or by general rule” and eliminated the requirement of a recommended decision in cases of rule making or determining applications for licenses in which the agency instead issued tentative decisions “as a basis for post-hearing procedure.” Ibid.
29. The Committee explained § 8 as follows:
   The Attorney General's Committee recommended that the officer or officers who presided at the reception of evidence should not merely make recommendations to the agency in which they serve, but should go further and make an initial decision binding upon the parties in the absence of administrative or judicial review (Final Report, pp. 50-53). This subsection, however, leaves it to the agency to choose either in the individual case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make a recommended decision for the further consideration of the agency. Such a provision not only allows the agency a discretion to be adapted to different subjects or cases, but it does not require a sharp break with current practice. In licensing or rule making, however, the agency may issue a tentative decision in lieu of either an initial decision or recommended decision by the officer who presided at the hearings.

APA Leg. Hist. 32-33.
30. APA Leg. Hist. 45-130. Another of these bills was H.R. 1203, supra note 20. The hearings on the bills disclose nothing of interest for present purposes.
ney General’s Committee and was identical with the provisions of that Committee’s bill, outlined above.\(^{31}\)

(b) H.R. 339 and H.R. 1117, identical bills introduced by Representatives Smith and Cravens respectively, provided that “Commissioners or Deputy Commissioners,” to be appointed as provided therein, should preside at hearings which by statute had to precede rule making or adjudication.\(^{32}\) The Commissioners were to “find all the relevant facts and enter an appropriate order, award, judgment or other form of determination.” Their determinations were to become final “without further proceedings” in the absence of “either an appeal to the agency (upon such specification of errors as it may require by general rule) or review upon the agency’s own motion and specification of issues.”\(^{33}\)

Upon appeal to the agency from such determinations,

the highest authority in the agency shall (1) afford the parties due notice of the specific issues to be reviewed, (2) provide an adequate opportunity for the presentation of briefs, proposed findings and conclusions, and oral argument by the parties, and (3) affirm, reverse, modify, change, alter, amend, remand, or set aside in whole or in part such decision . . . . Such review by the agency shall be confined to matters of law and administrative discretion.\(^{34}\)

The bill further provided:

In the decision of any case initially or upon review by the agency, all hearing, deciding, or reviewing officers shall personally consider the whole or such parts of the record as are cited by the parties, with no other aid than that of clerks or assistants who perform no other duties.\(^{35}\)

Final decisions of the agency, on review of initial determinations, were to be accompanied by “a statement of reasons, findings of fact and conclusions of law upon all relevant issues raised, including matters of administrative discretion as well as of law or fact.”\(^{36}\) “The findings, conclusions, and stated reasons shall en-

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\(^{33}\) H.R. 339, § 7(b) & H.R. 1117, § 7(b), supra note 32, printed in APA Leg. Hist. 143, 152.

\(^{34}\) H.R. 339, § 7(c) & H.R. 1117, § 7(c), supra note 32, printed in APA Leg. Hist. 143–44, 152.

\(^{35}\) H.R. 339, § 7(d) & H.R. 1117, § 7(d), supra note 32, printed in APA Leg. Hist. 144, 152.

\(^{36}\) H.R. 339, § 7(e) & H.R. 1117, § 7(e), supra note 32, printed in APA Leg. Hist. 144, 152.
compass all relevant facts of record and shall themselves be relevant to, and adequate [sic] support, the decision and order or award entered."

(3) It should be noted that the provisions of this bill were not internally consistent. On the one hand, they confined agency review of the determinations of the Commissioners to "matters of law and administrative discretion." On the other, they required the agency reviewing an initial determination to state its findings of fact on all the relevant issues raised, including issues of fact.

(c) H.R. 1206, introduced by Representative Walter, was intended to carry out the recommendations of the minority of the Attorney General's Committee. Like the majority bill, H.R. 1206 required hearing commissioners to be appointed as provided therein and to hear cases that the agency was obligated by statute to adjudicate on the record -- with stated exceptions. Unless unavailable, the presiding officer, after hearing, was required to "find all the relevant facts, including conclusions and inferences of fact, make conclusions of law, and enter an appropriate order, award, judgment, or other form of decision." The agency could dispense with the presiding officer's decision and direct that the entire record be transmitted to it for decision only "on petition of all the private parties therein and for good cause shown." It could not do so, as the majority bill provided, when the presiding officer certified that a case presented novel or complex questions. In such case, instead, the agency could give binding instructions to the presiding officer with respect to the questions of law or policy he certified.

The agency was to accompany its decision on review of a presiding officer's decision with a statement of the reasons therefor and with separately stated findings of fact and conclusions of law upon all points on which the decision rested; but it could adopt in whole or in part the findings, conclusions, and decisions of the presiding officer. In every case, the bill stated, the deciding officers should "personally master such portions of the record..."
as are cited by the parties, with the aid only of assistants who performed no other duties,” and their “findings and conclusions shall encompass all relevant facts of record and shall themselves be relevant to, and shall adequately support, the decision, order or award entered.”44

Review by the agency of a presiding officer’s decision could be instituted by an appeal to the agency or on the agency’s own motion; in the absence of either, the presiding officer’s decision would become final, without further proceedings.45 “Upon appeal to the agency from a decision of a presiding officer,” the appellant was required to “set forth separately each error asserted, in detail and with particularity.” Only “such questions as are specified by the appellant’s petition for review and such portions of the record as are specified in the supporting brief need be considered by the agency.”

Where the appellant asserts that the findings of fact made by the presiding officer are unsupported by evidence, the agency may limit its review of such ground to the inquiry whether, upon the portions of the record cited by the parties, the findings made by the presiding officer are clearly contrary to the manifest weight of the evidence. Where an agency on petition or on its own motion reviews the decision of a presiding officer, it shall with particularity specify the points, issues, or grounds of such review. Upon the taking of an appeal to it or upon review by it on its own motion, the agency shall have authority to affirm, reverse, modify, or set aside in whole or in part the decision of the presiding officer, or to remand the case to the presiding officer for the purpose of receiving further evidence and making further findings and conclusions or for further proceedings.46

In the main, the conclusions reached above with respect to the majority bill are applicable to H.R. 1206. The fact that H.R. 1206, unlike the majority bill, did not authorize the agency, when reviewing the presiding officer’s decision, to “itself . . . make any finding which in its judgment is proper under the record”47 might support an argument that H.R. 1206 did not contemplate de novo review, but required appellate review. Yet, the bill’s provisions with respect to the content of statements accompanying agency decisions on review, personal mastery of the record by the reviewers, and the scope of the agency’s findings and conclusions seem to imply authorization, if not requirement, of a de novo review. It is significant that the minority of the Attorney General’s Committee did not mention this difference between

44. Ibid.
45. H.R. 1206, § 308(n), printed in APA Leg. Hist. 175.
46. H.R. 1206, § 308(o), printed in APA Leg. Hist. 175.
47. See note 9 supra.
its bill, H.R. 1206, and the majority’s bill, but pointed to the substantial similarity of the two bills in these respects.48

(d) H.R. 2602, introduced by Representative Gwynne, adds nothing of importance.49

4. Report of Senate Judiciary Committee50

Section 8 of the bill reported by the Senate Judiciary Committee in November, 1945 was identical with section 8 of the enacted APA, except for differences in section 8(b) that are of no present importance.51 This reported bill first contained the full language of section 8(a) of the APA that we are attempting to construe.52

49. H.R. 2602, 79th Cong., 1st Sess. (1945), printed in APA Leg. Hist. 176–83. The bill provided that unless the officer or officers who presided at the hearing [required by statute as a basis for adjudication] also decide the case, they shall prepare and serve upon all parties and deciding officers an intermediate report of specific recommended findings of fact and conclusions of fact and law upon all relevant issues presented by the whole record.

H.R. 2602, § 9(a), supra, printed in APA Leg. Hist. 183. All deciding officers were required personally to consider “the whole or such parts of the record as are cited by the parties” and to accompany their decisions “by a statement of reasons, findings and conclusions upon all relevant issues of law, fact, or discretion raised by the parties: Provided, however, That the findings and conclusions in every case shall encompass all relevant facts of record and shall themselves be relevant to, and shall adequately support, the decision and order or award entered.” H.R. 2602, § 9(c)(d), supra, printed in APA Leg. Hist. 183.


51. S. Rep. No. 752, § 8(b), printed in APA Leg. Hist. 221–22. Section 8(b) of the reported bill did not contain the following sentence found in the APA: “The record shall show the ruling upon each such finding, conclusion, or exception presented”; and (2) it required all decisions to include a statement of the basis (the APA adds, in the alternative, “the reasons”) for the findings and conclusions upon all the issues presented (the APA adds “on the record”). Ibid.

52. It will be recalled that the Senate Judiciary Committee Print of May, 1945, supra note 26, defined the agency’s powers on “review of the initial decisions.” The reported bill added “on appeal from or review.”

Section 8 of the reported bill differed from § 8 of the May, 1945 draft in the following additional respects: (1) it required the officer who presided at the hearing or, “in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7” to “initially decide the case,” whereas the May, 1945 draft required and authorized any “officer or officers qualified to preside at hearings pursuant to section 7” to “initially decide” any case; (2) it authorized the agency, in rule making or determining applications for initial licenses, to substitute for the presiding officer’s recommended decision either a tentative decision by the agency or a recommended decision by any of the agency’s responsible officers, whereas the May, 1945 draft specified the agency’s tentative decision as the only substitute.
The Committee report did not explain the scope of the agency’s power to “limit the issues” on appeal from or review of initial decisions. It was careful to point out only that examiners’ decisions would become part of the record and therefore have effect, even though the agency in reviewing them was empowered to exercise all the powers it would have if it had made the initial decision.\(^5\) In explaining section 8(b), the Committee report commented that to afford parties a reasonable opportunity to submit “supporting reasons” for their exceptions, “briefs on the law and facts must be received and fully considered by every recommending, deciding, or reviewing officer.” “They must also hear such oral argument as may be required by law.”\(^5\)

5. Attorney General’s Explanation of Bill Reported by Senate Judiciary Committee

To his statement that the Justice Department would recommend enactment of the bill reported by the Senate Judiciary Committee, the Attorney General appended a memorandum analyzing its provisions.\(^5\) In this memorandum, the Attorney General read section 8(a) as follows:

The initial decision of the hearing officer, in the absence of appeal to or review by the agency, is (or becomes) the decision of the agency.

\(^{(8)}\) it authorized the agency to dispense with an intermediate report altogether in rule making or determining applications for initial licenses when “the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires,” whereas the May, 1945 draft authorized no such dispensation; and (4) its wording of § 8(b) differed in a number of respects, which it is not important to point out, but the full text of § 8(b) in the May, 1945 draft follows:

Prior to each recommended, initial, tentative decision or decision upon agency review of the decision of subordinate officers, the parties shall be afforded an opportunity for the submission of, and the officers participating in such decision shall consider, (1) proposed findings and conclusions where the complexity of the issues so requires, (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended or tentative decisions shall be a part of the record and include a statement of (1) the necessary findings and conclusions, and the basis therefore, upon the material issues of fact, law, or discretion and (2) the appropriate rule, order, sanction, relief, or denial thereof.

APA Leg. Hist. 38.

Upon review the agency may restrict its decision to questions of law, or to the question of whether the findings are supported by substantial evidence or the weight of evidence, as the nature of the case may be. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. It may remand the matter to the hearing officer for any appropriate further proceedings.56

The memorandum did not state upon what particular language of section 8(a) it rested this reading that the subsection authorized, but did not require, appellate review of the hearing examiner's initial decision.

The memorandum paraphrased section 8(b) as follows:

Prior to each recommended, initial, or tentative decision, parties shall have a timely opportunity to submit proposed findings and conclusions, and, prior to each decision upon agency review of either the decision of subordinate officers or of the agency's tentative decision, to submit exceptions to the initial, recommended, or tentative decision, as the case may be. Subject to the agency's rules, either the proposed findings or the exceptions may be oral in form where such mode of presentation is adequate.57

The bill as reported by the Senate Judiciary Committee passed the Senate on March 12, 1946, without change and without an adverse vote.58


The House Judiciary Committee made the changes in section 8 of the bill reported by the Senate Judiciary Committee. The final draft of the bill retained these changes.60

The House Judiciary Committee, as did the Senate Judiciary Committee,61 explained that its bill "follows generally the views of good administrative practice as expressed by the whole of" the Attorney General's Committee on Administrative Procedure, but that there were differences "in several important respects."62 The only difference mentioned that is of present interest is the provision "that agencies may choose whether their examiners shall

56. Id. at 229.
57. Ibid.
58. Id. at 344.
60. APA Leg. Hist. 289. See also note 51 supra and accompanying text.
61. APA Leg. Hist. 32-33, 192.
62. Id. at 246.
make the initial decision or merely recommend a decision, whereas the Attorney General's Committee made a decision by examiners mandatory.\textsuperscript{63}

The comments of the House Judiciary Committee on section 8 were in most respects similar to those of the Senate Judiciary Committee,\textsuperscript{64} and only significant additions made by the House Committee will be pointed out. Concerning the Section 8(a) sentence that is crucial for present purposes, the House Committee explained:

In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10(e) of the bill. The agency may adopt in whole or part the findings, conclusions, and basis stated by examiners or other presiding officers. Agency rules must prescribe a reasonable time for appeals from initial examiners' decisions. Where the agency determines to review such a case, it should, so far as possible, specify the issues of law, fact, or discretion for review with particularity.\textsuperscript{65}

The Attorney General also approved the bill reported by the House Judiciary Committee, describing the changes made as "clarifications of the language and intention" of the bill reported by the Senate Judiciary Committee.\textsuperscript{66} Senator McCarran agreed with this description when he successfully urged the Senate to accept the House bill, after it had passed the House.\textsuperscript{67}

7. \textit{Congressional Debates}\textsuperscript{68}

The debates do not disclose anything of interest for present purposes.

8. \textit{Views Expressed in Attorney General's Manual on the Administrative Procedure Act}\textsuperscript{69}

The Attorney General explained the provisions of section 8(a) as follows:

Where the agency permits a hearing officer to make an "initial" decision, "in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency."

\textsuperscript{63} Ibid.
\textsuperscript{64} Id. at 272-74.
\textsuperscript{65} Id. at 272-73.
\textsuperscript{66} Id. at 291. For the House Committee's comments on the changes it made, see id. at 288 nn.19 & 20.
\textsuperscript{67} Id. at 406, 422-23.
\textsuperscript{68} Id. at 295-423, particularly at 322, 324, 366-67.
\textsuperscript{69} See \textsc{att'y gen.}, \textsc{manual on the administrative procedure act} 81-87 (1947). Only those excerpts are set forth above which bear upon the subject of this paper.
Parties may appeal from the hearing officer's initial decision to the agency, which must thereupon itself consider and decide the case. Also, the agency may review the hearing officer's initial decision even though the parties fail to appeal. . . . Where the hearing examiner (or other officer where permitted by the subsection) makes a recommended decision, the agency must always make an "initial" or final decision.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. . . . Similarly the third sentence of section 8(a) provides that "On appeal from or review of the initial decisions of such [hearing] officers, the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." This is not to say that hearing examiners' initial or recommended decisions are without effect. "They become a part of the record [as required by subsection 8(b)] and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." Sen. Rep. p. 24, H.R. Rep. p. 38 (Sen. Doc. pp. 210, 272). In such cases, it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses. However, in cases where the credibility of witnesses is not a material factor, or cases where the recommended or initial decision is made by an officer other than the one who heard the evidence, the function of such decision will be, rather, the sharpening of the issues for subsequent proceedings.

Section 8(a) empowers agencies to "limit the issues upon notice or by rule" on appeal from or review of the initial decisions of hearing officers. That is, an agency may limit the issues which it will consider in such cases by notice in a particular case or by a general rule published in the Federal Register. It may restrict its review to questions of law and policy or, where it alleged that erroneous findings of fact have been made by the hearing officer, to determining whether cited portions of the record disclose that the findings are clearly wrong. Final Report, p. 51. See also Sen. Rep. p. 43 (Sen. Doc. p. 229).

Where the hearing officer makes a recommended decision, the agency must itself consider and determine all issues properly presented. However, it may provide that it will consider only such objections to its subordinates' decisions (recommended or initial) as are presented to it as exceptions to such decisions. . . . It may also require that exceptions be precise and supported by specific citations to the record. The agency in reviewing either initial or recommended decisions may adopt in whole or in part the findings, conclusions, and basis therefor stated by the presiding officer. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. Also, it may remand the case to the hearing officer for any appropriate further proceedings. Sen. Rep. p. 43, H.R. Rep. pp. 38–39 (Sen. Doc. pp. 229, 272–73).70

70. Id. at 83–85. (Footnotes omitted.)
In explaining section 8(b), the Attorney General emphasized:

Agencies may require that proposed findings and conclusions and exceptions be supported by precise citation of the record or legal authorities as the case may be. . . . The opportunity to submit supporting reasons means that briefs on the law and facts which are filed by parties in support of their proposed findings and conclusions and exceptions must be received and considered. Sen. Rep. p. 24, H.R. Rep. p. 39 (Sen. Doc. pp. 210, 273).71

71. Id. at 85.