RECENT DEVELOPMENTS IN INTERPRETATION OF THE APA: FLORIDA EAST COAST AND ITS PROGENY

REPORT OF JUDICIAL REVIEW COMMITTEE OF THE ADMINISTRATIVE LAW SECTION OF THE AMERICAN BAR ASSOCIATION†

Ever since the decision of the United States Supreme Court in *United States v. Florida East Coast Railway*,[1] there has been developing in various federal administrative agencies and in the United States Courts of Appeals, a view of the Administrative Procedure Act which we believe is plainly contrary to its correct interpretation. This erroneous view is primarily concerned with the application of the procedural requirements of §556 and §557 (the original sections 7 and 8) of the Act[2] to rulemaking proceedings including ratemaking proceedings under various regulatory statutes which were already in effect when the APA was adopted—statutes such as the Interstate Commerce Act, the Federal Power Commission Act, the Natural Gas Act and the Federal Communications Act. This view holds in effect that the procedural requirements of those sections of the APA do not have to be complied with when the agency chooses instead to conduct rulemaking proceedings in accordance with 1553 of the APA. It is based on the theory that such rules are not "required by statute to be made on the record after opportunity for an agency hearing" within the meaning of §553(c) of the APA.[3]

The origin of this extremely restrictive interpretation of §553(c) of the APA is primarily the opinion of Mr. Justice Rehnquist for the Court in *Florida East Coast*. That case involved an order of the Interstate Commerce Commission establishing Incentive Per Diem Charges to be paid by railroads for the use of cars which they do not

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1. 410 U.S. 224 (1973).
2. 5 U.S.C. 111556-57.
3. 5 U.S.C. 1553.

own to the railroads that own the cars. This order was issued under the authority of §14(a) of the Interstate Commerce Act which reads in part as follows:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices . . . .[4]

To some extent, in reaching this result, Mr. Justice Rehnquist was simply relying upon his previous opinion for a unanimous Court in *United States v. Allegheny Ludlum Steel Corp.*[5] holding that a previous rule of the Commission, also issued under §1(14)(a) of the Interstate Commerce Act and requiring prompt return of non-owned cars after unloading, did not have to be issued in compliance with §556 and §557 because there is no statutory requirement in §1(14)(a) or elsewhere in the Interstate Commerce Act that such a rule should be made "on the record". However, in *Florida East Coast*, reliance upon *Allegheny Ludlum* alone was not a sufficient response to the dissenting opinion of Justices Douglas amd Stewart, which argued that the rule involved in *Florida East Coast* was more like a rate order because it established the charges to be paid and was therefore sufficiently adjudicatory in nature to lay the basis for a due process right to a full hearing.[6] In response to this line of argument, Mr. Justice Rehnquist suggested that ratemaking on an industry-wide scale was primarily legislative in character, rather than adjudicatory, in accordance with "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases, on the other."[7] Mr. Justice Rehnquist also sugqested that even if §556 and §557 of the APA did apply, the complaining railroad might not be entitled to have the order set aside because of the exception in §556(d) permitting a rulemaking proceeding to be

4. 27 U.S.C. 111(14)(a).
5. 406 U.S. 742 (1972).
6. 410 U.S. at 251.
7. 410 U.S. at 245.

restricted to written submissions rather than oral examination and cross-examination, when "a party will not be prejudiced thereby."[8]

If the *Florida East Coast* decision had rested entirely on this last alternative qround, we would have no objection to it. Indeed we might have welcomed it as an enlightened application of the APA comparable to a similar approach adopted by Judge Friendly, speaking for a three-judge court in *Long Island R.R. Co. v. United States*,[9] which concerned the same ICC order. However, the principal ground rlied upon by Mr. Justice Rehnquist, the absence of the phrase "on the record", ór its equivalent, in section 14(a) of the Interstate Commerce Act, as a reason for treating as entirely inapplicable sections 556 and 557 of the APA, constitutes an unduly restrictive interpretation of the statute which threatens to render it largely inapplicable to the ratemaking and other rulemaking functions of several of the major regulatory agencies. Under this new interpretation, such functions, which had previously been generally regarded as subject to sections 556 and 557 of the APA, will be subject only to the procedural requirements of section 553 of the APA.

Examples of this tendency may be found in recent decisions of the Courts of Appeals dealing with orders of the Federal Power Commission and the Federal Communications Commission. In *Mobile Oil Corporation v. FPC*,[10] for example, the Court of Appeals for the District of Columbia, in an elaborate opinion by Judge Wilkey, assumed that an order of the FPC establishing minimum rates for natural gas, did not have to be issued in a proceeding complying with sections 556 and 557 of the APA, because the ratemaking provisions of the Natural Gas Act do not contain the phrase "on the record" or its equivalent.[11] Nevertheless, Judge Wilkey also held that, because such orders had to be reviewed on the administrative record of the Commission, in accordance with the substantial evidence rule, the procedures of the Commission had to satisfy the basic elements of fairness in resolving

8. 5 U.S.C. §556(d); 410 U.S. at 246. The district court in *Florida East Coast* recognized the possibility of confining the hearing to written submissions under sections 556(d), but held that exception inapplicable because the complaining roads had made a sufficient showing that they were "prejudiced by the summary procedures of the Commission." *Florida East Coast Ry. v. United States*, 327 F. Supp. 725, 728 (N.D. Fla. 1971). The dissenting Justices in the Supreme Court were apparently of the same opinion. See 410 U.S. at 247, n. 1.

9. 318 F. Supp. 490 (E.D.N.Y. 1970).

10. 483 F.2d 1238 (D.C. Cir. 1973).

11. Such provisions do, however, require a hearing. 15 U.S.C. 1717c(e) and 11717d(a).

all contested issues of fact.[12] In this respect the procedures of the FPC were found seriously deficient. Similarly, in *Bell Telephone Co. of Pennsylvania and A.T.T. v. Federal Communications Commission*,[13] Judge Garth, speaking for the Court of Appeals for the Third Circuit, assumed that an order of the FCC issued under sections 201(a) and 205(a) of the Communications Act, requiring the Bell System to provide interconnection facilities to certain named specialized common carriers, did not have to be issued in proceedings conforming to sections 556 and 557 because neither section 201(a) nor section 205(a) contains the phrase "on the record" or its equivalent.[14] Nevertheless, Judge Garth also held that Commission had to comply with the essential requirements of due process in resolving any contested issues of fact.[15] But in *Bell Telephone*, unlike *Mobile Oil*, the Commission's order was sustained because the Court found that the essential elements of due process had been satisfied. Thus the results of these two cases do not offend essential considerations of fairness but the opinions cast a pall over the proper application of very significant provisions of the APA and engender confusion with respect to the exact procedural steps which should be taken in order to satisfy the minimum requirements of due process or intelligible judicial review.

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12. 483 F.2d at 1257; 15 U.S.C. §717r(b) (1970). Judge Wilkey also rejected the views of the majority in *Phillips Petroleum Co. v. F.P.C.*, 475 F.2d 842 (10th Cir. 1973), approving the use of §553 proceedings by the FPC in establishing rates under the National Gas Act. Instead, Judge Wilkey expressed agreement with the dissenting view of Judge Seth that the Commission was required "to create a record that would adequately support the factual findings and permit judicial review . . . . " 483 F.2d at 1262. But compare *American Public Gas Ass'n v. F.P.C.*, 498 F.2d 718 (D.C. Cir. 1974) (per curiam), sustaining the use of § 553 proceedings for the issuance of an FPC order establishing "initial rates at which sales of natural gas in the Rocky Mountain area are to be certificated without refund obligation for sales made under contracts dated after June 17, 1970." Id. at 721. Conceivably this decision may be distinguished from *Mobile Oil* on the ground that it imvolved not a rate order issued under the ratemaking provisions of the Natural Gas Act but a regulation issued under section 16 of the Act, 15 U.S.C.7170. Nevertheless, the Commission, on the authority of *American Public Gas, Mobile Oil* and *Phillips Petroleum*, rejected challenges to the use of §553 proceedings, rather than §556-§557 proceedings, for the establishment of a uniform national base rate for the various types of natural gas in Opinion No. 699, National Gas Rate, D.K.F. No. R - 3890B, CCH Util. L. Rep. ¶ 11,549. This order after several revisions, is now on appeal in the 5th Circuit.

13. 503 F.2d 1250 (3d Cir. 1974). In the *Bell Telephone* case, unlike *Mobile Oil*, the Court sustained the Commission's order because it found that the essential elements of due process had been satisfied.

14. 47 U.S.C. §201(a), 11205(a). Both of these sections require an opportunity for hearing, but do not use the language "on the record".

15. 503 F.2d at 1266-1268.

The *Florida East Coast* interpretation of the APA is not justified even by a literal reading of the section 553(c), especially in the light of the Supreme Court's previous decision in *Wong Yang Sung v. McGrath*[16] interpreting the cognate provision of section 554(a), which refers to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ." In *Wong Yang Sung*, the Court, in an opinion by Mr. Justice Jackson, held that the absence of any express requirement of opportunity for an administrative hearing in the Immigration Act did not render this particular phraseology of section 554(a) inapplicable to deportation proceedings because the Immigration Act had been consistently interpreted to require such a hearing in order to satisfy the constitutional requirements of due process. The general principle of *Wong Yang Sung* has been applied to several other statutes which contain no explicit requirement for a hearing.[18] The Interstate Commerce Act provision involved in *Florida East Coast* did contain a requirement of opportunity for hearing but did not contain an explicit requirement that the hearing be "on the record" or that rule or order involved be "made on the record". Nevertheless, the accepted interpretation of the Interstate Commerce Act, ever since the decision of the Supreme Court in *Interstate Commerce Commission v. Louisville & Nashville RR. Co.*,[19] had consistently held that ICC rules or orders issued under statutory provisions which required only a hearinq, and said nothing about the hearing being conducted "on the record" or the rule or order being "made on the record", should be made and reviewed on the administrative record of the administrative hearing.[20] So long as that interpretation of the Interstate Commerce Act is followed,[21] and

16. 339 U.S. 33 (1950).

17. 339 U.S. at 48-51.

18. See, e.g., *Riss Co. v. United States*, 341 U.S. 907 (1951) (denial of motor carrier certificate by ICC); *Cates v. Haderlein*, 342 U.S. 804 (1951) (post office fraud order); *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958) (denial of application for patents to mining claims); *Door v. Donaldson*, 195 F.2d 764 (D.C. Cir. 1952) (post office order banning obscene films from the mails).

19. 227 U.S. 88 (1913).

20. Compare *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 362-72 (1936) (recognizing the right to introduce new evidence upon judicial review of allegedly confiscatory ICC order) with *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 480-90 (1918) (emphasizing that all pertinent evidence should be submitted in the first instance to the Commission, and that reversal of ICC action is unlikely to be based "upon evidence newly adduced but not in a proper sense newly discovered").

21. This interpretation of the statutory review provisions applicable to the ICC is now in effect codified by the recent amendment of the Hobbs Act transferring judicial review of most ICC orders to the Court of Appeals, and thus providing explicitly for

is deemed to apply to section 14(a) of the Act, as well as to the ratemaking sections of the Act, the principle of *Wong Yang Sung* seems to us equally applicable, with the result that orders of the ICC issued under such sections should be regarded as "required by statute to be made on the record" within the meaning of section 553(c) of the APA. The only possible qualification of this view which seems to us rational is that section 14(a) of the Interstate Commerce Act might be treated differently than the ratemaking sections of the statute either because of its particular language (i.e., its use of the word "hearing" rather than "full hearing" as in the ratemaking provisions) or its legislative history, or both; and that orders issued under that section are not required to be made on an administrative record or to be reviewed on that record.[22] This qualification is not, however, consistent with the opinion in *Florida East Coast*, which did not limit its holding to the peculiar language of section 14(a), or suggest that review could be on anything but the administrative record.

Whatever may be thought of this possible interpretation of section 14(a) of the Interstate Commerce Act, it certainly has no application to rate orders issued under the Natural Gas Act, or to the type of order issued by the FCC in the *Bell Telephone* case. As Judge Wilkey recognized in the *Mobile Oil* case, FPC rate orders issued under the Natural Gas Act must be made on an administrative record and must be reviewed on that record, in accordance with the substantial evidence rule. This was made explicit by the judicial review provisions of the statute.[23] Similarly, the order of the FCC involved in the *Bell*

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judicial review on the record of the administrative hearing. Public Law 93-584; 88 Stat. 1917 (Jan. 2, 1975).

22. The validity of this distinction is not enhanced by the fact that the amendment of 1975 (P.L. 93-584) transferring review to the Court of Appeals, makes an exception for orders "for the payment of money, or the collection of fines, penalties and forfeitures" leaving them to be reviewed in the district courts. This simply continues in effect a similar exception from the three-judge requirement of the previous statute, 28 U.S.C. §2321. It was obviously not considered applicable to orders establishing per diem charges in *Florida East Coast*. Cf. *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949)(holding the exception applicable to an order denying a reparations award to a shipper).

23. See note 12 *supra*. This is equally true with respect to other rate orders of the FPC issued under the Federal Power Act (16 U.S.C. §8251(b)), and rate orders of the CAB, under the Civil Aeronautics Act (49 U.S.C. §1486(e)). Regulations issued by the FPC and CAB under provisions granting rulemaking authority without any applicable requirement for hearing, or explicit provision for judicial review, are presumably subject to review either in enforcement proceedings or in suits for declaratory judgments or to enjoin enforcement. Cf. *United Gas Pipe Line v. FPC*, 181 F.2d 796 (D.C. Cir. 1950); *Air Line Pilots Ass'n Int. v. Quesada*, 278 F.2d 892 (2d Cir. 1960) with *United*

Telephone case was required to be made on an administrative record and to be reviewed on that record, although this was not made explicit by the original Communications Act, which simply adopted by incorporation the procedures for judicial review of the ICC in the three-judge district courts. However, the legislative history of the Act[24] and subsequent Supreme Court decisions interpreting it,[25] established quite clearly that, at least whenever the Communications Act itself provided for an administrative hearing, review was to be on the record of the administrative hearing. This was made even more explicit with the adoption in 1950 of the Hobbs Act when review of most FCC orders was shifted to the Courts of Appeals.[26] It is our belief that the only sound interpretation of the APA, as applied to these and similar regulatory statutes in existence at the time the APA was adopted, is that, to the extent that rules and orders of the agencies were reviewed on the record of the administrative proceedings, they were also understood to be rules "required" to be made "on the record" within the meaning of section 553(c) of the APA.

This rather obvious and natural meaning of the APA is fully borne out by its own legislative history. When bills most comparable to the

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States v. Storer Broadcasting Co. 351 U.S. 192 (1956); *FPC v. Texaco, Inc.*, 377 U.S. 32 (1964); *American Air Lines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966), cert. den., 385 U.S. 843 (1966); and *City of Chicago, Ill. v. FPC*, 458 F.2d 731 (D.C. Cir. 1971). See too Currie & Goodman, *Judicial Review of Federal Administrative Action: The Quest for the Optimum Forum*, 75 Col.L.Rev. 1, 39-54 (1975).

24. The Senate Report on what was to become the Communications Act of 1934 makes explicit reference to Supreme Court decisions limiting judicial review of ICC orders. S.Rep. No. 781, 73rd Cong., 2d Sess. 9 (1934).

25. See, e.g., *Rochester Telephone Co. v. United States*, 307 U.S. 125, 129-143 (1937); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 434-435 (1942).

26. 28 U.S.C. §2347-2351 (1970). The operative provision is:

> (a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law. 28 U.S.C. 2347 (1970).

This provision is applicable to all orders of FCC made reviewable by section 402(a) of the Communications Act. It is also applicable to certain orders issued by the Secretary of Agriculture, the Federal Maritime Commission or Maritime Administration, the Atomic Energy Commission and now, by virtue of P.L. 93-584, supra note 21, to most orders of the ICC.

The legislative history of the Hobbs Act also makes it clear that the draftsmen and sponsors of the Act were relying upon the procedural provisions of the APA, presumably sections 556 and 557, to ensure adequate administrative records for the purpose of judicial review. S. Rep. Wo. 2618, 81st Cong., 2d Sess. 4 (1950). H.R. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950).

APA were first introduced in Congress they did not contain the rather peculiar definition of "rule" now contained in the APA, making the definition inclusive of rules of "particular" as well as "general" applicability, and explicitly including the prescription of rates, wages, financial structures, etc.[27] Neither did those bills contain the various exceptions for rulemaking procedures, introduced into the original sections 7 and 8 of the APA, and now contained in sections 556 and 557. It was the concern of regulatory officials, such as Commissioner Aitchison of the ICC, that the procedures specified in section 7 and 8 would cripple the ratemaking and similar procedures of the regulatory agencies, that prompted the inclusion of ratemaking and other specific policy functions in the definition of rule, and the addition of the special exceptions for rulemaking and initial licensing so as to permit more flexible procedures in the performance of those functions.[28] This legislative history would make no sense at all if it was also the understanding of the responsible draftsmen and sponsors of the APA that requirements of sections 7 and 8 would have no mandatory application to most, if not all, of the ratemaking and comparable rulemaking functions of the major regulatory agencies then in existence. Yet that is the effect of the interpretation adopted in *Florida East Coast*, especially if it is carried to its logical conclusion, as demonstrated in the *Mobile Oil* and *Bell Telephone*.

We recognize that the harmful effect of this interpretation is considerably mitigated by the application of the judicial review and due process principles adopted in the *Mobile Oil* and *Bell Telephone* opinions. But the exact requirements of that approach are extremely variable and uncertain and may themselves generate considerable unnecessary litigation, which would be obviated by adherence to the procedures outlined in sections 556 and 557 of the APA.[29] Furthermore, we are quite satisfied that, insofar as the *Florida East Coast, Mobil Oil* and *Bell Telephone* approach promotes flexibility in administrative procedures, substantially the same results could be obtained by a careful but imaginative use of the exceptions of the sections 556 and 557 of the APA, as demonstrated by Judge Friendly's opinion in the *Long Island Railroad* case. Similarly, the procedures adopted by the FCC in *Bell Telephone* could have been justified by the FCC under sections 556 and 557 of the APA, with the possible

27. Cf. H.R. 339, H.R. 1117, and H.R. 1203, Hearings on H.R. 184, etc., before House Committee on Judiciary, 78th Cong., 1st Sess. at 93, 101, and 109 (1945).

28. See Hearings on H.R. 184, supra note 27, at 69, 71-82 (1945).

29. Cf. Fitzgerald III, *Mobile Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 Ad. L. Rev. 287 (1974).

addition of a tentative opinion in the place of the final opinion. The same could probably be said for the procedures used by the FPC for the issuance of its order establishing a Uniform National Rate for sale of natural gas, now on appeal in the 5th Circuit.[30] On the other hand, the procedures followed in *Mobile Oil* would have been clearly in violation of the APA, just as Judge Wilkey held them invalid under his "flexible interpretation" of the APA, relying primarily upon the requisites of fair hearing and substantial evidence. In any event, the extent to which greater flexibility is required for such proceedings than is now permitted by the APA is plainly a legislative question which should be frankly faced as such, instead of being achieved through an obvious distortion of the original meaning of the Act.

In a somewhat ambiguous fashion, this question has been faced on a legislative level in recent environmental and safety statutes where Congress has explicitly provided for direct judicial review in the Courts of Appeals of rules apparently intended to be issued in accordance with §553 procedures rather than in accordance with §556-§557 procedures.[31] Since these were all statutes enacted after the APA, they stand on a somewhat different level of interpretation than the statutes in existence at the time of the APA's adoption. To the extent that these statutes have deliberately chosen to direct the use of §553 rather than §556-§557 proceedings for the creation of an administrative record, which will constitute the basis for judicial review as well as for administrative action, they may be regarded as creating ad hoc exceptions to the general command of section 553(c) that administrative rules required to be made "on the record" must be conducted in accordance with sections 556 and 557 of the APA. This is far from saying, however, that such statutes have solved all the problems of creating an adequate record for judicial review and satisfying the requirements of due process in the resolution of contested issues of fact, as demonstrated by some of the leading opinions strug-

30. Supra note 12.

31. See e.g., *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968), and *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659 (6th Cir. 1972) (both dealing with Safety Standards issued under the National Traffic and Motor Vehicle Act of 1966, 15 U.S.C. 1381 §1431); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. 1973), and *Southern Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) (EPA orders under the Clean Air Act and its amendments, 42 U.S.C. 11857); and *Associated Industries, Inc.v. Department of Labor*, 487 F.2d 342 (2d Cir. 1973), and *Industrial Union Dept. AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. 1651 et seq.

gling with these problems.[32] It is also noteworthy that in even more recent statutes, Congress has demonstrated its growing concern for these problems by providing for additional procedural safeguards to be attached to the bare bones of §1553 rulemaking proceedings whenever contested issues of fact are developed.[33]

Whether the spread of the *Florida East Coast* interpretation of the APA is sufficiently detrimental to suggest the desirability of a legislative curb, either through the amendment of the APA or of the regulatory statutes involved, is a very difficult question to answer at the present time. This is particularly so because it is not yet clear that the *Florida East Coast* opinion will be deemed applicable to the ratemaking and comparable regulatory functions of the major regulatory agencies. If the position of FPC on this point is sustained by the Court of Appeals for the 5th Circuit, and eventually by the Supreme Court, in the National Gas Rate case now pending, then it would be clear that the broadest interpretation of *Florida East Coast* had carried the day, and we would have no hesitation in recommending remedial legislation. If, on the other hand, this broad interpretation were rejected, and *Florida East Coast* were to be authoritatively limited to section 14(a) of the Interstate Commerce Act, there would be no need for remedial legislation. Consequently, we recommend that the Administrative Law Section withhold any legislative proposals until the full scope of the *Florida East Coast* opinion has been further developed.[34]

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32. See especially the opinions in *International Harvester, Southern Terminal Corp., Industrial Union Dept. AFL-CIO, supra* note 31. For a somewhat different point of view, see Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375 (1974), and *Court of Appeals Review of Federal Agency Rulemaking*, 26 Ad. L. Rev. 199 (1974).

33. See e.g., The Federal Trade Commission Improvement Act, Pub. L. 93-637 (Jan. 4, 1975, Tit. II 1202, 88 Stat. 2193, and Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97, Jan. 4, 1975, 114, amending § 6 of the Securities Exchange Act of 1934, especially §6(e)(4) (89 Stat. at 108-109). These developments were also foreshadowed in the opinion of Chief Justice Stone in *Yakus v. United States*, 321 U.S. 414, 436 (1944), emphasizing the due process requirement of fair hearing as applied to the development of an administrative record upon the basis of which the validity of price and rent regulations was determined under the Emergency Price Control Act of 1942.

34. In this connection, account should also be taken of pending ABA proposals for amendment of the APA. Particularly pertinent is S. 796, 94th Cong., 1st Sess. (introduced by Senators Kennedy and Mathias), which would amend the definition of rule to read as follows:

> (4) "rule" means the whole or a part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency.

In the meanwhile we recommend that the Section make known its disapproval of the *Florida East Coast* opinion, at least in its broader implications, and take appropriate steps to secure its limitation.

The effect of this amendment would be to include within the definition of adjudication ratemaking and similar orders of particular applicability. It would not, however, seriously militate against the flexibility of §556 and §557, as applied to such orders, because the exceptions applicable to rulemaking and initial licensing would also be made applicable to "ratemaking and cognate proceedings." This proposed amendment would not significantly affect the *Florida East Coast* problem, particularly so far as ratemaking orders of general applicability are concerned, since they would still be treated as "rules" for the purpose of the APA. The general philosophy of *Florida East Coast* also has some possible relevance to cases of "adjudication under §554 of the APA, as indicated by *International Tel. & Tel. Corp. v. Local 134, Int. Brotherhood of Electric Workers*, 95 S.Ct. 600 (1975), where the Court, in a unanimous opinion by Justice Rehnquist, held that the determination of a jurisdictional dispute by the NLRB was not an "adjudication" subject to §1554 of the APA. In our judgment, however, the specific holding in *International Tel. & Tel.* is much more justifiable than the interpretation of "on the record" in *Florida East Coast*.