INDEPENDENT REGULATORY AGENCIES ACT OF 1961

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 14

A BILL TO PROMOTE THE EFFICIENT, FAIR, AND INDEPENDENT OPERATION OF THE CIVIL AERONAUTICS BOARD, THE FEDERAL COMMUNICATIONS COMMISSION, THE FEDERAL POWER COMMISSION, THE FEDERAL TRADE COMMISSION, THE INTERSTATE COMMERCE COMMISSION, AND THE SECURITIES AND EXCHANGE COMMISSION

JUNE 6, 7, 8, AND 9, 1961

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INDEPENDENT REGULATORY AGENCIES ACT OF 1961

TUESDAY, JUNE 6, 1961

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 1334, New House Office Building, Hon. Oren Harris presiding.

The CHAIRMAN. Let the committee come to order.

This morning the committee begins hearings on H.R. 14, a bill which I introduced on the opening day of the 87th Congress.

I think at this point it would be appropriate to have a copy of the bill included in the record, together with such agency reports as are available.

(H.R. 14 and the reports follow:)

[H.R. 14, 87th Cong., 1st sess.]

A BILL To promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Independent Regulatory Agencies Act of 1961".

DEFINITIONS

SEC. 2. For the purposes of this Act—

(1) The term "agency" means the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission, respectively.

(2) The term "agency employee involved in the decisional process'" includes any employee of an agency who is subject to the immediate supervision of a member of the agency and any employee of an agency who is charged with the preparation of decisions with respect to proceedings before the agency.

(3) The term "on-the-record proceeding" means any proceeding before an agency in the case of which agency action is required by law or agency rule to be based on the record of an agency hearing, but such term includes such a proceeding only beginning with (A) the time that such proceeding has been noticed for hearing, or (B) such earlier time as the agency may designate as provided in section 6.

(4) The term "person" includes, in addition to any individual (whether or not in public life), corporation, company, firm, partnership, association, or society, any organized group of individuals and any governmental body or body politic.

(5) A communication with respect to a proceeding, or with respect to the consideration or decision of a proceeding, shall be considered to be "ex parte" if reasonable notice thereof is not given, in advance of such communication, to all interested parties; except that a request for information with respect to the status of a proceeding shall not be deemed to be an ex parte communication.

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby declares that it is vitally important in the public interest to strengthen the independence and effectiveness of regulatory agencies (as defined in section 2) and to promote the efficient, fair, and independent operation thereof, and, to this end, it is necessary to take action—

(1) to guard against the exertion of improper influence upon such agencies, and against improper conduct by members and employees of such agencies;

(2) to insure the observance of proper ethical standards by the members and employees of such agencies, by the parties, by persons acting for or on behalf of such parties, and by other persons;

(3) to prohibit improper "off-the-record" communications in proceedings in which agency action is required by law or agency rule to be based on the record of an agency hearing; and

(4) to clarify and make uniform the power of the President to remove members of such agencies for cause.

(b) The following provisions of this Act are intended to implement and make effective the policy declared in subsection (a).

IMPROPER INFLUENCE EXERTED BY PARTIES AND OTHERS; IMPROPER CONDUCT OF AGENCY MEMBERS AND EMPLOYEES

SEC. 4. (a) The Congress hereby recognizes that it is improper for any person, for himself or on behalf of any other person, to influence or attempt to influence any vote, decision, or other action by an agency or by any member or employee of such agency, in any proceeding or matter before the agency by the use of secret and devious methods calculated to achieve results by the exertion of pressures, by the spreading of false information, by the offering of pecuniary or other inducements, or by other unfair or unethical means, rather than by reliance upon a fair and open presentation of facts and arguments in accordance with established procedures.

(b) The Congress hereby recognizes that it is improper for any member or employee of an agency to—

(1) engage, directly or indirectly, in any business transaction or arrangement for profit with any person, or any representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform;

(2) accept or solicit any money, loan, service, employment, or thing of value from any person, or representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform;

(3) use for the personal profit of himself or others confidential information gained by reason of his official position or authority;

(4) fail to restrict his personal business affairs so as to avoid conflicts of interest with his official duties; or

(5) act in any official matter with respect to which there exists a personal interest incompatible with unbiased exercise of official judgment.

(c) For the purpose of carrying out in an effective manner the policy stated in section 3(a) of this Act, each agency shall prescribe regulations implementing and supplementing the provisions of subsections (a) and (b) of this section. In order to bring about compliance with such regulations, and in order to prevent acts, practices, and conduct which, by subsections (a) and (b) of this section, are declared to be improper, each agency shall, among other things, establish procedures for considering and acting on complaints.

STATEMENTS TO BE INCLUDED IN HEARING NOTICES

SEC. 5. Every notice of hearing issued by an agency with respect to a proceeding shall contain a statement as follows:

(1) If such notice relates to an "on-the-record proceeding" (as defined in section 2 of this Act) it shall state that such proceeding is subject to section 7 of this Act.

(2) If such notice relates to any other type of proceeding, it shall state that the proceeding is not subject to section 7 of this Act.

If a notice of hearing with respect to any proceeding before an agency fails to comply with this section, such proceeding shall be deemed to be an "on-the-record proceeding" for the purposes of section 7.

AUTHORITY TO TREAT CERTAIN PROCEEDINGS AS "ON-THE-RECORD PROCEEDINGS" PRIOR TO BEING NOTICED FOR HEARINGS

SEC. 6. (a) Whenever an agency determines that the issues involved in any proceeding to which clause (A) of section 2(3) would apply are of such a nature as to make such action appropriate, it may designate a time, earlier than the time specified in such clause (A), when such proceeding shall begin to be an "on-the-record proceeding" for the purposes of this Act.

(b) When an agency takes the action authorized by subsection (a) of this section, such agency shall, in advance of the time designated by the exercise of such authority, give notice in the same manner that notice of hearing would be given, that beginning with the time so designated such "on-the-record proceeding" shall be subject to the provisions of section 7 of this Act.

EX PARTE COMMUNICATIONS IN THE CASE OF "ON-THE-RECORD PROCEEDINGS"

SEC. 7. (a) In the case of any "on-the-record proceeding" before an agency, in order to satisfy the requirements of basic fairness in connection with such proceeding—

(1) except in circumstances authorized by law, no party to such proceeding, or person acting on behalf of such party, shall communicate ex parte (as defined in section 2(5) of this Act) with respect to such proceeding, directly or indirectly, with any agency member, hearing officer, or employee involved in the decisional process (as defined in section 2 of this Act); and

(2) except in circumstances authorized by law, no agency member, hearing officer, or employee involved in the decisional process shall communicate ex parte with respect to such proceeding, directly or indirectly, with any party to such proceeding or any person acting on behalf of such party.

(b) If any written ex parte communication is made to any agency member, hearing officer, or employee involved in the decisional process in violation of subsection (a) of this section, the recipient shall promptly deliver it to the Secretary of the agency together with a written statement of the circumstances of such communication. The Secretary shall promptly place the communication and statement in the public file of the agency and shall give notice of such communication to all parties to the proceeding with respect to which it was made.

(c) If any written ex parte communication is made by any agency member, hearing officer, or employee involved in the decisional process in violation of subsection (a) of this section to a party to an "on-the-record proceeding" before the agency or any person acting on behalf of such party, such member, officer, or employee, as the case may be, shall promptly deliver a copy of such communication to the Secretary of the agency together with a written statement of the circumstances of such communication. The Secretary shall promptly place the copy of the communication and the statement in the public file of the agency and shall give notice of such communication to all parties to the proceeding with respect to which it was made.

(d) A violation of paragraph (1) of subsection (a) of this section shall be good cause, in the agency's discretion, for disqualification of the party who made the ex parte communication, or on whose behalf the ex parte communication was made, in the "on-the-record proceeding" with respect to which the ex parte communication was made.

(e)(1) No ex parte communication made in violation of subsection (a) of this section shall be considered in the "on-the-record proceeding" with respect to which it was made unless it shall have been duly admitted in evidence in such proceeding.

(2) No document placed in the public file of an agency as required by this section shall be removed from such file, except for official purposes.

(f) Any person who willfully violates subsection (a), (b), (c), or (e) of this section shall be fined not more than $10,000 or imprisoned not more than one year, or both.

WRITTEN INQUIRIES WITH RESPECT TO THE STATUS OF "ON-THE-RECORD PROCEEDINGS"

SEC. 8. If any written request for information with respect to the status of an "on-the-record proceeding" before an agency is received by any member or employee of the agency, other than the Secretary of the agency, the recipient shall promptly deliver such request to the Secretary of the agency for an appropriate reply. The Secretary of the agency shall place such request in the public

file of the agency, together with a copy of any reply thereto made by him in writing. Such Secretary shall also place in the public file of the agency every written request for information received by him directly wtih respect to the status of any "on-the-record proceeding", together with a copy of any reply thereto made by him in writing. No document placed in the public file of an agency as required by this section shall be removed from such file, except for official purposes.

REMOVAL OF AGENCY MEMBERS FOR CAUSE

SEC. 9. Nothwithstanding any other provision of law, any member of an agency (as defined in section 2 of this Act) may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.

ADMINISTRATIVE PROCEDURE ACT

SEC. 10. (a) In the case of any "on-the-record proceeding" before an agency (as defined in section 2 of this Act), subsection (c) of section 5 of the Administrative Procedure Act (5 U.S.C. 1004(c)) and the provisions of this Act shall apply as though the last sentence of such subsection (c) had not been enacted.

(b) This Act shall supersede and modify the provisions of the Administrative Procedure Act to the extent that this Act is inconsistent therewith.

AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934

SEC. 11. (a) The following provisions of the Communications Act of 1934 are hereby repealed:

(1) Subsection (c) of section 5 (47 U.S.C. 155(c)), which provides for a "review staff".

(2) Paragraph (2) of subsection (c) of section 409 (47 U.S.C. 409(c)(2)), which, in cases of adjudication, prohibits the making of "additional presentations" by certain agency personnel unless upon notice and opportunity for all parties to participate.

(b) Such subsection (c) of section 409 of the Communications Act of 1934 is further amended by redesignating paragraph (3) thereof as paragraph (2).

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., June 2, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, House Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: This will acknowledge your letters of February 9, 1961 and March 16, 1961, inviting the Bureau to comment on H.R. 14, the Independent Regulatory Agencies Act of 1961, and H.R. 4812, the Regulatory Commissions Ethics Act of 1961.

On April 27, the President sent a message to the Congress recommending the enactment of general legislation to modernize the existing conflict-of-interest statutes. The proposed legislation would apply to all agencies of the executive branch and would be supplemented by regulations issued by agency heads tailored to suit the activities of the particular agency. The President also recommended the enactment of legislation requiring the promulgation by the heads of independent agencies of a code of ethics governing ex parte communications in various types of proceedings. Such regulations, when approved by the Congress, would have the force of law and be subject to appropriate sanctions.

While the Bureau of the Budget favors the objectives sought to be accomplished by H.R. 14 and H.R. 4812, we recommend favorable consideration of the more comprehensive legislation proposed by the President.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., June 1, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR CHAIRMAN HARRIS: Your letter of February 9, 1961, addressed to the Chairman of the Commission and requesting a report and comments on a bill, H.R. 14, introduced by you, to promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission, has been considered by the Commission, and I am authorized to submit the following comments:

H.R. 14 is concerned principally with ex parte communications in proceedings before the Interstate Commerce Commission and five other independent regulatory agencies.

Section 2 of the bill is of basic importance because of the effect of the definitions therein on the scope of various sections that follow. As defined in section 2 the term "agency employee involved in the decisional process" includes any agency employee who is subject to the immediate supervision of a member of the agency and any agency employee who is charged with the preparation of decisions with respect to proceedings before the agency. As applied to agency employees "subject to the immediate supervision of a member of the agency," the definition appears somewhat broad since it would, insofar as this Commission is concerned, include secretarial, stenographic, and clerical employees in the members' offices, and, in the case of the Chairman's office, the Commission's legislative and congressional liaison staff, none of the members of which are "charged with the preparation of decisions" or have any duties or responsibilities in connection with the determination thereof. We recommend, therefore, that the definition be clarified to exclude these employees.

The term "on the record proceeding" is defined as meaning any proceeding in "which agency action is required by law or agency rule to be based on the record of an agency hearing" beginning with "(A) the time that such proceeding has been noticed for hearing, or (B) such earlier time as the agency may designate. * * *" An ex parte communication is defined as being a communication "with respect to a proceeding, or with respect to the consideration or decision of a proceeding, * * * if reasonable notice thereof is not given, in advance of such communication, to all interested parties." Requests for information respecting the status of a proceeding are specifically excluded.

Section 3 of the bill contains a declaration of congressional policy which is implemented in greater detail by subsequent sections.

Subsections (a) and (b) of section 4 of the proposed measure read as follows:

"(a) The Congress hereby recognizes that it is improper for any person, for himself or on behalf of any other person, to influence or attempt to influence any vote, decision, or other action by an agency or by any member or employee of such agency, in any proceeding or matter before the agency by the use of secret and devious methods calculated to achieve results by the exertion of pressures, by the spreading of false information, by the offering of pecuniary or other inducements, or by other unfair or unethical means, rather than by reliance upon a fair and open presentation of facts and arguments in accordance with established procedures.

"(b) The Congress hereby recognizes that it is improper for any member or employee of an agency to—

"(1) engage, directly or indirectly, in any business transaction or arrangement for profit with any person, or any representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform;

"(2) accept or solicit any money, loan, service, employment, or thing of value from any person, or representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform;

"(3) use for the personal profit of himself or others confidential information gained by reason of his official position or authority;

"(4) fail to restrict his personal business affairs so as to avoid conflicts of interest with his official duties; or

"(5) acts in any official matter with respect to which there exists a personal interest incompatible with unbiased exercise of official judgment."

Under the provisions of paragraph (c) of this section each agency is directed, for the purpose of carrying out the declaration of congressional policy in section 3(a), to prescribe regulations implementing and supplementing the provisions of the above-quoted subsections of section 4.

Because of its broad sweep, section 4(a) gives us some concern. It is not limited to "on the record proceedings" as defined in section 2(3), but applies to "any vote, decision, or other action by an agency or by any member or employee of such agency, in any proceeding or matter before the agency." As applied to the thousands of informal administrative actions taken by this Commission and its staff each year, we feel that the prescription of established procedures for "fair and open presentation of facts and arguments" would result in formality and delay without corresponding benefits. As we stated in our report of November 19, 1959, in commenting on a somewhat similar provision in H.R. 4800 (86th Cong.):

"We are in complete accord with and endorse the purpose of section 103(a) to prohibit various and subtle methods by which attempts could be made to influence improperly the administrative process. Nevertheless, while we seek to avoid a hypercritical reading of section 103(a), we are inclined to believe that it illustrates the difficulty of drafting broad prohibitions which will cover all possible forms of impropriety without stripping the administrative process of its characteristic advantages of flexibility and relative informality.

"We recognize the dangers of relying upon interested and one-sided presentations from representatives of parties and others, and, as representatives of the public interest, we can assume neither accuracy nor objectivity in statements untested by publicity or reply. At the same time, the proper discharge of the functions entrusted to the Commission by the Congress frequently requires action upon the basis of essentially ex parte statements and representations. For example, it has been our experience in some uncontested finance proceedings that it is only in informal discussions with the applicant that certain matters can be resolved in the public interest without injury to the financial standing of the applicant * * *."

In addition, we believe that it is impractical for any agency by regulation to effectively prevent regulated persons from expressing views and arguments, outside of "established procedures," which may well be intended to exert pressure upon the agency or to create a pressure of public opinion. We are aware that officers, employees, and industry and employee representatives of carriers of every mode are continually making speeches and writing articles expressing their views on issues which are involved in cases pending before the Commission. Since these issues are, at times, also appropriate for legislative consideration and are a matter of legitimate interest to the general public, we do not believe it desirable to attempt to restrict the expression of carrier, employee, or shipper views, for example, on intermode rate competition, to "established procedures." Accordingly, in view of the more specific provisions of section 4(b) and of sections 5 through 8, we recommend the ommission of section 4(a).

Generally, it would be feasible for the Commission to prescribe regulations implementing and supplementing the provisions of section 4(b). In fact, the principles underlying section 4(b) are found in sections 11, 17(3) and 205(i) of the Interstate Commerce Act and in regulations issued by the Commission. However, there are specific problems to which we wish to call attention. Section 4(b)(1) would make it improper for any member or employee of an agency to "engage, directly or indirectly, in any business transaction or arrangement for profit with any person, or any representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform." It is assumed that in prescribing a rule to implement the quoted provision, it would be entirely proper for the Commission to provide an exception for the purchase of transportation services from regulated carriers in accordance with their published tariffs. Also, in this connection, section 4(b)(2) would make it improper for any member or employee of an agency to "accept or solicit any * * * employment * * * from any person, or representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform." It is

assumed that insofar as section 4(b)(2) relates to "employment" it would be satisfied by a regulation to the effect that when a member of employee engages in negotiations as to employment with such a person, he must refrain from participating in the decision of any matter in which such person has a direct or substantial pecuniary interest. For example, this Commission's restatement of ethical principles provides that:

"5. If a member or employee of the Commission entertains a proposal for future employment by any person subject to regulation by the Commission, such member or employee should refrain from participating in the decision of any matter in which such person is known to have a direct or substantial interest, both during such negotiations and, if such employment is accepted, until he severs his connection with the Commission."

We believe that such a regulation satisfies the salutary purpose of the quoted portion of section 4(b)(2), without unduly penalizing public service.

Sections 5 through 8 relate to ex parte communications with respect to "on the record proceedings" as defined in section 2(3). Thus, section 7(a) prohibits, "except in circumstances authorized by law", ex parte communications (as defined in sec 2(5)) between a party to an "on the record proceeding" (as defined in sec. 2(3)) or a person acting on behalf of such party, and any agency member, hearing officer, or "employee involved in the decisional process" (as defined in sec. 2(2)) "with respect to such proceeding." Section 2(5) provides that:

"(5) A communication with respect to a proceeding, or with respect to the consideration or decision of a proceeding, shall be considered to be 'ex parte' if reasonable notice thereof is not given, in advance of such communication, to all interested parties; except that a request for information with respect to the status of a proceeding shall not be deemed to be an ex parte communication."

Considering only this definition of ex parte communications, it would seem to include communications relating to procedural matters as well as to the merits of proceedings. However, the prohibitions of section 7(a) are qualified by the phrase "except in circumstances authorized by law." Presumably, the exception for "circumstances authorized by law" is intended to cover those routine or emergency procedural matters which tribunals generally dispose of without notice and hearing (see the exception in sec. 5(c) of the Administrative Procedure Act "for the disposition of ex parte matters as authorized by law"). The phrase "circumstances authorized by law" is not defined in the bill, and we are inclined to doubt the feasibility of drafting a precise definition covering the variety of procedural situations and emergencies in which an agency should be able to act quickly upon the basis of ex parte communications. Accordingly, we recommend that the definition of ex parte communication in section 2(5) be revised by substituting the words "with respect to the merits of a proceeding" for the words "with respect to a proceeding, or with respect to the consideration or decision of a proceeding." We believe that the evil at which these provisions are directed is ex parte communication with respect to the merits of proceedings. Unless they are clearly so limited, we believe that the criminal sanctions of section 7(f) will cause many agency members and employees to simply refuse to discuss informally anything relating to a proceeding which has been noticed for hearing. We submit that the result might well be an excessive judicialization of regulatory procedures.

Section 8 would require that all written requests for information with respect to the status of "on the record proceedings" be delivered to the Secretary of the agency for reply, and that both such a request and the Secretary's reply be placed in the public file of the agency. We see no objection to a requirement that such correspondence be placed in the public file or docket of a proceeding. However, we are inclined to believe that a requirement that all such requests be channeled to the Secretary may result in some delay in replying to entirely proper requests for information.

Section 9 would provide that "Notwithstanding any other provision of law, any member of an agency [subject of the bill] may be removed by the President for neglect of duty or malfeasance in office, but for no other cause." This would repeal pro tanto the provision of section 11 of the Interstate Commerce Act that "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

While we do not favor enactment of H.R. 14 in its present form, we hope that the views expressed above will be of assistance to the committee in its consideration of this matter.

Respectfully submitted.

EVERETT HUTCHINSON, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., May 25, 1961.

HON. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request inviting comment on H.R. 14, 87th Congress, 1st session, a bill to promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission.

This bill would create a new act to be known as the Independent Regulatory Agencies Act of 1961. The bill is, in part, a policy statement concerning broad standards of agency conduct in three general areas: (1) improper influence exerted by the parties and others upon agency members or employees and improper conduct of agency members and employees; (2) directions that agencies shall prescribe regulations implementing and supplementing the above designations of improper influences and conduct; and (3) ex parte communications in the case of "on-the-record proceedings." The bill also contains (4) a provision regarding the removal of agency members for cause, and (5) a provision to amend the Communications Act of 1934. As to the Communications Act amendment, since this would amend no law administered by the Federal Trade Commission, we have no comment on it.

The Federal Trade Commission is in full agreement with the purposes and objectives of H.R. 14, 87th Congress.

The Commission presently has rules governing the conduct of its employees which it believes are substantially in accord with the provisions of sections 4(a) and 4(b) insofar as these sections can be applied within the framework of operations of the Commission. It also has rules providing for the suspension or disbarment from practice before the Commission of any outside attorney for cause. We propose to reexamine our directives on rules of conduct in light of the provisions of H.R. 14 to determine whether further regulations should be promulgated.

The Commission agrees with the substance of the provisions of sections 5, 6, and 7 of the proposed act and defers to the Attorney General as to whether the provisions of section 7 are sufficiently definitive and specific to meet the constitutional requirements for a criminal statute.

It is noted that the Federal Trade Commission Act presently provides for removal of a Commissioner for "inefficiency" as well as neglect of duty and malfeasance in office. Section 9 of this bill would amend the Federal Trade Commission Act to omit "inefficiency" as a cause for removal.

It is further noted that the President in a message to Congress on April 27, 1961, discussed the whole area of "conflict of interest," stating that bills would be offered pertaining to this subject, and that he would submit subsequently an Executive order. The President did issue Executive Order No. 10939, dated May 5, 1961, "To Provide a Guide on Ethical Standards to Government Officials" which was addressed to the heads and assistant heads of boards, commissions, departments, and agencies, plus the White House Staff.

Pursuant to regulations, this report was submitted to the Bureau of the Budget on April 18, 1961, and on May 18, 1961, the Commission was advised by telephone that the Bureau of the Budget has no objection from the standpoint of the administration to the submission of the proposed report.

By direction of the Commission.

PAUL RAND DIXON, *Chairman.*

FEDERAL POWER COMMISSION REPORT ON H.R. 14, 87TH CONGRESS

A bill to promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission

This bill deals with the problem of ex parte communications in certain cases between parties and the decisional officers of the regulatory agencies listed in the title and section 2(1) of the bill. It is probably unnecessary to repeat it but, for the record, the Federal Power Commission is wholly in accord with the purposes of the bill and the declaration of policy set out in section 3.

H.R. 14 is the latest in a long series of attempts to adequately cope with improper practices either disclosed or alleged during hearings held by sundry committees of the Congress during the last several years. As such it comes closer, in our opinion, to being a complete resolution of the complicated questions involved than any of its predecessors.[1] Furthermore, we are pleased to note that many of the suggestions which we made in our reports on the earlier bills have now come to fruition—in bill form, at any rate.

Our primary concern with respect to most of the earlier proposals was their failure to make the necessary distinction between practices which are merely improper or unethical and those which should be made unlawful and subject to criminal penalties. For example, it is easy to recognize that certain ex parte approaches to deciding officers are clearly unethical, or at least unfair, to other parties in the proceeding. Similarly, it is clear that some actions taken by former employees of an agency in subsequent appearances before it would be a clear breach of confidence, producing a conflict of interest subject to criminal penalties. Obviously, the problem is one of definition, and the line between proper and improper ex parte contacts in many situations is so hazy as to defy definition. It follows that if the propriety or impropriety of a particular contact cannot be specified with the particularity needed in a criminal statute, it should not be made subject to criminal penalties.

The pending bill does not go quite as far in this regard as we think would be desirable[2] but, at least, the actions or nonactions which are made subject to criminal penalties would seem to be as specifically defined as possible under the approach to the solution of the problem taken by the bill.

As stated above, the Commission is in agreement with the purpose of and the policy expressed in the bill. But we are also of the firm opinion that the receipt and consideration of ex parte communications is at times not only proper but necessary. Since it is often difficult or even impossible to distinguish procedural matters from the merits of a case, it is, of course, reasonable to require that all parties be advised of any ex parte communication.

The real poser is not so much the content of the communication as the type of proceeding (or publicity) which should apply and the manner of its exclusion from consideration by decisional officers.

The bill would apply the prohibition to a proceeding "in the case of which agency action is required by law or agency rule to be based upon the record of an agency hearing' (p. 2, lines 11–13). But this, in our opinion, is both too broad as related to some types of proceedings and too narrow with respect to others.

It is broad in that it would encompass proceedings in which there are no adversary parties, intervenors, or protestants, although possibly the agency staff may object, about which we will have more to say hereafter. In this situation, there is no point to prohibiting ex parte communications between the decisional officers and the only party involved (applicant or respondent).[3]

On the other hand, the definition of section 2(3) may be too narrow for it would exclude from "on-the-record" proceedings hearings which are not "required by law" but which are in fact held, the record thereof being the basis

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[1] H.R. 14 is identical with H.R. 12731, 86th Cong., as it was reported late in the closing session of the 86th Cong. (H. Rept. 2070, July 1, 1960). Consideration of the provisions of the pending bill is much simplified by the contents of that report.

[2] We have heretofore suggested the desirability of a congressional expression of broad principles for administrative guidance while, at the same time, questioning the practicality of statutory criteria containing detailed specificatons of all kinds of unethical conduct. The more proper place for effective standards, it seems to us, is in the criminal statutes, where specific, clearly defined action or nonaction can be defined or proscribed and appropriate penalties can be provided. Any statement of principles may, and rather should, be hortatory in nature.

Two bills introduced in the House (H.R. 2156, H.R. 2157, 86th Cong.), properly, in our opinion, recognize this separable but coordinate approach to the problem. The first is a reenactment of the existing bribery and conflict-of-interest laws with amendments to make them pertinent to the administrative agencies as well as to other offices in the Government. The other would enact a code of official conduct for the executive branch. Such code wou'd make certain conduct improper rather than illegal. It imposes no criminal penalties but does impose upon the various agencies the responsibility of enforcing and implementing its provisions in response to the particular needs of each. This dual approach is, in our view, the soundest way to resolve the problem.

[3] Of course, another person, as distinct from "party" (in public or private life), might attempt to influence the decision through an ex parte approach but the propriety or impropriety of such an attempt would turn on the purpose thereof and whether it was a matter to be included in the "record." Even this unlikely situation should not, however, require the proscription of communications between the only "party" involved and the decisional officers.

of the agency's action. Proceedings leading to the issuance of a license under part I of the Federal Power Act are in this category. No hearing record is required by law but where there is a protestant or an intervenor opposing the issuance of a license (even though a competitive applicant is not involved) fairness requires that section 7(a) of the bill should apply.

Concisely, section 7(a) of the bill should apply to proceedings in which the agency action is based upon the record of an agency hearing (whether or not required by law) and in which there are adversary interests represented by intervenors or protestants. Obviously, if there are no intervenors and no interest is evinced by others than a single party (applicant or respondent), an ex parte contact on a procedural matter or on the merits could well be proper and might well serve to facilitate final Commission action. In other words, the presence of an adversary party would appear to logically precipitate applicability of section 7(a), rather than the mere fact that a hearing is held, whether or not that hearing was required by law.

The following amendments to the bill would carry out our suggestions:

On page 2, delete from line 12 the words "required by law or agency rule to be" and insert before the comma in line 13 the words "in which adversary interests are represented by intervenors or protestants,".[4]

As we interpret the definition of the term "agency employee involved in the decisional process" in section 2(2) and of the term "person" in section 2(4), the prohibitions of section 7(a) would not apply to ex parte communications (either oral or written) made to or by an agency employee who is neither a hearing officer nor an employee involved in the decisional process. In former reports we have pointed out that there is inherent in the regulatory process the necessity for the Commission members and others engaged in the decisional process to have access to the technical staff. We suggested that the intention of Congress in this regard be made crystal clear either in the language of the bill itself or in the committee report on the bill.[5] We are still of that opinion.

With respect to the phrase "except in circumstances authorized by law" as used in paragraphs (1) and (2) of section 7(a), we note the committee's reference to section 5(c) of the Administrative Procedure Act and its understanding "that this will exempt ex parte communications with respect to such matters as requests for subpenas, adjournments, and continuances, and the filing of papers".[6] The fact remains that the phrase is indefinite and violations of section 7(a) of the bill are subject to criminal penalties.

We would point out that it has long been established that criminal statutes must be clear and definite. Congress must inform a citizen with reasonable precision of what acts it intends to prohibit. *Winters* v. *New York* (333 U.S. 507, 509 (1948)). Consequently, this necessary and proper recognition of the propriety of ex parte communications under some unspecified circumstances may render the criminal penalties of section 7(f) either invalid for uncertainty or citizens might be placed in jeopardy if they rely upon the indefinite exemptions.

In this connection we would draw the committee's attention to a matter of legislative draftsmanship. The bill specifically exempts certain communications from its prohibitions. Section 2(5) excepts requests for information with respect to the status of a proceeding and both paragraphs (1) and (2) of section 7(a) except communications made in circumstances authorized by law. In the interest of clarity we would suggest that all exceptions be stated at one point in the bill, for example, "the circumstances authorized by law" exception might be removed from section 7 and included in section 2(5). Furthermore, the bill, insofar as the imposition of criminal penalties is concerned, would be much strengthened, in our opinion, if the intended exemptions (i.e., requests for subpenas, adjournments, and continuances, and the filing of papers) were specifically set forth. This would be preferable to the general phrase (authorized by law) used in the bill. In any event, the phrase, "except in circumstances authorized by law" should be amended by adding the words "including agency regulations" in lines 15 and 22 of page 7 of the bill.

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[4] As thus amended, the first four lines of subsec. 2(3) would read: (3) The term "on-the-record proceeding" means any proceeding before an agency in the case of which agency action is based on the record of an agency hearing in which adversary interests are represented by intervenors or protestants, but such term includes such a".

[5] We note the committee's discussion of the question with respect to the identical sections of H.R. 12731, 86th Cong. (H. Rept. 2070, p. 13) which confirms our interpretation and suggest the advisability of a similar discussion in any report which the committee may make with respect to the pending bill.

[6] Id., p. 13.

Section 4 establishes, in effect, a code of ethics. No criminal penalties for breaches thereof are imposed, but the agencies are required to prescribe regulations implementing and supplementing the provisions of the section. Since this is the approach we have so often suggested, we recommend its enactment.

Since sections 8 and 10 of the bill would, no doubt, aid in the administration of the other provisions thereof, we recommend their enactment.

In our opinion, section 9 relating to the removal of agency members should be enacted.

Since section 11 has no application to this Commission, we have no comments to offer with respect thereto.

In conclusion, we would say that while we are in complete accord with the purposes of the bill and believe it preferable to any we have considered up to this time, the foregoing observations and recommendations are submitted in the hope that they may be assistance in drafting legislation which will be workable as a practical matter and effective in accomplishing its purpose.

FEDERAL POWER COMMISSION,
By JEROME K. KUYKENDALL,
Chairman.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., June 5, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. HARRIS: This is in further reply to your request for the views of the Civil Service Commission on H.R. 14, a bill to promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission.

The Commission believes that further statutory regulation is needed in the field of conflict of interest and agrees with the purposes of this bill. The Commission is of the opinion, however, that such legislation should extend to all agencies of the executive branch, should include revisions of the present conflict of interest laws in the interest of consistency and should place coordinating and regulatory responsibilities on the President.

The President has in fact recently taken action with respect to standards of ethical conduct. On April 27, 1961, the President submitted a message to the Congress (H. Doc 145) containing a draft bill to be known as the Executive Employees Standards Act. This draft prescribes standards of conduct for employees of the executive branch, provides penalties for violations of the act, and amends existing conflict of interest statutes. The President's message also makes the following statement with respect to ex parte contacts:

"* * * This is a problem which can best be resolved in context of the particular responsibilities and activities of each agency. I, therefore, recommend that the Congress enact legislation requiring each agency, within 120 days, to promulgate a code of behavior governing ex parte contacts within the agency specifying the particular standard to be applied in each type of agency proceeding, and containing an absolute prohibition against ex parte contact in all proceedings between private parties. The statute should make clear that such codes when approved by Congress will have the force of law, and be subject to appropriate sanctions."

The Commission favors general legislation of the type suggested above rather than special legislation such as H.R. 14 affecting a limited number of agencies only.

The Bureau of the Budget advises that from the standpoint of the administration's program there is no objection to be submission of this report.

By direction of the Commission.

Sincerely yours,

JOHN W. MACY, JR., *Chairman.*

The CHAIRMAN. The purpose of this proposed legislation, and I quote, is "to promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commis-

sion, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission and the Securities and Exchange Commission."

The bill is an attempt to deal with one of the most vexatious problems posed by the nature of the independent regulatory agency.

Let me repeat what I have said over and over again, that when we started the investigation of these major regulatory agencies 4 years ago we had a purpose in mind, and that purpose was not to destroy nor to adversely affect the regulatory procedures which the Congress had provided throughout the many years, beginning in 1887 with the Interstate Commerce Commission, but to strengthen and improve regulatory processes and procedures, and that is precisely what we have in mind in connection with this proposed legislation.

Each of the agencies whose operations H.R. 14 would apply to exercises different kinds of functions. This is another reason that it is important that we attend hearings on this proposed bill to reach all of the major regulatory agencies. But we must recognize that each of the agencies has a different kind of function in its own particular field, and, therefore, it is a complicated problem to reach all that is encompassed in one proposal.

When resolving disputes between competing applicants for a license or certificate, for example, the agency is acting as a court. When enforcing prohibitions against various kinds of proscribed conduct, an agency is acting like a policeman or a prosecutor. When prescribing rates, standards, and the like to govern future conduct, an agency is assuming the role of a legislator. That is a legislative function.

So these different functions are thus combined in the same agency and in the same men within that agency. When an agency is acting as a court in determining a matter on the basis of a record made at a hearing, the parties and the public are entitled to expect the level of integrity and fairness that we associate with our courts. Yet where an agency is charged with the responsibility of supervising national transportation, communications or other policies, it must have access to information from every possible source, including those to be affected by its actions. So distinctions must be made, a demarcation must be brought about in my judgment.

The problem then is how to reconcile the acknowledged need for judicial aloofness with respect to certain matters with an agency's need to collect information where it can find it. This problem has been recognized by many people and groups in this country. It has been recognized by the President of the United States in his message of April 27 on "Ethical Conduct in the Government."

This committee has long been engaged in the effort to determine the extent and scope of the difficulties presented and the ways and means of coming to grips with them through legislation.

In 1960 the committee held hearings on two bills, introduced in the 86th Congress dealing with the same problem, H.R. 4800 and H.R. 6774. Those bills—the first introduced as a result of hearings in 1958 by the Special Subcommittee on Legislative Oversight, and the second, a bill sponsored by the American Bar Association, which I might say, parenthetically, developed out of the same investigations in 1958 were subject to the most intensive and exhaustive scrutiny, as our colleagues will recall.

As a result of the criticisms directed at them, much of which I thought was frivolous but much of which was well taken, a substitute bill, H R. 12731, was introduced in the last Congress. This committee unanimously recommended passage, but the crowded schedule of the 86th Congress made final consideration of the bill impossible. As a matter of fact, it was designed that the bill would not be pursued any further in the last Congress because we wanted to give ample time and opportunity for agencies of the Government, people in industry, practitioners, and everybody in the country to chew on it, to consider it, to bring to us then, when we got back to the subject matter, the best possible wisdom that they had and suggestions and recommendations.

That was primarily the reason we did not pursue the matter in the last Congress.

We have now had approximately 10 months. That opportunity has been given, and certainly no one can complain that he has not had ample opportunity to give us his best judgment on these very important problems.

In its final report of January 3, 1961, our Subcommittee on Legislative Oversight recommended that a bill be introduced substantially identical to H.R. 12731. H.R. 14, the bill under consideration, is the product of that recommendation.

When I announced these hearings on May 10 I expressed the hope that any criticism directed toward the bill would be specific and alternative provisions would be offered. As I said at that time, broadside attacks are not helpful in dealing with delicate problems of this sort. The committee has received comments from some of the agencies affected. I am very pleased to say that these comments are fairly specific, and I hope that the committee's consideration of the proposal will be greatly facilitated if we can continue to be as specific as possible.

I might add also that this bill, while it will affect only the six agencies which I have earlier mentioned, seems to me to be compatible with the suggestion made in the President's message that the agencies themselves be permitted to determine to which of their proceedings prohibitions against ex parte contacts will apply and at what stage of the proceeding. That is a difficult problem that we have.

Let me make this further comment. Most members of this committee remember Dr. Splawn. Dr. Splawn served admirably and capably, with great ability on the Interstate Commerce Commission for 19 years. Prior to that time he served in a very important capacity to this committee.

When Speaker Rayburn was chairman of this committee, he brought Dr. Splawn here for the purpose of making a certain investigation having to do with the securities markets of this country. Out of his investigation largely came the Securities and Exchange Act and the other acts in that field.

When the investigation of the Special Committee on Legislative Oversight got underway in 1957 I requested Dr. Splawn to come back. As you know, he retired a few years prior to that time. I requested that he come back as a special consultant to the chairman and to the committee because of his long years of experience, his knowledge of the history, of course, resulting from his experience while he was at

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the University of Texas. As you know, he was president of the University of Texas before he came to Washington.

After going through the years of investigation for the committee, Dr. Splawn advised me that he was going back to Texas. He advised me that that would be his last service to his country and Government. And my colleagues who are here, who were on the committee at that time, remember that Dr. Splawn sat about where Governor Thomson is now, and he made this unusual comment which stuck with me and penetrated, and I believe it is well to repeat it here. He recalled his early days here that brought him to the Congress, and that there was a turmoil that brought him into the Government. He talked about his investigation and the result of it and what came of it.

He recounted his experience in the late thirties when there was another turmoil that developed in connection with agencies of the Government established to provide needed service to the American people, and he explained in connection with that some of the results. He recounted in the late forties how again there developed a situation which resulted in turmoil affecting these particular agencies of the Government and their service to the people. Then he recounted the experience that we were undergoing at that time, and he reminded us that these incidents occur every so often, in cycles apparently, and as long as there was not some way to keep reminding people who serve in these responsible positions, those who have business before these responsible agencies of the Government, those who practice before them and those of us who try to write legislation and deal with the subject, we are going to continue to have these upheavals and turmoil every so often unless some solutions can be reached.

I think that was the statement that we would all do well to keep in mind, because no one gets any fun or pleasure out of going through what we did for a period of 3 years or more in those prior years.

I think everyone basically has good intentions of performing a service in the highest tradition of our country. What we should do if we can is to set a pattern that would help as we continue to strive for higher goals. In my judgment, that is the purpose of this proposed legislation.

Whatever we are able to do so that we can accomplish that objective, I would say would be one of the finest services that we could possibly perform as we journey this great path of service during this age and this time. I do feel this problem pretty deeply.

I would give an opportunity to some of my other colleagues, if they want to, who served with me during these years, if they have anything to say at this time for the record as we start on this important legislation.

Mr. Friedel?

Mr. FRIEDEL. Mr. Chairman, I remember very vividly when the Interstate and Foreign Commerce Committee came before the House Administration Committee for appropriations for this investigation. One of the things that was brought out clearly before our committee was that this investigation was to be nonpartisan, that both Republicans and Democrats were in favor of it. The intent was to find out whether the agencies were going too far with their regulations; that is, beyond the intent of Congress.

These agencies set their own rules and regulations and there are indications that some of them went further than they were allowed to go. I hope we will be able to prevent that in the future.

The question is: Do we know what is happening on some parts of the investigation? I am wondering whether, by setting up this ethical standard, it will be considered unfair for a Member of Congress to make inquiries on behalf of interests in his State. Say, for instance, Baltimore City might inquire about airlanes for Friendship Airport. Under this ethical standard, would it be considered unethical for a Member of Congress to intercede in such an instance?

On the other hand, I would like to know whether it would be unfair if an industry, some airline, would approach the members of an agency and give their point of view, whether that would be unethical.

The CHAIRMAN. Well, those are the things we hope to develop in the course of these hearings.

I might say that that is the reason that I suggested that this was a very, very important proposal, and it should be understood, certainly by members of the committee, to help the Government and the people of the country, the practitioners and everyone, to understand just what is intended. This thing has been worked out to a pretty fine point.

There is no intention of intervening through this legislation in anyway to deprive any individual of a right that he is entitled to. But when the matters go to adjudication, then it becomes a matter as it would before a court and ex parte contacts should not be permitted.

It does not mean, as the gentleman has said here, that he could not inquire as to the status of any particular proceeding before any agency, just as you can inquire of any Federal judge in the country the status of any case that is on that docket. But it is a question of discussing the merits of the case after it comes up for adjudication.

We are very pleased to have with us this morning as our first witness the Chairman of the Civil Aeronautics Board representing the Board here this morning.

And I believe, Mr. Chairman, this is your first appearance before this committee since your assuming your new duties and responsibilities as chairman. Perhaps I have been a little remiss in not giving you an opportunity to come before this committee before now, but I know you have been very busy, certainly, engaged in getting yourself acquainted with the responsibilities of the Civil Aeronautics Board.

I was pleased to watch your approach to these problems and the progress you have made thus far wth these duties, and I think it is quite important. Your first mission is to discuss what I believe to be one of the most vital problems that we have in our agencies of Government.

I welcome you to this committee on behalf of the members of the committee. We are glad to have your statement this morning.

Mr. Rogers of Florida.

Mr. ROGERS of Florida. Mr. Chairman, I just want to say I certainly commend the Chairman to this committee, having known him for many, many years and his most distinguished record of service to the State of Florida. He has been an outstanding attorney and a man of real integrity. It is an honor to have him represent our State here as Chairman of the Civil Aeronautics Board.

The CHAIRMAN. Mr. Boyd, you may proceed.

STATEMENT OF HON. ALAN S. BOYD, CHAIRMAN, CIVIL AERONAUTICS BOARD

Mr. BOYD. Thank you, Mr. Rogers and Mr. Chairman.

This is my first appearance, and I appreciate very much the opportunity to be here today, and I also appreciate the fact that you haven't invited me over any earlier.

What you said is altogether true. It takes a little time to get your feet on the ground. And I am certainly in accord with your feeling that there is nothing that could be more important to the integrity or the functioning of organizations such as the Board in the matters which we are about to discuss today.

I am accompanied here today by our very able Associate General Counsel, Mr. Ross Newmann.

Mr. Chairman and members of the committee, the Board is pleased to appear before you in connection with H.R. 14 entitled "The Independent Regulatory Agencies Act of 1961," a bill designed to strengthen the independence and effectiveness of the six principal regulatory agencies. The Board strongly supports the objectives of H.R. 14, and, with certain modifications, recommends the enactment of this bill.

Because of its position as an independent regulatory agency dealing with quasi-legislative and quasi-judicial functions, the Board has been particularly concerned with the various provisions of the law relating to ethical standards in Government service.

During the past several years the Board has appeared before numerous committees of the House and Senate in support of various bills which would strengthen our laws dealing with ex parte influence, conflicts of interest, leaks and pressures, administrative procedure, and other matters related to the general problem of ethical standards.

I think the importance of this subject was highlighted by the President in his special message to the Congress on conflict of interests on April 27, 1961.

At the outset I should point out that the Board has a very fine code of ethics which covers most of the points raised in H.R. 14, and in some respects goes further than the provisions of this bill. There is one deficiency, however, in our own code of ethics which can be remedied only by legislation. H.R. 14 does not correct this defect which I will discuss in detail in connection with the specific provisions of this bill.

H.R. 14 would strengthen the independent regulatory agencies in the following manner:

(1) By laying down congressional policies on the basis of which these agencies are directed to prescribe regulations to prevent the exercise of improper influence upon, and to prevent improper conduct by, members and employes of such agencies;

(2) By requiring the establishment of proper procedures by such agencies for considering and acting on complaints with regard to such improper influence and improper conduct;

(3) By protecting the integrity of "on-the-record proceedings" through the imposition of criminal penalties for improper ex parte communications made in connection with such proceedings;

(4) By strengthening existing requirements with respect to intra-agency separation of functions, for the purpose of protecting the integrity of the decisionmaking process in on-the-record proceedings; and

(5) By providing, in the case of each of these agencies, that agency members may be removed for neglect of duty or malfeasance in office, but for no other cause.

Section 2 of H.R. 14 defines certain terms used in the bill. The term "agency" is defined to limit the applicability of the proposed legislation to the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, and the Securities and Exchange Commission.

This section also defines the terms "agency employee involved in the decisional process," "on-the-record proceeding," and "ex parte communication." These terms are used in sections 5, 6, 7, and 8 of the bill which impose restrictions on ex parte communications in the case of certain agency proceedings.

Section 2 also defines the term "person" as including, in addition to any individual, whether or not in public life, any corporation, company, firm, partnership, association or society, any organized group of individuals, and any governmental body or body politic. The Board sees no difficulty in the definitions of these terms as set forth in section 2.

Section 3 is a congressional declaration of policy stating that enactment of H.R. 14 is vitally important in the public interest to strengthen the independence and effectiveness of the regulatory agencies, and to promote the efficient, fair, and independent operation of these agencies. The provisions of this section are similar to the Board's own code of ethics, and the Board strongly endorses them.

Section 4 is intended to carry out the recommendation of the Special Subcommittee on Legislative Oversight that there be enacted into law a code of ethics governing the conduct of commissioners, commission employees, practitioners, and others who appear before the commissions.

Subsection (a) declares it to be improper for any person to influence or attempt to influence any vote, decision, or other action by an agency or any agency member or employee, by unfair or unethical means, rather than by reliance upon a fair and open presentation of facts and arguments in accordance with established procedures.

Subsection (b) lists five specific types of actions which are declared to be improper, such as a Board member or employee (1) engaging in a business transaction with a person who has a pecuniary interest in any matter pending before the Board and in connection with which the member or employee has any duty to perform; (2) accepting or soliciting any money, loan, service, employment, or thing of value from any person who has a pecuniary interest in any matter before the agency and in connection with which the member or employee has any duty to perform; (3) using for personal profit of himself or others confidential information gained by reason of his official position or authority; (4) failing to restrict his personal business affairs so as to avoid conflicts of interest with his official duties; or (5) acting in any official matter with respect to which there exists a personal interest incompatible with unbiased exercise of official judgment.

Section 4 is not enforcible by criminal penalties, but subsection (c) would require each agency to prescribe regulations implementing and supplementing subsections (a) and (b) for the purpose of carrying out in an effective manner the statement of policy set forth in section 3. It would also require each agency to establish procedures for considering and acting on complaints to prevent the improprieties described in sections 4 (a) and (b).

The general congressional intent with respect to the problem of ethical standards is adequately set forth in sections 3 and 4 of the bill. While the Board has no objection to a statutory code of ethics, the Board believes that the congressional purpose in this respect might better be accomplished through the promulgation of agency regulations which have the advantage of being easily adapted to meet new problems and changing conditions as they arise.

The provisions of section 4(b) would apply to a great multitude of activities by the Board and its staff and may be unduly restrictive and harsh in their application to all situations. In our opinion, it would be better to delete the specific listings of improprieties contained in section 4(b) and to permit each agency to implement the congressional policy set forth in sections 3 and 4(a) by regulation.

Our own code of ethics not only preserves the quasi-judicial character of the Board's actions but prescribes in written form the rules governing the conduct of Board officials and employees which require strict adherence to the highest standard of conduct. These rules have been developed over a period of years and have been revised and brought up to date through a continuous process.

Sections 5, 6, 7, and 8 deal with one of the most important objectives of H.R. 14—to protect the integrity of on-the-record proceedings by imposing prohibitions against improper ex parte communications.

On-the-record proceeding is defined in section 2(3) as a proceeding in the case of which "agency action is required by law or agency rule to be based on the record of an agency hearing."

The Board sees no difficulty in this definition which is similar to our own regulations.

Section 300.2 of the Board's Principles of Practice makes the Board's rules against ex parte communications applicable to any proceeding which is to be decided by the Board after notice and hearing and upon a formal record. Moreover, in a nonhearing case the Board's rules are flexible enough to permit the Board, if it finds such action necesary or desirable, to make its rules against ex parte communications applicable to such a proceeding.

Section 2 of H.R. 14 makes it clear as to when the prohibition against ex parte communications shall begin to apply. It provides in the definition of on-the-record proceeding that such term—

> includes such a proceeding only beginning with (*a*) the time that such proceeding has been noticed for hearing, or (*b*) such earlier time as the agency may designate as provided in section 6.

The Board concurs in these provisions of the bill, which are similar to our own regulations.

In the Board's opinion in the recent New York-San Francisco case, the question was raised whether the prohibition against ex parte communications applies to proceedings requesting institution of an evidentiary hearing on a route application.

In order to clarify this point, the Board recently amended its regulations so that the prohibition against ex parte communications becomes applicable from the time of filing of any application or petition which can be granted by the Board only after notice and hearing. As to matters which the Board voluntarily sets down for an evidentiary hearing, it was proposed that the rules be applicable from the time of such Board action.

The Board's action is consistent with section 6 of H.R. 14 which recognizes the need for agency flexibility and permits the agency to treat certain proceedings as on-the-record proceedings prior to being noticed for hearing.

The Board concurs with the provision of section 5 of H.R. 14 which requires that a statement must be included in every notice of hearing as to whether the proceeding is or is not an on-the-record proceeding. If the notice is silent, the proceeding will be deemed an on-the-record proceeding.

The prohibitions against ex parte communications in on-the-record proceedings are contained in section 7 of the bill. Subsection (a)(1), which is applicable to oral as well as written communications, provides that, except in circumstances authorized by law, no party to such a proceeding, or person acting an behalf of such party shall communicate ex parte with respect to such proceeding with any agency member, hearing officer, or employee involved in the decisional process. Subsection (a)(2), which is also applicable to both oral and written communications, prohibits ex parte communications by agency members, hearing officers, or employees involved in the decisional process.

Section 7(b) provides that if any written ex parte communication is made to an agency member, hearing officer, or employee involved in the decisional process in violation of subsection (a), the recipient shall deliver it to the Secretary of the agency, together with a written statement of the circumstances. The Secretary of the agency is directed to promptly place the communication and statement in the public file and to give notice of the communication to all parties to the proceeding.

Section 7(c) provides that if any written communication is made by an agency member, hearing officer, or employee involved in the decisional process in violation of subsection (a) to a party to an on-the-record proceeding or to any person acting on behalf of such party, the officer or employee making the communication shall promptly deliver it to the Secretary of the agency together with a written statement of the circumstances. Provisions similar to those of subsection (b) regarding placement of the communication and statement in the public file and the giving of notice to parties to the proceeding are contained in subsection (c).

Section 7(d) provides that where a party, or a person acting in behalf of a party, has violated section 7(a)(1), such violation shall be good cause in the agency's discretion for disqualification of the party by whom or on whose behalf the ex parte communication was made.

Section 7(e) provides (1) that no ex parte communication made in violation of subsection (a) shall be considered unless it shall have been duly admitted in evidence, and (2) that no such communication which has been placed in the public file shall be removed from such file except for official purposes.

Section 7(f) provides that any person who willfully violates subsection (a), (b), (c), or (e) shall be fined not more than $10,000 or imprisoned no more than 1 year, or both.

The Board is in accord with the provisions of section 7 of H.R. 14 which are similar in many respects to our own regulations. We believe, however, that section 7(a)(1) could be strengthened to include the prohibition against ex parte communications made by persons outside the Board who are not parties and who are not acting on behalf of parties.

We note that section 4(a) of the bill, which deals with improper influence and improper conduct, is applicable to any person. But the bill provides no criminal penalties for violations of that section. Section 7(a), which does provide criminal penalties, is applicable only to parties or persons acting on behalf of such parties. This is the same problem for which under the present law the Board has no effective remedy.

While our own code of ethics has been reasonably adequate and has worked well in the past, it is nevertheless subject to this deficiency which can be remedied only by appropriate legislation.

Section 300.2(a) of the Board's Principles of Practice is consistent with the provisions of section 7 with respect to the disposition of written ex parte communications. Under the Board's rule, any prohibited communication in writing received by the Board or its staff or the examiner in the case shall be made public by placing it in the correspondence file which is available for public inspection and cannot be considered by the Board or the examiner as part of the record for decision.

Section 300.6(b) of the Board's Principles of Practice is similar to section 7(d) of the bill in that the Board, where appropriate in the public interest, may deny the relief requested by a party in a proceeding who has violated the Board's principles of practice.

Under the bill, a request for information with respect to the status of a proceeding is not an ex parte communication, and, thus, the prohibition contained in section 7(a) does not apply. This is covered by section 8 of the bill which provides that written requests of this type shall be placed in the public file of the agency together with a copy of any written reply thereto. Such communications shall not be removed from the file except for official purposes. This is similar to section 300.2(a) of the Board's rules which provides that communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits.

Section 9 of H.R. 14 deals with the removal of agency members for cause. Under present law there is no provision for removal of members of some of the independent regulatory commissions whereas the members of other regulatory commissions, including the Civil Aeronautics Board, may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

Section 9 would permit the President to remove any member of an agency for neglect of duty or malfeasance in office, but for no other cause. We understand that inefficiency has not been included as a basis for removal in H.R. 14 because the meaning of that term is too vague and indefinite to be a proper basis for removal of members of these important regulatory agencies. The Board has no objection to this change.

Section 10 of H.R. 14 is designed to protect the integrity of the decision making process in on-the-record proceedings by strengthening existing requirements with respect to intra-agency separation of functions. Section 10(a) of the bill provides that in the case of any on-the-record proceeding subsection (c) of section 5 of the Administrative Procedure Act and the provisions of this bill shall apply as though the last sentence of section 5(c) had not been enacted.

In the committee report accompanying H.R. 12731 it is stated that one of the purposes of section 10(a) is to make the requirement of separation of functions applicable to all on-the-record proceedings including those involving the determination of applications for initial licenses and those involving the validity or application of rates, facilities, or practices of public utilities or carriers.

According to the committee report, another purpose of section 10(a) of the bill is to make certain that the last sentence of section 5(c) of the Administrative Procedure Act does not operate to permit agency members in the case of on-the-record proceedings to consult off the record with parties to such proceedings or with persons acting on behalf of such parties.

The result of the amendment proposed in section 10(a) would make the separation of functions of section 5(c) of the Administrative Procedure Act applicable not only to proceedings involving investigative and prosecuting functions but to all on-the-record proceedings.

The Board concurs in this objective, which is consistent with the Board's existing regulations, although we go further in cases involving investigative and prosecuting functions by excluding from the decisional process not only the witness and counsel who participated in the case, but also the entire office or bureau of such employees.

In addition to accomplishing the objective of extending the separation-of-functions doctrine to all on-the-record proceedings, the amendment proposed in section 10(a) would make section 5(c) of the Administrative Procedure Act applicable to agency members. Under the present law the agency can perform an investigative or prosecuting function in a case and still render the final decision. Under section 10(a) of the bill, however, agency members would no longer be exempt from the provisions of section 5(c), and, therefore, would be precluded from participating in the decision in a case in which such members have performed an investigative or prosecuting function.

Although the Board has delegated these functions to the staff to the extent possible, the Board cannot always avoid deciding whether an investigation or prosecution is to be instituted, and it must usually make the decision on offers of settlement and motions to dismiss in such cases. The making of these interlocutory decisions constitutes, in a sense, the performance of an investigative or prosecuting function. Yet it is plain that the Board must not be disqualified from rendering the final decision. We recommend, therefore, that section 10(a) be clarified to preclude such a result.

In conclusion, Mr. Chairman, the Board wishes to thank the committee for this opportunity of expressing its views. I hope you will find our comments and suggestions helpful. We strongly endorse the objectives of H.R. 14 and recommend its enactment subject to the amendments we have proposed in sections 4(b), 7(a) and 10(a).

The Bureau of the Budget has advised that there is no objection to the Board's testimony from the standpoint of the administrative program.

Thank you, sir.

The CHAIRMAN. Thank you very much, Mr. Boyd, for your very fine and pointed statement on this problem. We appreciate your pinpointing these issues and the suggestions which you think would help to carry out the purposes and objectives of this legislation. Certainly, the committee will give careful consideration to the suggested changes that will help to carry out the objectives but, yet, permit agencies to perform their responsibilities to the public.

Mr. Williams, any questions?

Mr. WILLIAMS. Mr. Chairman, I have no questions regarding the testimony. I would like to ask Mr. Boyd if this is the unanimous opinion of all of the Board members.

Mr. BOYD. Yes, sir. This represents the unanimous opinion of four Board members. I am sure it would represent the unanimous opinion of all five except for the fact that Senator Gurney has been out of action for over a month.

Mr. WILLIAMS. Insofar as you know, none of the Board members take exception to any of the recommendations made in your statement?

Mr. BOYD. No, sir. As a matter of fact, all of the other Board members have concurred in full in the statement as prepared and given.

The CHAIRMAN. Mr. Springer?

Mr. SPRINGER. No questions, Mr. Chairman.

The CHAIRMAN. Mr. Mack?

Mr. MACK. Mr. Chairman, I would like to commend you on a very fine statement this morning. I wanted to ask your opinion about the last statement you made. That is, do you feel that it is proper for an independent agency to be required to submit its testimony to the Bureau of the Budget for presentation to Congress?

Mr. BOYD. I will tell you the truth, Mr. Mack. I hadn't given that any thought.

It certainly appeared to me that, since this was the procedure, I have no reason to argue it so long as there is no censorship involved. And, to my knowledge since I have been a member of the Board, there has been no effort to censor any statement.

Mr. MACK. The question is then if there is no censorship why should it be submitted to them in the first place.

Mr. BOYD. Well, the purpose, as I understand it, is merely to get an indication from the Bureau of the Budget as to whether or not the testimony is in accord with the administration's program, and merely a requirement which seems reasonable to me, to tell you the truth, that the agency indicate whether or not it is in accord with the administration's program.

I should think the committee would want to be aware of that fact.

Mr. MACK. Of course, the Bureau of the Budget is invited to present its views on most legislation as well.

Mr. BOYD. I'm sorry, sir. I didn't catch that.

Mr. MACK. I said the Bureau of the Budget is also invited to present its views on legislation before the committees of Congress.

Mr. BOYD. There may very possibly be some duplication involved here.

Mr. MACK. Do you feel that this procedure would limit any of the independent agencies in expressing their opinion on proposals of Congress?

Mr. BOYD. No, sir, I don't think so. I can't speak for the other agencies, but certainly it has not inhibited the Civil Aeronautics Board.

Mr. MACK. That is all I have at this time.

Mr. WILLIAMS. Mr. Schenck?

Mr. SCHENCK. Mr. Chairman, I was interested in the testimony of Chairman Boyd, and it is splendid.

I was wondering is there any effect of H.R. 14 on speeding up the decisions of the cases before the Board or is that not included in this at all?

Mr. BOYD. No, sir, I don't think that is included at all in this bill.

Mr. SPRINGER. Would the gentleman yield here?

Mr. SCHENCK. Surely.

Mr. SPRINGER. There is one question I would like to ask. Has the Board taken any action of any kind with reference to representations by Congressmen or Senators on the record?

Mr. BOYD. I think probaby, if I may be permitted to assume what you have in mind, Mr. Springer, the Board recently amended its rule 14 which applies to Congressmen and Senators as well as to other individuals, and provides that no one may be entitled to appear before the Board in oral argument unless they have appeared before the Board at the hearing stage of the case.

Mr. SPRINGER. In short then, this means that unless a representation has been made by a Congressman or Senator during the hearing stage of the case before final argument, he may not appear and argue the merits of the case thereafter.

Mr. BOYD. That is absolutely correct, and it applies to any person.

Mr. SPRINGER. If that Congressman or Senator sends in a letter that he wishes to argue the merits of the case when you reach that point pursuant to whatever he puts in this letter, he is then eligible to do so?

Mr. BOYD. Let me consult my associate general counsel.

Mr. SPRINGER. All right.

Mr. BOYD. No, sir, not unless you are a party to the case; not unless the Congressman or the individual has filed an appearance in the case at the hearing stage.

Mr. SPRINGER. Has filed an appearance?

Mr. BOYD. Yes, sir.

Mr. SPRINGER. If he files an appearance, is it then necessary for him to appear and to render testimony in order to be able to argue the merits of the case thereafter?

Mr. BOYD. I am advised that the interpretation is that only parties are entitled to argue before the Board under this rule.

Mr. SPRINGER. Then your previous statement that a written, entered appearance is not sufficient in that respect——

Mr. BOYD. That is correct.

Mr. SPRINGER. Would you tell us what you mean by being a party?

Mr. BOYD. By being a party, yes, sir. A party is some one who seeks to have accomplished some action as a result of application and

hearing, someone who has a substantial interest in the outcome of the proceeding.

I am sorry I can't tie it down any more than that.

Mr. SPRINGER. Let's see if we can pin it down a little closer because I just want to be sure we know where we are. I think everybody on this committee ought to know.

If a Congressman or Senator merely writes to you and says "I have an interest in the outcome of this case" is that sufficient?

Mr. BOYD. No, sir; I would say not.

Mr. SPRINGER. What would you say he had to say in his message?

Mr. BOYD. It would seem to me that for any party, whether it be a Congressman or mayor or Governor, president of the chamber of commerce or whoever, who was not a carrier-applicant in a case, he would find it necessary to appear before the examiner and make a statement of position.

Mr. SPRINGER. In short, he would have to make a personal appearance before the examiner in order to become a party to the case?

Mr. BOYD. Yes, sir.

Mr. SPRINGER. Is that correct?

Mr. BOYD. That is my understanding.

Mr. DINGELL. Will the gentleman yield to me?

Mr. SPRINGER. Just a second. I want to follow this.

Do you have an answer to that last question?

Mr. BOYD. I'm sorry, sir.

Mr. SPRINGER. Miss Reporter, please read the question back.

Mr. BOYD. A person must be a party in order to file briefs or argue before the Board. One who is not a party, who does not have a substantial interest in the case may appear under our rule 14 and present a statement of position before the hearing examiner, but he may not file briefs nor argue before the Board.

Mr. SPRINGER. You say he would have to be a party?

Mr. BOYD. Yes, sir.

Mr. SPRINGER. Under your rule would you define a party? I take it that you mean a party in interest. Is that right?

Mr. BOYD. Yes, sir.

Mr. SPRINGER. Would you define a party in interest for me?

Mr. BOYD. A party in interest would be—May I give examples?

Carrier-applicants are certainly parties in interest. Cities who may or may not obtain service as a result of the current proceeding are parties in interest.

Mr. SPRINGER. Mr. Chairman, I don't want to prolong this. Maybe I can cut it a little finer.

When would a Congressman representing an area qualify as a party in interest? Under what circumstances?

Mr. BOYD. I doubt seriously that a Congressman would. We haven't gotten into that.

Mr. SPRINGER. Suppose that I did appear and said "I represent a substantial number of people in my congressional district who are opposed to this route, and I want to testify."

Mr. BOYD. I would say, in that case, probably you would be a party.

Mr. SPRINGER. But you aren't saying I would be a party?

Mr. BOYD. No, sir; I am not prepared to commit myself this morning on an abstract question.

Mr. SPRINGER. Now I yield to the gentleman from Michigan.

I'm sorry. Just this one thing.

Mr. DINGELL. That is all right. I will wait.

Mr. SPRINGER. Will you further clarify that in writing as to when a Congressman or Senator is a party and under what circumstances is he such a party in interest that he may argue the case thereafter. Will you insert that in this record?

Mr. BOYD. Yes, sir; we will undertake to do that.

Mr. MOSS. Would the gentleman from Ohio yield very briefly? Not for a question, but just on the questions of the gentleman from Illinois.

Mr. SPRINGER. A brief question.

Mr. MOSS. Would you ask that that communication be supplied before we conclude the hearings on this piece of legislation?

Mr. SPRINGER. Will the Chairman do that?

Mr. BOYD. Yes, sir; we will endeavor to have this within 48 hours.

Mr. SPRINGER. Thank you. That is all.

(The material referred to is as follows:)

CIVIL AERONAUTICS BOARD,
Washington, D.C., June 9, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the Board's testimony on June 6, 1961, in connection with H.R. 14, questions were raised concerning the recent amendment of rule 14 of the Board's Rules of Practice. In accordance with your request, a copy of this amendment has been sent to the committee for insertion in the record.

The Board was also requested to submit (1) information setting forth the circumstances in which a public official is permitted to intervene in Board proceedings, and (2) an example of the deficiency which presently exists in the Board's code of ethics.

With respect to the question of intervention, there are two provisions of the Board's Rules of Practice (pt. 302) which govern participation of all persons, including public officials, in Board proceedings; i.e., rules 14 and 15. Under rule 14 the so-called informal intervention rule, any person may participate in a hearing case before the Board. This rule implements the provisions of the Federal Aviation Act which provides that in certain matters relating to routes of air carriers and foreign air carriers any interested person may file with the Board a protest or memorandum of opposition to, or in support of, the proposed action. Rule 14 permits any person, including a public official, to appear at the hearing and present relevant evidence. With the consent of the hearing examiner, he may also cross-examine witnesses. Such person may also present to the examiner a written statement which must be submitted prior to the close of the hearing and served on all parties to the case.

Rule 15, on the other hand, deals with formal intervention. When intervention is granted, the intervener becomes a party to the proceeding, and has the rights of introducing evidence, filing exceptions to the initial decision and briefs to the Board, and participating in oral argument before the Board if the Board allows oral argument in the case.

Rule 15 lays down the conditions for formal intervention. Any person who has a statutory right to be made a party to a proceeding, such as the Postmaster General in mail rate cases, shall be permitted to intervene. Otherwise, any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene. Rule 15 sets out the standards which govern the Board's decision in passing upon petitions to intervene. These are as follows:

The nature of the petitioner's right under the statute to be made a party to the proceeding;

The nature and extent of the property, financial or other interest of the petitioner;

The effect of the order which may be entered in the proceeding on petitioner's interest;

The availability of other means whereby the petitioner's interest may be protected;

The extent of which petitioner's interest will be represented by existing parties;

The extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and

The extent to which participation of the petitioner will broaden the issue or delay the proceeding.

A person desiring to intervene in a Board proceeding is required to file a petition setting forth the facts and reasons why he thinks he should be permitted to intervene. The petition should make specific reference to the factors set forth above which are applicable to him. In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, the petition must be filed within the time specified in the order for the filing of a notice of objection. In all other proceedings, a petition must be filed with the Board prior to the first prehearing conference or, where no such conference is held, no later than 15 days prior to the hearing. A petition to intervene filed by a city, other public body or chamber of commerce, must be filed no later than the last day prior to the beginning of the hearing. Provision is made in rule 15 for any party to a proceeding to file an answer to a petition to intervene.

With respect to the second question, the Board considers its code of ethics to be reasonably adequate, but there is one deficiency which the Board cannot correct without the aid of legislation. This deficiency is that there is no sanction which the Board can impose for violation of its code of ethics by persons who are neither applicants for relief in the proceeding nor practitioners before the Board. Among the provisions of the Board's code of ethics for which effective sanctions are thus lacking is the prohibition against ex parte communications by such persons.

For example, in a Board proceeding in which the issues are whether a new route should be established, which points should receive service, and which air carrier applicant or applicants should be certificated to render the service, some local organization might start a letter-writing campaign, encouraging interested persons to write letters to the Board in favor of a certain service by a certain carrier. The persons instituting the campaign would be in violation of the rule governing solicitation of communications to the Board, section 300.2(e), and the writers of the letters would violate the rule against ex parte communications, section 300.2(a). Since none of these persons would be applicants before the Board for relief, or practitioners before the Board, the Board could not impose any sanctions on any of these persons.

Sincerely yours,

ALAN S. BOYD, *Chairman.*

Mr. SCHENCK. Mr. Chairman, I take it from Mr. Boyd's statement that he does not consider H.R. 14 as an appropriate place to provide for more prompt decisions on questions of routes, beefing up the processing of the Board.

Mr. BOYD. Let me say, sir, that this bill is one that the Board did not prepare, and, to our mind, it does not deal with the matter that you referred to. It deals with a different subject. It is certainly of tremendous importance. Certainly the Board would have no objection if the committee were to add some provisions to this bill that in their opinion would speed up the processes of the regulatory agencies, including the Board.

We anticipate that Reorganization Plan No. 3, which is currently under consideration by the Congress, would have the effect of speeding up some of the Board's functions.

Mr. SCHENCK. I think, Mr. Boyd, you appreciate that many communities are deeply disturbed over the long-drawn-out procedure when it comes to establishing routes, so on, on various airlines.

Mr. BOYD. Yes, sir; and I would like to say, if I may, that the regulatory process is considerably different than the processes of a court of law or equity, and apparently few people realize that the Civil

Aeronautics Board in dealing with route cases has to consider in most of its cases some 15 to 20 to 30 separate cases all within 1 docket because of the interaction of service between one community and another, in addition to which the Board has to deal with the Ashbacker doctrine which requires a consolidation of all applications that might have any bearing on the issues at hand.

We are very hopeful that the problems that have been developed in the past in connection with H.R. 4800 that would tend to restrict the agencies further—we don't see them in H.R. 14, and in that connection this does have something to do with speeding up of the process.

I might say in an aside that we are doing everything we can to expedite the processes of the Board within the confines of due process and the capability of our staff.

Mr. SCHENCK. Yes. Well, the responsibilities of the Civil Aeronautics Board are to consider the economics, the financial questions of airline applications, for community applications for airline service; is that right?

Mr. BOYD. Community applications?

Mr. SCHENCK. Well, communities are inseparably tied in with requests for airline service.

Mr. BOYD. Yes, sir.

Mr. SCHENCK. And that is an important part of your responsibilities.

Mr. BOYD. Yes, sir.

Mr. SCHENCK. Part of your responsibilities is the question of determining cause of crashes?

Mr. BOYD. Yes, sir.

Mr. SCHENCK. In your opinion, does H.R. 14 in any way breach any dispute there may be between CAB and the FAA in determining the reason for crashes, and, if it does not, should it?

Mr. BOYD. Let me answer no to both questions, Mr. Schenck. We have no conflict in this area with the FAA. They have publicly stated and supported our function of establishing the cause of accidents. So we have no problem or conflict in that area.

Mr. SCHENCK. Should there be anything spelled out in this legislation to delineate relationships between agencies which are interested in the same situation? I recall there was considerable criticism from some sources when FAA made a statement as to what it had thought was the cause of an accident or a crash prior to the determination by the CAB.

Mr. BOYD. I don't believe that is a matter that could be really legislated, Mr. Schenck. It seems to me that where you have a situation of a man, the Federal Aviation Administrator, being a Presidential appointee, confirmed by the Senate, he is entitled to say whatever he wants to say.

I think that all of us sometimes could possibly be a little more discriminating in what we say or what we don't say, but I have serious doubt that it would be advisable to try to censor any man's statements by legislation.

Mr. SCHENCK. Do you feel that he should be permitted to make any statement he feels is in the best public interest?

Mr. BOYD. Yes, sir.

Mr. SCHENCK. That is all.

Mr. WILLIAMS. Mr. Friedel?

Mr. FRIEDEL. Mr. Boyd, I want to compliment you on your very fine statement. I just want to clear up one little matter that worries me. I will give you an example—the Greater Baltimore Committee, a lot of public-spirited citizens are on that committee, the chamber of commerce, they were all interested, and they appeared before the Civil Aeronautics Board about the inadequacy of service to Friendship Airport in Maryland. That hearing went on and on, and after the hearing, after 2 years, there still was no decision. I was getting letters from the chamber of commerce and the Greater Baltimore Committee and the mayor asking what could be done about it.

Would it be unethical for me to correspond with the CAB and find out why they hadn't reached a decision and why they hadn't granted the airlines authority to provide adequate service to Friendship Airport?

Mr. BOYD. I think that your question is in two parts. The first part is an inquiry as to the status of the case, and that is certainly proper within the rules and under the provisions of H.R. 14.

Now when you go on, however, and put in your letter questions as to why the Board hasn't required the airlines to provide more adequate service, then you are taking a position on the merits of the case which would seem to me would be clearly an ex parte communication in an on-the-record proceeding, because, in effect, you are taking a position of advocacy.

Mr. FRIEDEL. Well, I probably would be taking a position. But I know of so many people coming to Washington to get complete through flights. We get many requests for similar service from Baltimore, and I am interested.

Would that be unethical for me to state in the letter that I thought we should have such service?

Mr. BOYD. I think probably it would, Mr. Friedel.

Mr. FRIEDEL. Unethical?

Mr. BOYD. Yes, sir.

I won't say unethical. It would be an ex parte——

Mr. FRIEDEL. It would still be improper?

Mr. BOYD. Under this bill; yes, sir, I think it would.

Mr. FRIEDEL. All I could do is just make an inquiry?

Mr. BOYD. That is right.

Now I won't say that is all you could do. Certainly it would be possible for you or any other party to apply to file a motion with the Board or petition, seeking to reopen the case for additional argument or additional evidence.

Mr. FRIEDEL. I wouldn't want to reopen it because we waited 2 years to get an answer. I wouldn't want to prolong it. I would want to get fast——

Mr. BOYD. I appreciate your problem, and I am certainly happy you are speaking in the past tense about this case.

Mr. ROGERS of Florida. Would the gentleman yield?

Mr. FRIEDEL. Yes.

Mr. ROGERS of Florida. Would it be proper for a Congressman to make such an inquiry, assuming he sent copies of his correspondence to all parties concerned?

Mr. BOYD. It would still be considered improper, Mr. Rogers, because the Board is not permitted by law to consider such matters in reaching its decisions.

Now, in respect to this particular case, Mr. Friedel, I can assure you that, even though I happily only got in at the latter stages, the Board was very conscious of the impatience that emanated not only from Capitol Hill but from Baltimore.

Mr. FRIEDEL. There were appeals and we had to wait another 3 or 6 months, and then another appeal and that prolonged it another year.

Mr. BOYD. That is very true, buth there you are talking about the legal process itself, and sometimes this gets all wrapped up in the big category of delay which is all blamed on the Board.

Mr. FRIEDEL. Would it be improper if I state now that I wouldn't want to see Friendship hurt when Dulles opens up?

Mr. BOYD. I am sure that the Board shares your feeling officially and personally, Mr. Friedel. We are in the business of promoting aviation, not demoting Friendship.

Mr. FRIEDEL. That is all.

The CHAIRMAN. Mr. Younger?

Mr. YOUNGER. Thank you, Mr. Chairman.

Mr. Boyd, just as a matter of interest more than anything else, I notice, in reading your statement, that you did not have the reference to the President in your prepared statement, and we have heard a good deal about the circularization of an order to always mention the President in the forepart of your statements. Was that added by the Bureau of the Budget or how did that come in?

Mr. BOYD. No, sir. That was added by me with the concurrence of the Board members.

To be frank about it, I just recently testified in opposition to the administration's program and I am trying to get right the best way I can.

Mr. YOUNGER. I think that is a very legitimate reason. I mention it because the Chairman of one of the other regulatory agencies was up here the other day and he also had a similar statement right at the beginning, but he had put it in his prepared statement. He had it in before it was printed.

Mr. BOYD. Well, this goes to show the benefit of afterthought, Mr. Younger.

Mr. YOUNGER. In your connection with the CAB do you consider that the agency is an arm of the Congress?

Mr. BOYD. Yes, sir, I have always so considered it.

Mr. YOUNGER. You mentioned the reorganization plan. Do you think that if that was inaugurated it might transfer a good deal of the power to the Executive instead of the Congress?

Mr. BOYD. No, sir, I don't think so, nor do any of the other Board members. We have felt no concern on that score. Rather, we see the reorganization plan as an opportunity to delegate some of our authority in cases that can only be characterized as routine and, therefore, speed up some of our processes.

Mr. YOUNGER. Do you think that could be done easily by legislation?

Mr. BOYD. Yes, sir.

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Mr. YOUNGER. You mentioned about a recent change in your own rules, about the parties in interest having to appear in the hearings.

Mr. BOYD. Yes, sir.

Mr. YOUNGER. Otherwise they could not appear in the oral argument.

When was that changed? Before or after the *American* case?

Mr. BOYD. The *American* case is still in process, Mr. Younger. So I can only answer by saying it was after the original case on the route award itself, but before the end of the case because we are still in various aspects of that case right now.

Mr. YOUNGER. Well, a group of us appeared not long ago in connection with an application of the Pacific Airline in oral argument before the Board, and we had not appeared before the trial examiner in that case. Was your rule changed after that appearance?

Mr. BOYD. Yes, sir. It was—the old rule was amended very recently as a matter of fact, but it has been in the process for quite some time because the Board was most anxious to get comments.

Mr. YOUNGER. What was the date of your adoption of that change in the rule?

Mr. BOYD. The notice of rulemaking went out, was published last December 1, and the rule was adopted May 17 of this year.

Mr. YOUNGER. May 17?

Mr. BOYD. Yes, sir.

Mr. YOUNGER. In other words, what we as Members of Congress did in connection with that specific case could not be repeated now under your rule?

Mr. BOYD. That is right, sir.

Mr. YOUNGER. On page 10 of your testimony:

> We believe, however, that section 7(a)(1) could be strengthened to include the prohibition against ex parte communications made by persons outside the Board who are not parties and who are not acting on behalf of parties.

Can you define that, give us an example of what you mean by that?

Mr. BOYD. Those are third parties, and it is rather difficult to give you a definition at the moment. I am very sorry that I don't have one because I had hoped that I could provide you with one, anticipating this question.

With your indulgence, I would very much prefer to include an example in the statement that we are going to provide the committee because I am sure there are some, and I just don't know what they are, Mr. Younger, and I would rather be able to pull one from a file and give you a specific example than to——

Mr. YOUNGER. At this point could you also give us your recommendation as to how this section can be strengthened to accomplish what you had in mind?

Mr. BOYD. Yes, sir.

Mr. YOUNGER. The wording that you would recommend.

Mr. BOYD. If you use the same wording in section 7(a)(1) that is used in section 4(a), namely "any person" instead of "any party."

Mr. YOUNGER. Referring on page 7 to section 7(a)?

Mr. BOYD. Yes, sir.

Mr. YOUNGER. You would insert what?

Mr. BOYD. I would use the same language that is used in section 4(a) which merely says "any person."

Now 7(a)(1) refers to "person" as someone acting on behalf of a party, and if the limiting phrase were eliminated so that it would read "any party to such proceeding" or "any person shall communicate ex parte."

Mr. YOUNGER. You would eliminate "acting on behalf of such party"?

Mr. BOYD. Yes, sir.

Mr. YOUNGER. Just eliminate that section?

Mr. BOYD. Yes, sir.

The CHAIRMAN. Will the gentleman yield?

Do you interpret this language, Mr. Boyd, "or person acting on behalf of such party" to mean that that person had to be a party to the proceeding?

Mr. BOYD. No, sir. He could be, certainly, an agent of the party.

The CHAIRMAN. In other words, you would say "or any person" and strike "acting on behalf of such party"?

Mr. BOYD. Yes, sir.

The CHAIRMAN. Thank you.

We had that same question, as you may recall, in the course of our hearings to develop, and a member or some members of a commission took the position that there was no statutory authority to deal with it. However, we did show and read into the record that there is presently statutory authority to deal with such matters. But it appears that the law is and has been completely ignored in the past because apparently many felt that it was designed for an entirely different purpose altogether; and, if you remember, we discussed it during the course of the hearings and read it into the record over and over again.

But evidently there is going to have to be something done about it before it is going to be utilized.

Mr. YOUNGER. That is all. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Flynt?

Mr. FLYNT. No questions.

The CHAIRMAN. Mr. Collier?

Mr. COLLIER. Yes.

Mr. Boyd, am I to assume that this reference to on-the-record proceedings would mean such records as are available to the public?

Mr. BOYD. No, not necessarily.

Mr. COLLIER. But could they be?

Mr. BOYD. Well, in some cases we are talking about hearing cases, cases that would go to an evidentiary hearing. That is what I meant by on-the-record proceedings.

Mr. COLLIER. Let me pursue this a little further. Let us assume, just for the purpose of arguing, that there is an ex parte communication which was completely fallacious but which contained highly derogatory or even libelous statements. As I understand this legislation, this would be placed upon the record.

What general effect might result from this might become a problem.

Mr. BOYD. I think that that would be placed in the record if it is written by a party or by a board official or employee. It would come under section 7(a) and would, of necessity, be placed in the public file.

Mr. COLLIER. Would this necessarily be good practice?

Mr. BOYD. I beg your pardon?

Mr. COLLIER. I say would this necessarily be a good practice? Could this not, in effect, be damaging to one involved in a case before an agency?

Mr. BOYD. Well, it certainly could be damaging if you want to assume there is libellous material in there. But I think this is somewhat out of the realm of Board discretion.

Mr. COLLIER. Going back to section 7(a)(1) and referring specifically again to your statement on page 10, actually does Congress prohibit or legislate to prohibit ex parte communications of any person who might be interested in the public interest but who necessarily might not be acting in behalf of either party?

This is exactly what we do if I interpret this recommendation.

Mr. BOYD. Well, of course, we have got the requirements here that this applies only to those who willfully violate section 7(a)(1), and as far as the legislation itself goes, I think you could do it by eliminating the phrase "acting on behalf of such party." Then there would be a question as to whether someone who felt he was representing the public interest in communicating with the Board was in willful violation of 7(a)(1).

Mr. COLLIER. That would require some language clarification to provide the means by which someone might be permitted to make an ex parte communication strictly in what he construed to be the public interest.

Mr. BOYD. Of course, it seems to me, Mr. Collier, that if it is our feeling—and I think it is, both the Congress and the Board—that on-the-record proceedings are supposed to be decided purely and simply on the basis of what is in the public record, then we need not be too concerned.

Mr. COLLIER. That is all I have, Mr. Chairman.

The CHAIRMAN. Mr. Jarman?

Mr. JARMAN. Mr. Boyd, early in your statement you mentioned that the Board has a fine code of ethics of its own that covers most of the points raised in H.R. 14. What are the mechanics of the Board's procedure for enforcing its own code of ethics? Just very generally.

Mr. BOYD. Well, the Board can refuse to grant the relief sought if it finds a party guilty of violation of the code. It can, in effect, disbar any practitioner who is guilty of violating the code of ethics although we have no bar. But we can refuse to a practitioner the right to practice before the Civil Aeronautics Board. The Board has plenary power to dismiss an employee.

Mr. JARMAN. How do you determine if there has been a breach of the code?

Mr. BOYD. We do it through the hearing process. We have, as you know, a Bureau of Enforcement, and if we have reasonable grounds to be suspicious of a situation, the practice is to require, to direct the Bureau of Enforcement to investigate, and if that investigation elicits evidence to the effect that there has been probably a violation of the code, then a hearing is set up, a public hearing.

This procedure is covered in our Administrative Memorandum No. 67, Civil Aeronautics Board, which has an effective date of December 1, 1954. I believe that the members of the committee have copies of that memorandum.

Mr. JARMAN. Have there been many instances of violations, complaints?

Mr. BOYD. Very few to my knowledge, Mr. Jarman. We have one in the process right now, and that is——

Mr. JARMAN. On which a hearing has been held or is being held?

Mr. BOYD. Yes, sir.

Mr. JARMAN. Thank you.

That is all, Mr. Chairman.

The CHAIRMAN. Mr. Devine?

Mr. DEVINE. Mr. Boyd, I believe, in response to Mr. Younger's question to you relative to his having appeared before the Board with a group of other Congressmen some time ago in connection with some specific airline, I believe you said the Board announced its intention to make a rule on December 1 and did promulgate your rule on May 7 of this year.

Mr. BOYD. Yes, sir.

Mr. DEVINE. How far does that go? Does that prevent a Member of Congress from making an inquiry as to the status of a case?

Mr. BOYD. No, sir.

Mr. DEVINE. How far does that rule go?

Mr. BOYD. It would merely prevent any individual, Mr. Devine, whether he be a Congressman, the mayor of a city, or anyone else, from appearing at the argument level when he had not appeared at the hearing level as a party.

We are going to submit a written statement of just exactly how this does apply.

Mr. DEVINE. I am concerned about perhaps a restrictive dilemma in which Congress might find itself.

Congress did create the Board.

Mr. BOYD. Yes, sir.

Mr. DEVINE. And Congress did give the Board the power to form its own rules.

Mr. BOYD. Yes, sir.

Mr. DEVINE. And, to take it one step further, the Congress has now put itself in a position where it created an agency, gave it power to make rules which can restrict the Congress.

Mr. BOYD. Well, it is not a question of restricting the Congress any more than it is a question of restricting anyone else, Mr. Devine.

Mr. DEVINE. I would agree with you on that, but I am just wondering if we are getting ourselves in a position where we are going to handcuff ourselves in our legitimate function to protect the public interest.

Mr. BOYD. Well, of course, the only thing I can say in answer to that statement is that in publishing our proposed rule, everyone had notice of it, and, as I recall, we did not receive objections. And, secondly, while we are certainly aware of the requirements and responsibilities of Congress to protect the public interest, this is also the reason for which we conceive the CAB was established.

Mr. DEVINE. Yes, that is also one of the duties of the Board.

Mr. BOYD. That is right, sir.

Mr. DEVINE. Thank you.

The CHAIRMAN. Mr. O'Brien?

Mr. O'BRIEN. Mr. Chairman, at the hearing stage then a Member of Congress or anyone else who felt the public interest was involved could testify?

Mr. BOYD. Absolutely. Yes, sir.

Mr. O'BRIEN. Now supposing at that same stage, instead of appearing personally to testify, a Member of Congress or anyone else were to send a letter asking that it be made a part of the hearing record, would he be obligated at that point to notify in advance all the interested parties?

Mr. BOYD. No, sir.

Mr. O'BRIEN. Or would he——

Mr. BOYD. No, sir. The ex parte rules go to a matter that is not intended to be a part of the public record. So a letter that is submitted for the public record certainly would not come within the prohibition of ex parte communications.

Mr. MOSS. Would you yield at that point?

Mr. O'BRIEN. Yes, sir.

Mr. MOSS. What you have just said, as I interpret it, is contradictory to the response given Congressman Springer. He asked the same question, if he could file a notice with the hearing examiner, with a desire to be heard, and would he then have to appear. He was told—you said yes, he would have to appear; he would be permitted to appear only if he had an interest.

Mr. BOYD. Now, Mr. Moss, let me go back over this because I don't want to leave you with a misconception.

As I understood Mr. Springer's question, his statement, his question was this:

If I write a letter to the examiner saying that I want to appear at the oral argument to argue, then do I have to appear before the examiner in order to be entitled to argue the case?

Mr. MOSS. And your response was that he had to appear.

Mr. BOYD. Yes, sir.

Mr. MOSS. Now Mr. O'Brien just asked if he could make that appearance by a letter.

Mr. BOYD. I am glad you raised this question. I understood that Mr. O'Brien wanted to state his views in the record, that his question didn't go to the matter of argument before the Board.

Mr. MOSS. I assume it would be inherent if he is interested sufficiently to acquaint the examiner that he would want to reserve the right for further participation at the time of oral argument. Wouldn't that be your intent?

Mr. O'BRIEN. No. My thought was that my communication with respect to proceedings and so forth, I wanted to make sure that if I sent a letter to the examiner protesting or supporting something of public interest or against the public interest and ask that it be made a part of the record, there would be nothing unethical or wrong about that, nor would I be required to notify the interested parties in writing that I had sent that letter because the fact that it was included in the record would constitute sufficient notice.

Mr. BOYD. You are absolutely right.

Mr. O'BRIEN. That is what I am wondering; under the bill. That is what I have in mind.

Mr. MOSS. Read the bill and the rule and I don't think you would be entitled to it.

Mr. O'BRIEN. It reads:

A communication with respect to a proceeding, or with respect to the consideration or decision of a proceeding shall be considered to be "ex parte" if reasonable notice thereof is not given, in advance of such communication, to all interested parties.

My point is this: let us say there is a great deal of public interest in my hometown in a proposed route. Instead of testifying before the examiner, I send him a letter stating how the people feel, how I feel perhaps in the matter, and asking that it become a part of the record.

Now what I am fearful of is that under this proposed section that I have just read, that I would also be required to notify all of the interested parties in advance of sending that letter to the examiner.

Mr. BOYD. I certainly would think that that would be a strained interpretation of the intent of this legislation because the intent of the legislation as we understand it is to eliminate any back-door communication.

Now, certainly there is no requirement that a person who is to testify before the examiner provide copies of his testimony in advance to all parties in interest, and I frankly don't see that the letter to which you alluded would be in any different category whatsoever. It is not a question of trying to pull the wool over anybody's eyes.

Mr. O'BRIEN. You can see the point I am trying to make, why you get in difficulty doing a perfectly legitimate thing and asking that it be made a part of the record so there is no secrecy, no backstairs. But nevertheless I would not have given reasonable notice in advance of such communication to all interested parties.

Mr. BOYD. I see your point.

Mr. O'BRIEN. They would get their notice when it appeared in the record, which would be subsequent to the communication and not in advance of it.

The CHAIRMAN. That is what the language in the bill provides, that if such communication is transmitted, the Secretary then shall place it in the public file and then notify the parties.

Mr. ROGERS of Florida. Would the gentleman yield?

That is a part of what I was trying to ask Congressman Friedel when he inquired about sending a letter. That is why I asked whether if he gives notice to everyone, would the statement then be considered improper. And this seems to imply that it wouldn't, if notice is given.

Mr. BOYD. It would not be an improper statement if notice were given as we construe the bill. However, for the purposes of decision, the Board could not by law consider the matter within the letter in reaching its decision.

Mr. DINGELL. You mean under existing law or under the bill?

Mr. BOYD. Existing law.

Mr. DINGELL. Under existing law and the rules of the Commission?

Mr. BOYD. Yes.

Mr. DINGELL. But more under the rules of the Commission than under existing law?

Mr. BOYD. Well, I don't know what weight you would be giving to that.

Mr. DINGELL. In other words, I am talking about the rules of the Commission as differentiating from statutory law.

Mr. BOYD. No, I don't think so. I think it is——

Mr. ROGERS of Florida. You don't ever consider ex parte communications, do you?

Mr. BOYD. No, sir.

Mr. ROGERS of Florida. But it wouldn't be improper for the Congressman to write if he gave notice to the other parties?

Mr. BOYD. That is right.

Mr. ROGERS of Florida. But you just wouldn't consider it?

Mr. BOYD. That is right.

Mr. ROGERS of Florida. There is no point in his writing?

Mr. BOYD. Well, I don't know about that.

Mr. ROGERS of Florida. Except for home consumption.

Mr. BOYD. I am in no position to pass judgment on the efficacy of such letters.

Mr. O'BRIEN. That is all, Mr. Chairman.

The CHAIRMAN. Mr. Nelsen?

Mr. NELSEN. No questions.

The CHAIRMAN. Mr. Moss?

Mr. Moss. Well, I am troubled by rule 14 and particularly when we take rule 14 and tie it to this bill. I can see some small communities out in my district that have no means of being informed on many of these matters that are committing a criminal act in communicating on the merits with the Board. This concerns me.

But I am also concerned over the fact that under rule 14, and while I recognize that notice was given the first of December at a time when most of the Members were out of Washington and preparing perhaps to conclude holidays and return for the session and arriving back here at the beginning of a new session, that we were informed of the intention to adopt rule 14 and it was adopted on the 17th of May.

CAB can do nothing that the Congress itself could not do. Isn't that true?

Mr. BOYD. Well, if it is true, as I think it is, that we are a creature of Congress, I would say——

Mr. Moss. We have delegated to you certain authority.

Mr. BOYD. That is my understanding.

Mr. Moss. I don't concede that we have delegated to you any responsibilities. I think we have that still here in this committee and in the Congress.

Mr. DINGELL. As a matter of fact, that is just a basic rule of law that when Congress delegates authority it may delegate some responsibilities, but it still retains the basic responsibility. Isn't that correct?

Mr. BOYD. Well, I think we may be engaging in semantics because I don't believe either of you gentlemen——

Mr. Moss. I think semantics are important.

Mr. BOYD. Are seriously urging that the Board does not have responsibilities.

Mr. DINGELL. I am not. I am simply suggesting that Congress retains the responsibilities. Very clearly so.

Mr. BOYD. I have no disagreement with that.

Mr. Moss. Well, now, I happen to live in a community where we have been plagued for many, many years with the procrastination of the Board in solving our need for service. We are cut off from service to other communities in my State without going by the most circuitous of routes. My people are concerned, and while I may not

have knowledge that an action has been started over with the Board at the hearing level before an examiner, I somehow get the information usually by a communication from communities interested that the matter is under consideration.

I am not concerned with whether carrier Y or X or Z gets the route, but I am very much concerned with whether or not the community gets service. And I can't conceive of any condition where my communication of that fact to the Board and its consideration by the Board should be improper. Can you? After all, I represent some 700,000 people by their free choice, and I feel that imposes on me a very real responsibility, far greater than that which is vested in any person appointed even though ultimately confirmed, and I feel it is a responsibility which should be zealously protected and that we should not permit any action of any agency, independent or otherwise, to circumscribe the right to exercise that responsibility.

Mr. BOYD. Let me answer your statement, if I may, by asking you a question, Mr. Moss.

You will concede that, regardless of the ultimate responsibility of Congress, the Board has a responsibility to decide cases based on the evidence of record. Now——

Mr. Moss. I recognize that.

Mr. BOYD. Now, is there any valid reason why you, who receive notice of every case affecting your area, should not present these views on the record instead of waiting until the examiner, we will say, without any knowledge of how you or your people feel about the need for service, hears the record testimony, makes his initial decision, and then it goes to the Board, and then you come in and say, well, wait a minute; this is not right at all. My community needs service.

Why should we be put in a position at that stage of the game of saying, well, here is a Congressman who represents 700,000 people who want service, but nobody put anything in the record about it.

Mr. Moss. Well, now, you say why shouldn't I. I will tell you one of the main reasons I can't is because I am not adequately staffed to follow in every agency of Government every case at the point of its being initiated. You know the Congress has been very, very cautious in providing staff to its Members, and I just haven't the staff available to take the myriad of notices I get and follow through on them, but I do get notice from folks back home, communities, on the recent, I think, *Reno* case, the Sacramento and the whole valley when it became aware of the fact that the case was back here and wanted to express their feelings.

Now, I think the Board has a responsibility, a positive responsibility to determine the public need for that service not only from the competing carriers—and I think I play an important role in that process. Now, if I appear to urge the case of carrier Y or X, I think then I should be bound by every rule that applies to those carriers. But on the matter of the route, on the matter of service I don't think I should be so bound.

Mr. BOYD. Let me go back to the basic fact, which is that we are required and we adhere to the requirement that we decide our cases on the basis of the record.

Mr. Moss. Well, then I think you should initiate means of determining more clearly the public attitude toward the need for that serv-

ice, and I think had that been the case over the years that you wouldn't have communities suffering under the burden of shoddy service which has characterized many of the communities I represent.

Mr. BOYD. Well, of course, there we get into judgment standards and——

Mr. MOSS. Because it has been done doesn't convince me as to its rightness.

Mr. BOYD. Well, certainly I am not in a position to defend what has been done in the past. I don't feel that it is any requirement on me here this morning to do so.

Mr. MOSS. No.

Mr. BOYD. However, I will say this, that many communities feel that they have a right to airline service without regard to any of the economic factors which the Board must take into consideration.

Mr. MOSS. Well, I think probably there may be a few, but most of them with whom I do business appear to be represented by reasonable men, and they are not anxious to see us undertake service that is going to place any great burden on the Government because of subsidizing some of these carrier operations.

Mr. BOYD. I think that is very true.

Mr. MOSS. This is a matter where reason enters into it.

I think on the economic questions that some cases I am familiar with—I was in this *San Francisco-New York* case, and I have not the slightest apology. I think the service that San Francisco gets transcontinentalwise is abominable. I usually have to fly from Sacramento to San Francisco to Los Angeles to get a decent connection to Baltimore. So I am not apologizing there again, and I think the economics of it would clearly sustain additional service, and I think that as a representative of the people who elected me, I have the right and the responsibility to voice that opinion wherever, at any time, so long as I give good, adequate public notice.

And, let me tell you, I am sufficiently a good politician that when I make a representation, the story is in the newspapers. So I am not trying to go in the back door, and I think that is characteristic of the approaches of the Members of Congress. We do it very openly, and we want to seek every credit for being alert to the needs of our people in making those representations. I think if we are going to take away that right, it should be by statute and not by the action of an independent agency.

Mr. BOYD. Well, I can only say, Mr. Moss, that the Board felt that it was acting in the public interest in making this rule as in making, in promulgating the other rules it has promulgated. If, in its wisdom, Congress feels that we should not have done so, I think they have the remedy at hand.

Mr. MOSS. I agree with you. And I certainly hope and will do ever thing I can to urge that they utilize the remedy at hand and act to overcome the effect of rule 14.

Mr. BOYD. I am sure that we would have no disagreement with that.

Mr. MOSS. That is all I have.

Mr. MACK. Would the gentleman yield to me?

Mr. MOSS. Yes. I would be very happy to yield.

Mr. MACK. Mr. Chairman, in a case such as these we have been reading about recently where the trunk carriers are trying to turn over un-

economical routes to the feeder airlines, how is the public protected in those circumstances? In other words, does the Board decide a case such as that on the record exclusively without presentation made by the community or by the taxpayers generally? That point would not be considered? Or could you——

Mr. BOYD. Well, actually, Mr. Mack, all of these cases are decided on the record after hearing, and I will have to say I don't recall any instance where the trunk carriers have tried to dump uneconomic service, or communities where the service is uneconomic to them. The only ones we have had recently, since I came to the Board, involved operations that would be profitable to the local service carrier and, furthermore, would provide better service for the public than trunks were providing.

Now, I Mention specifically Springfield and Peoria, Ill. to Chicago, and Columbus-Dayton-Toledo to Detroit, and on one of those American Airlines sought suspension on the two Illinois cities, and Ozark was placed in there on a temporary basis subject to hearing.

In the other one, TWA sought suspension and Lake Central Airlines was placed in there after hearing, after public hearing, and the whole question of service and economics was thoroughly reviewed on the record.

Mr. MACK. Of course, this is an unusual case because—I mean these cases are unusual because here you have two parties. The two airlines are in agreement on what they want to accomplish, and you must rely in those instances, I would think, on a member of Congress, such as Congressman Moss has raised, or on the communities affected to present the other side of the story.

Mr. BOYD. No, sir. We have a Bureau of Economic Regulation with Bureau counsel who participate in every one of these cases and, in effect, are the public prosecutor or the defender of the public interest in these cases, and I think that it is generally conceded that Bureau counsel does an outstanding job in this area, and they don't accept the figures that anybody presents.

Mr. MACK. Does he argue a case before a CAB examiner?

Mr. BOYD. Yes, sir. He appears in all these cases on behalf of the public interest, and not only argues the case but presents testimony through staff members who are statisticians and experts in various fields of economics. In addition, in every case that I can recall we have had not only the cities represented, but also in those States having aviation or aeronautical commissions, the members of the State government in that field to present evidence and to argue.

Mr. MACK. Then your representative might be arguing against the decision which is made by your examiner. Is that——

Mr. BOYD. Oh, surely. The examiner and the Bureau counsel have violent differences of opinion in many cases.

Mr. MACK. I have another question, but——

The CHAIRMAN. Mr. Sibal?

Mr. SIBAL. Mr. Boyd, as I understand it, under your regulations as they now exist, having been adopted the 17th of last month, a public official is not able to participate in the argument stage of the hearing unless he has participated in the testimony stage as a party. Is that right?

Mr. BOYD. That is correct.

Mr. SIBAL. In the memo you are going to send to us within the next 48 hours would you go into some detail as to how a public official is a party?

Mr. BOYD. Yes, sir.

Mr. SIBAL. Particularly perhaps giving us the Board's views in terms of a public official who might hold an executive post in the city, such as the mayor.

Mr. BOYD. Yes, sir, we will try to give you a breakdown of the municipalities, county, State, and Federal.

Mr. SIBAL. I would appreciate that.

That is all.

The CHAIRMAN. Mr. Dingell?

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Chairman, I am very much distressed by your rule 14, and I propose to do what I can to slay it by legislation, if possible. I want you to know that.

I have been very critical of the administrative agencies for their failure to observe what I regard as proper protection of public interest from undue ex parte consideration and ex parte communications. I now find that an administration, namely, your own, has gone a great deal further and has taken a step which I regard very strongly as seeking to deny communities and people who are affected by judgments and decisions of your agency the right to have their elected officials speak before them.

Now, I am not greatly concerned what weight your agencies should give to the elected representatives of the people, but I think you have not only a right to hear them, but I think you have the duty to hear them, and I think your rule 14 clearly and very obviously rejects the duty which I think you have to hear the elected representatives of the people.

I want to say that I am not appreciably impressed with the comments you made about your agency and divisions and departments within your agency having careful regard for the public interest. I think as a general rule you do seek to do this. There may very well be occasions in the past and in the present and future where your agency will, by either mistake or otherwise, fail to consider the interests of the people.

Now, having said that, I want to get more specifically to some of the things that I am concerned with. I represent a large portion of the city of Detroit, and it so happens that the people in the southeastern corner of the State of Michigan look to me for assistance in securing adequate and proper airline service, and I am sure you are aware of the fact that even the great city of Detroit does not have adequate service to large areas of this country. And there are from time to time proceedings which your agency considers, service from Detroit to various areas of this country, and in which your agency very strongly, in my opinion, has moved very slowly in providing service and in which proceedings in the past I have sought to present the position of the elected officials of my city of Detroit, county supervisors, the public utility commission of the State of Michigan, and others, and I think that your rule 14 denies me the right to present the views of the people in my area, the elected officials of the people of my area, and denies my people an adequate opportunity to secure protection of the laws, and

adequate opportunity to have their views presented to your agency, and I think when you go back you should take a very careful look at rule 14.

I am not impressed by the comments that you made that Members of the Congress have had an opportunity to review this. I don't think it has any bearing on this matter at all. I think the matter should be considered simply on the basis of whether it happens to be good or bad or in the public interest. And I think you would recognize you and your agency are not always so cognizant of the public interest, nor are you competent in all instances to solely determine what is or what may be the public interest. There are others who are elected, who have grave responsibility in this and other spheres of Government activity.

I would remind you, as my colleague Mr. Moss has, that you are an arm of the Congress, that you are not answerable to no one—what powers you have have been delegated by the Congress and can very well be taken from you by the Congress, or could be modified by the Congress, and I think you should remember that Members of the Congress generally seek to speak on behalf of their people. I think that they are entitled to a courteous hearing by you and by your agency, and the people they represent are entitled also to receive a full opportunity to have their interests considered.

Now I don't happen to care a whit which airline happens to carry which—which route. The only thing I am concerned with is that my people back home should receive an opportunity as others do in this country and as others should in this country to travel expeditiously from point to point within the economic considerations which happen to be present.

So I want you to know my position without any semantics. You know my position very plainly with regard to your rule 14 and with regard to the bill that is before us today.

Mr. BOYD. I appreciate your statement of position, Mr. Dingell, and I trust that at least you will give us the same credit for sincerity in our beliefs that you have in yours.

Mr. DINGELL. I do.

Mr. BOYD. We just happen to have a very honest difference of opinion.

I will certainly follow your recommendation and go back and review rule 14 thoroughly.

Now I really am at somewhat of a loss to understand your statement that the Board is not in a position to establish the public interest.

Mr. DINGELL. I didn't say that. I said that you——

Mr. BOYD. We were not competent to, I believe you said.

Mr. DINGELL. I said you may not in all instances be competent to.

Mr. BOYD. That is the point to which I wish to direct my statement.

We understand and appreciate that we are an arm of the Congress. We also have the impression that the Congress has set down the policies which the Board is to proceed on in its actions which must comprehend the public interest, and we think we do that.

Now certainly every time we reach a decision we create unhappiness on somebody's score. I don't think that you can seriously say that because a decision of ours doesn't happen to agree with your conclusions, that we have not considered the public interest. And I don't think you mean that.

Mr. DINGELL. I wouldn't make such an allegation.

Mr. BOYD. Now, to deviate for a moment here, I will say, sir, that the most difficult single problem the Board has to deal with is the question of what is adequate service. There is no such thing as an objective standard that we have been able to develop yet, although we are devoting a tremendous amount of time and effort on this, and Detroit is not alone in feeling that it does not have adequate service to various other markets in the country. But I can assure you, sir, that there is nothing the Board has to do that is more difficult than trying to figure out what is reasonable service to any community.

Mr. DINGELL. I have in mind other things than reasonable service. I have in mind rates and other things which you consider also, in which I want my people to have a full opportunity to have their views heard. After all, too often the independent agencies come around, either knowingly or unknowingly, with the viewpoint that they exist to foster the interests of industry, and they very frequently—and I have in mind some independent agencies particularly which just simply don't give a damn about the public interest, and that is one of the reasons I think your rule 14 is particularly pernicious.

Mr. BOYD. Well, it seems to me that what we boil down to is that you don't feel there should be any restrictions placed on you because you are a Congressman, as to what stage of the proceedings——

Mr. DINGELL. I don't make that statement at all, sir. I will have you know that——

Mr. MOSS. Will you yield? Let me clarify that because Mr. Dingell's objection is the same as mine.

I feel that when you create, in effect, an agent to carry out your responsibilities, delegate him the responsibilities, that you rarely ever permit him to then act to circumscribe your rights or even to change your customs. If you are the one that has the final responsibility—and I think we have here—I think if there is going to be any restriction placed upon the rights of the Members of Congress to contact the agency openly, that that decision should be made by the Congress, not by the agency. Congress has usually been able to speak up clearly where it wanted to restrict itself.

I had occasion in the course of some 5 years chairing another subcommittee of this House to encounter refusals of agencies to give certain information to the Congress. Now in instances where Congress did not intend that the information had to be supplied, it has spoken very clearly on that point. It has always been competent to do that. But we had many who wanted to make their own rules, and I think we have got that same problem here. I think these are such basic issues that the decision should be by statute and not by rule and regulation of the agency.

Mr. DINGELL. If the gentleman would let me make one observation, I have no allusion whatsoever to backdoor communications which are made to agencies by high-priced lobbyists and others going in by way of the back door to visit and connive and deceive and seek unfair advantage, but I do feel the public record should be open as much as possible so that the public and their elected officials should be permitted full opportunity to present the views on behalf of the people they happen to represent.

I think in this your rule 14—if the rule 14 were to limit the rights of an individual to make these backdoor calls on an agency, you would hear nothing but commendation from me. But rule 14 simply denies the people the right to have their elected officials speak on their behalf, and denies the people opportunity to petition their Government for redress of grievances and seek an opportunity to be heard in a democratic way, and I think in that regard it is relevant.

The CHAIRMAN. Mr. Boyd, will you supply us a copy of rule 14?

Mr. BOYD. Yes, sir.

The CHAIRMAN. If you will do that, we will be very glad to have it. Is it a lengthy document or brief?

Mr. BOYD. No, sir; fairly brief.

The CHAIRMAN. I think probably it would be appropriate at this point to let it into the record for the information of the subcommittee.

Mr. BOYD. All right, sir.

(The document referred to is as follows:)

Regulation No. PR–47

UNITED STATES OF AMERICA,
CIVIL AERONAUTICS BOARD,
Washington, D.C.

Procedural regulations.
Amendment No. 26 to Part 302.
Effective: May 17, 1961.
Adopted: May 12, 1961.

PART 302—RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

PARTICIPATION IN HEARING CASES BY, AND SERVICE OF DOCUMENTS ON, PERSONS NOT PARTIES; OTHER AMENDMENTS

On December 1, 1960, the Board issued a Notice of Proposed Rule Making, PDR–4, Docket 11221, 25 F.R. 12477, proposing an amendment to §302.14 of the Board's Rules of Practice (14 CFR 302.14) which would permit persons who are not parties to a proceeding to appear, and/or submit written statements, only at the hearing stage of the proceeding. At the same time, in PR–44 the Board amended §302.14 (14 CFR 302.14), to provide for a procedure whereby interested persons other than parties may request that a proceeding be expedited, and in PR–43 adopted as final rules certain amendments to Part 300—Principles of Practice of the Civil Aeronautics Board (14 CFR Part 300).

Comments and suggestions in response to the notice have been received from a number of interested persons, including Members of Congress,[1] 44 attorneys practicing before the Board (practitioners), two State aviation commissions, one air carrier, and one city aviation commission.

After consideration of all relevant matter presented, the Board has decided to adopt the amendments to §302.14 substantially as proposed in the notice.

Section 302.14 is applicable to cases which are decided by the Board upon a formal record after notice and hearing. Elimination of oral argument by nonparties from the formal record will accomplish two desirable objectives: (1) it will enhance the judicial character of Board proceedings in hearing cases since it will exclude the filing of statements with the Board at a time when the parties can no longer introduce evidence in support or rebuttal of factual matter therein, and will make possible enforcement of the rule that factual references in oral argument must be based solely on the evidence contained in the formal record; and (2) it will expedite Board procedures since only parties will be allowed to present oral argument.

Comments in opposition to the amendment took the position that participation in oral argument before the Board provides the best available means for giving members of the Congress an understanding of the problems confronting the Board; that in the formulation of the overall policy, the Board needs the

[1] In addition to the notice provided in the Federal Register, the Board advised each Member of Congress of the proposed amendment by letter dated Dec. 1, 1960.

observations and opinions of Congressmen and State officials, which can be obtained by permitting such persons present oral argument or submit written statements to the Board; that it is democratic and right for the Board to hear Members of Congress and other nonparties; and that the amendment is not necessary for the protection of the Board's processes. One comment suggested that representatives of the Federal or State Governments should be permitted to present oral argument if they file a written statement on the issues at the hearing stage of the proceeding.

These arguments do not appear to be well taken. The best way for obtaining an understanding of overall Board problems is not presenting oral argument in a litigated case. Members of Congress can more readily obtain a complete understanding of Board problems from other sources such as the Board's Annual Report to the Congress and testimony on behalf of the Board or by industry representatives before congressional committees. It should be noted that the amendment of rule 14 will not exclude Congressmen and State officials from Board proceedings; it will only require that they appear at the hearing or submit a statement prior to the close of the hearing in order to give the parties to the proceedings an opportunity to support or rebut such statement. The suggested procedure of permitting nonparties to file, at the hearing stage, a statement of issues which they intend to raise in oral argument does not appear feasible. The issues to be discussed at oral argument can be determined only after the examiner's decision has been issued. The Board believes that this amendment is necessary to further implement the provisions of Sections 5(a) and 7(d) of the Administrative Procedure Act in formal Board proceedings.

The practitioners also suggested that the Board amend subparagraph 302.8 (a)(2) to require service of all documents on persons whose petition for consolidation or intervention is pending before the Board. The Board is of the view that this proposal is too broad. It believes, however, that, in certificate cases, motions by parties and non-parties to expedite a proceeding should be served on persons who have requested intervention or consolidation. Therefore, §§ 302.8 and 302.14(a) will be so amended. These amendments will further implement the Board's recent amendment to paragraph 300.2(b) of its Principles of Practice, in which it is specifically provided that requests for expeditious treatment of a pending application are considered communications on the merits. The Board also concludes that in order to afford timely information to all parties, any protest or memoranda in opposition or support of an application filed pursuant to sections 401 and 402 of the Act should be filed and served before the close of the hearing, and §§ 302.6 and 302.14 will be amended accordingly.

[Unrelated text concerning Part 300 omitted.]

Since the foregoing amendments to Part 302 are procedural rules, notice and public procedure hereon are not required and the amendments may be made effective on less than 30 days' notice.

In consideration of the foregoing, the Board, effective May 17, 1961, amends Part 302—Rules of Practice in Economic Proceedings (14 CFR Part 302), as follows:

1. By changing the section head of §302.6 to "Answers, protests or memoranda" and adding a sentence to read as follows:

"Protests or memoranda of opposition or support, where permitted by statute, shall be filed before the close of the hearing in the case to which they relate, and shall be served as provided in subparagraph 302.8(a)(2) of this Part."

2. By deleting the text of subparagraph 302.8(a)(2) and substituting the following:

"*The parties.*—Answers, petitions, motions, briefs, exceptions, notices or any other documents filed by any party or other person with the Board or an examiner shall be served by the person filing such document upon all parties to the proceeding in which it is filed; provided that motions to expedite filed in any proceeding conducted pursuant to sections 401 and 402 of the Act, shall, in addition, be served on all persons who have petitioned for intervention in or consolidation of applications with such proceeding. Proof of service shall accompany all documents when they are tendered for filing."

3. By deleting the phrase "upon all parties to the case" in the last sentence of paragraph 302.14(a).

4. By deleting the third and last sentences of paragraph 302.14(b) and inserting in lieu thereof the following text:

"Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing."

5. By deleting paragraph 302.14(c).

(Sec. 204(a), 72 Stat. 743; 49 U.S.C. 1324. Interpret or apply sec. 1001, 72 Stat. 788; 49 U.S.C. 1481, and secs. 5, 7, and 12 of the Administrative Procedure Act, 60 Stat. 239, 241, 244; 5 U.S.C. 1004, 1006, 1011.)

By the Civil Aeronautics Board:

JAMES L. DEEGAN, *Acting Secretary.*

[SEAL]

The CHAIRMAN. On behalf of the committee, let me thank you, Mr. Boyd, for your testimony here and your very fine statement on this important problem.

The committee will adjourn until 2 o'clock, at which time Mr. Kuykendall, Chairman of the Federal Power Commission, will be the witness.

Mr. BOYD. Thank you, Mr. Chairman.

(Whereupon, at 12:25 p.m., the committee adjourned, to reconvene at 2 p.m., this same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order. Continuing the hearings on H.R. 14, the witness this afternoon is Mr. Jerome K. Kuykendall, Chairman of the Federal Power Commission.

Mr. Chairman, we are glad to have you back before us.

Mr. KUYKENDALL. Thank you.

The CHAIRMAN. We will be glad to have your statement on this proposed legislation.

STATEMENT OF HON. JEROME K. KUYKENDALL, CHAIRMAN, FEDERAL POWER COMMISSION; ACCOMPANIED BY JOHN C. MASON, GENERAL COUNSEL, AND FREDERIC M. P. PEARSE, JR., ATTORNEY

Mr. KUYKENDALL. Mr. Chairman, copies of our statement on the bill have been supplied to the committee.

I might point out there are about 6 footnotes. In reading the statement I have in mind that I will leave out reading all the footnotes except footnote 2. Most of the others are just for clarity and editorial simplicity.

The CHAIRMAN. Very well.

Mr. KUYKENDALL. This bill deals with the problem of ex parte communications in certain cases between parties and the decisional officers of the regulatory agencies listed in the title and section 2(1) of the bill. It is probably unnecessary to repeat it but, for the record, the Federal Power Commission is wholly in accord with the purposes of the bill and the declaration of policy set out in section 3.

H.R. 14 is the latest in a long series of attempts to adequately cope with improper practices either disclosed or alleged during the hearings held by sundry committees of the Congress during the last several years. As such it comes closer, in our opinion, to being a complete resolution of the complicated questions involved than any of its

predecessors.[1] Furthermore, we are pleased to note that many of the suggestions which we made in our reports on the earlier bills have now come to fruition—in bill form, at any rate.

Our primary concern with respect to most of the earlier proposals was their failure to make the necessary distinction between practices which are merely improper or unethical and those which should be made unlawful and subject to criminal penalties. For example, as it is easy to recognize that certain ex parte approaches to deciding officers are clearly unethical, at at least unfair, to other parties in the proceeding. Similarly, it is clear that some actions taken by former employees of an agency in subsequent appearances before it would be a clear breach of confidence, producing a conflict of interest subject to criminal penalties. Obviously, the problem is one of definition, and the line between proper and improper ex parte contacts in many situations is so hazy as to defy definition. It follows that if the propriety or impropriety of a particular contact cannot be specified with the particularity needed in a criminal statute it should not be made subject to criminal penalties.

The pending bill does not go quite as far in this regard as we think would be desirable.

I will read footnote 2:

> We have heretofore suggested the desirability of a congressional expression of broad principles for administrative guidance while, at the same time, questioning the practicality of statutory criteria containing detailed specifications of all kinds of unethical conduct. The more proper place for effective standards, it seems to us, is in the criminal statutes, where specific, clearly defined action or nonaction can be defined or proscribed and appropriate penalties can be provided. Any statement of principles may, and rather should, be hortatory in nature.
>
> Two bills introduced in the House (H.R. 2156, H.R. 2157, 86th Cong.), properly, in our opinion, recognize this separable but coordinate approach to the problem. The first is a reenactment of the existing bribery and conflict-of-interest laws with amendments to make them pertinent to the administrative agencies as well as to other offices in the Government. The other would enact a code of official conduct for the executive branch. Such code would make certain conduct improper rather than illegal. It imposes no criminal penalties but does impose upon the various agencies the responsibility of enforcing and implementing its provisions in response to the particular needs of each. This dual approach is, in our view, the soundest way to resolve the problem.

but, at least the actions or nonactions which are made subject to criminal penalties would seem to be as specifically defined as possible under the approach to the solution of the problem taken by the bill.

As stated above, the Commission is in agreement with the purpose of and the policy expressed in the bill. But we are also of the firm opinion that the receipt and consideration of ex parte communications is at times not only proper but necessary. Since it is often difficult or even impossible to distinguish procedural matters from the merits of a case, it is of course, reasonable to require that all parties be advised of any ex parte communication.

The real poser is not so much the content of the communication as the type of proceeding (or publicity) which should apply and the manner of its exclusion from consideration by decisional officers.

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[1] H.R. 14 is identical with H.R. 12731, 86th Cong., as it was reported late in the closing session of the 86th Cong. (H. Rept 2070, July 1, 1960). Consideration of the provisions of the pending bill is much simplified by the contents of that report.

The bill would apply the prohibition to a proceeding—

in the case of which agency action is required by law or agency rule to be based upon the record of an agency hearing (p. 2, lines 11–13)—

but this, in our opinion, is both too broad as related to some types of proceedings and too narrow with respect to others.

It is broad in that it would encompass proceedings in which there are no adversary parties, interveners, or protestants, although possibly the agency staff may object, about which we will have more to say hereafter. In this situation, there is no point to prohibiting ex parte communications between the decisional officers and the only party involved (applicant or respondent).[3]

On the other hand, the definition of section 2(3) may be too narrow for it would exclude from on-the-record proceedings hearings which are not required by law but which are in fact held, the record thereof being the basis of the agency's action. Proceedings leading to the issuance of a license under part I of the Federal Power Act are in this category. No hearing record is required by law but where there is a protestant or an intervener opposing the issuance of a license (even though a competitive applicant is not involved) fairness requires that section 7(a) of the bill should apply.

Concisely, section 7(a) of the bill should apply to proceedings in which the agency action is based upon the record of an agency hearing (whether or not required by law) and in which there are adversary interests represented by interveners or protestants. Obviously, if there are no interveners and no interest is evinced by others than a single party (applicant or respondent), an ex parte contact on a procedural matter or on the merits could well be proper and might well serve to facilitate final Commission action. In other words, the presence of an adversary party would appear to logically precipitate applicability of section 7(a), rather than the mere fact that a hearing is held, whether or not that hearing was required by law.

The following amendments to the bill would carry out our suggestions:

On page 2, delete from line 12 the words "required by law or agency rule to be" and insert before the comma in line 13 the words "in which adversary interests are represented by intervenors or protestants".[4]

As we interpret the definition of the term "agency employee involved in the decisional process" in section 2(2) and the term "person" in section 2(4), the prohibitions of section 7(a) would not apply to ex parte communications (either oral or written) made to or by an agency employee who is neither a hearing officer nor an employee involved in the decisional process. In former reports we have pointed out that there is inherent in the regulatory process the necessity for the Commission members and others engaged in the decisional process to have access to the technical staff. We suggested that the intention

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[3] Of course, another person, as distinct from "party," (in public or private life) might attempt to influence the decision through an ex parte approach but the propriety or impropriety of such an attempt would turn on the purpose thereof and whether it was a matter to be included in the record. Even this unlikely situation should not, however, require the proscription of communications between the only "party" involved and the decisional officers.

[4] As thus amended, the first four lines of subsec. 2(3) would read:

"(3) The term 'on-the-record proceeding' means any proceeding before an agency in the case of which agency action is based on the record of an agency hearing in which adversary interests are represented by intervenors or protestants, but such term includes such a".

of Congress in this regard be made crystal clear either in the language of the bill itself or in the committee report on the bill.[5] We are still of that opinion.

With respect to the phrase "except in circumstances authorized by law" as used in paragraphs (1) and (2) of section 7(a), we note the committee's reference to section 5(c) of the Administrative Procedure Act and its understanding—

> that this will exempt ex parte communications with respect to such matters as requests for supenas, adjournments, and continuances, and the filing of papers.[6]

The fact remains that the phrase is indefinite and violations of section 7(a) of the bill are subject to criminal penalties.

We would point out that it has long been established that criminal statutes must be clear and definite. Congress must inform a citizen with reasonable precision of what acts it intends to prohibit. *Winters* v. *New York*, 333 U.S. 507, 509 (1948). Consequently, this necessary and proper recognition of the propriety of ex parte communications under some unspecified circumstances may render the criminal penalties of section 7(f) either invalid for uncertainty or citizens might be placed in jeopardy if they rely upon the indefinite exemptions.

In this connection we would draw the committee's attention to a matter of legislative draftsmanship. The bill specifically exempts certain communications from its prohibitions. Section 2(5) excepts requests for information with respect to the status of a proceeding and both paragraphs (1) and (2) of section 7(a) except communications made in "circumstances authorized by law." In the interest of clarity we would suggest that all exceptions be stated at one point in the bill, for example, "the circumstances authorized by law" exception might be removed from section 7 and included in section 2(5). Furthermore, the bill, insofar as the imposition of criminal penalties is concerned, would be much strengthened, in our opinion, if the intended exemptions (i.e., requests for subpenas, adjournments, and continuances, and the filing of papers) were specifically set forth. This would be preferable to the general phrase (authorized by law) used in the bill. In any event, the phrase, "except in circumstances authorized by law" should be amended by adding the words "including agency regulations" in lines 15 and 22 of page 7 of the bill.

Section 4 establishes, in effect, a code of ethics. No criminal penalties for breaches thereof are imposed, but the agencies are required to prescribe regulations implementing and supplementing the provisions of the section. Since this is the approach we have so often suggested, we recommend its enactment.

Since sections 8 and 10 of the bill would, no doubt, aid in the administration of the other provisions thereof, we recommend their enactment.

In our opinion, section 9 relating to the removal of agency members should be enacted.

Since section 11 has no application to this commission, we have no comments to offer with respect thereto.

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[5] We note the committee's discussion of the question with respect to the identical sections of H.R. 12731, 86th Cong. (H. Rept. 2070, p. 13), which confirms our interpretation and suggest the advisability of a similar discussion in any report which the committee may make with respect to the pending bill.

[6] Id., p. 13.

In conclusion, we would say that while we are in complete accord with the purposes of the bill and believe it preferable to any we have considered up to this time, the foregoing observations and recommendations are submitted in the hope that they may be of assistance in drafting legislation which will be workable as a practical matter and effective in accomplishing its purpose.

The CHAIRMAN. Thank you, Mr. Chairman, for your statement and suggestions along with your explanation. It certainly will be helpful to the committee and the committee will give most careful consideration to your suggestions.

Mr. MOULDER?

Mr. MOULDER. No questions, Mr. Chairman.

The CHAIRMAN. Mr. Younger?

Mr. YOUNGER. No questions.

The CHAIRMAN. Mr. Macdonald.

Mr. MACDONALD. No questions, Mr. Chairman.

The CHAIRMAN. Mr. Thomson.

Mr. THOMSON. No questions.

The CHAIRMAN. Our chief counsel, who has been working on this matter has a few questions he would like to ask.

Mr. HOWZE. Mr. Chairman, I would like to ask you to comment on something Chairman Boyd said this morning. You just stated that the Commission approved section 10 of the bill, which in the case of on-the-record proceedings as defined by this bill, says—

> the provisions of this act shall apply as though the last sentence of section 5(c) of the Administrative Procedure Act had not been enacted.

Mr. Boyd said that the last phrase or the last clause of that section, of that sentence, which refers to members of the agency, would inhibit members of the agency who had had any part in initiating earlier action from sitting on the case, or that is how I understand what he said. Would that affect the Federal Power Commission at all or would that criticism be applicable to the Federal Power Commission?

Mr. KUYKENDALL. Yes, we have certain statutory authority to start investigations; rate investigations for example and accounting investigations, and as a matter of fact those proceedings cannot be started except by Commission action, by approval of the Commission. I don't have that section of the Administrative Procedure Act before me, but if what Commissioner Boyd—I heard his testimony on that. If he is right in his conclusion as to the Civil Aeronautics Board, I would be quite certain that we would have similar proceedings where the same effect would come about.

The CHAIRMAN. We want to find out whether he is right and if so, we should amend that section of the bill.

Mr. KUYKENDALL. Or if you wish, we can give you a letter. We would have to get the Administrative Procedure Act and read it and decide.

The CHAIRMAN. Furnish a copy of that, Mr. Beasley. It is pretty important that this be cleared up, because it is my understanding that the Administrative Procedure Act is applicable to everyone except the Commission, and consequently a loophole is left there that during the course of our hearing it was made abundantly clear. You will remember, I think you were there, Mr. Chairman——

Mr. KUYKENDALL. Yes, I was there all through that hearing.

The CHAIRMAN. That was the reason that this was included or an effort was made to reach that problem.

Mr. HOWZE. The question in my mind, Mr. Chairman, is whether we have not gone too far in reaching that particular problem, whether we may not be restricting or hobbling the Commission in performing its ordinary functions.

Mr. KUYKENDALL. Yes.

Mr. HOWZE. I think we do not want to do that.

Mr. KUYKENDALL. It would be worse than hobbling if the conclusion is correct. It would be absolutely a nullification of some of our authority. We don't seem to have a copy of the Administrative Procedure Act.

The CHAIRMAN. Here is a copy. I will let you have it.

Mr. KUYKENDALL. Offhand I am inclined to think there is merit in Chairman Boyd's comment, and if we may, I would like to have a day for consideration and will submit a letter, if that is agreeable, giving you our view on it.

The CHAIRMAN. I think it would be helpful to read that provision in the record at this point, section 10(a) which provides that—

> In the case of any "on-the-record proceeding" before an agency (as defined in sec. 2 of this Act), subsection (c) of section 5 of the Administrative Procedure Act and the provisions of this Act shall apply as though the last sentence of such subsection (c) had not been enacted.

Now, the sentence referred to, in subsection (c) of section 5, is as follows:

> This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practice of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

I would like to have your comments on that as you suggested, in view of the statement of Mr. Boyd this morning. As we know, it has received a great deal of attention that there was a loophole there in the act, whereas in the case prompting this amendment the individual said that was within his rights and he thought the Congress intended for him to do it, and regardless of the effect of it as some had interpreted it, that he was going to continue to do it. Now, if that situation continues to exist, then it seems to me that we have reached a vital point in this whole field.

Mr. KUYKENDALL. I will speak more or less off the cuff.

The CHAIRMAN. And you can supplement it with your statement or change it as you like.

Mr. KUYKENDALL. Yes. But it seems to me that this bill, H.R. 14, is dealing—well, we know it is dealing with matters of ethics and ex parte contacts. Section 5(c) of the Administrative Procedure Act is dealing with the separation of functions, which I think is another matter aside from ethical conduct or the prohibition of improper ex parte contacts. My first thought is that probably H.R. 14 should be amended perhaps not by just this reference to the Administrative Procedure Act, but by some language that will be right in the bill, and if there is any necessity of superseding section 5(c), of course it would do it. But I think if we can avoid linking the two together it would be well because we are dealin with two topics here in H.R. 14 as contrasted with section 5(c) of the Administrative Procedure Act.

The CHAIRMAN. We would be glad to have your further comments on it after you have a chance to go over it. Our staff during the last Congress came to the conclusion, which is a part of the record, though some members of the committee disagreed, that Mr. Corcoran had a sound position when he relied on this particular provision to accomplish the purpose that he had in mind at that time.

Mr. KUYKENDALL. We stated in the record that I just read if there are no adverse parties, and there is only the one party before the Commission, the applicant or the respondent, whichever he may be, that we see no harm in that person talking with anyone on the Commission who has part in the decisional process, and that was more or less Mr. Corcoran's argument. In that case, although there were other parties in the whole overall case, his argument was there was no one who was opposing his client on the matters about which he discussed. If this bill is enacted and makes clear that any time there is an adversary proceeding where there are at least two parties that have adverse interests, that it is an on-the-record proceeding, why then regardless of the Administrative Procedure Act dealing with the separation of functions, it seems to me clear that there can be no ex parte contacts with anybody involved in the decisional process.

The CHAIRMAN. That does pinpoint an awfully important problem in connection with this whole thing, because as I recall that question, his contention was that the staff was having or attempting to have influence on the Commission, and the staff, as I recall the record, was opposing the rate of return proposed by the company at that time. His contention was, and he made it very clear, that the staff was having ex parte contacts with the Commission and therefore why shouldn't he have ex parte contacts with the Commission? We are attempting to deal with that subject in this bill.

Mr. KUYKENDALL. Well, you limit our contacts, I mean you deprive us, forbid contacts with the staff who are involved in the investigating and prosecuting functions.

The CHAIRMAN. Those who investigate and participate in the hearing.

Mr. KUYKENDALL. And I believe this bill, if enacted, would preclude an argument such as Mr. Corcoran made from being made again, because it would be unlawful for us then to confer with members of the staff whom he thought or who might have a position that was adverse to that of Mr. Corcoran.

The CHAIRMAN. It may be that this provision of the bill may not be altogether necessary, but then again I am inclined to think it might be approached in a little different way from this to make it abundantly clear what we have in mind.

Mr. KUYKENDALL. Yes.

The CHAIRMAN. You can give some thought to that.

Mr. KUYKENDALL. I think it requires a little more thought.

The CHAIRMAN. Anything further, Mr. Howze?

Mr. MOULDER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Moulder.

Mr. MOULDER. Do I understand the bill would prohibit members of the Commission from conferring with a member of the staff?

Mr. KUYKENDALL. Not all members. Just those members who participated in a particular case.

Mr. MOULDER. If they were in a particular case you would be prohibited from conferring with such a member of the staff?

Mr. KUYKENDALL. Yes, who was involved in the investigative and prosecutory functions.

The CHAIRMAN. In other words, I say to the gentleman from Missouri, those members of the staff who went out and investigated, made an investigation of the particular problem or case as it may be, and then who participated in hearings, in other words took a position in the hearing before the examiner, then they of course would in a sense become a party to the proceedings themselves. They take their position in the hearing record, and it goes on through until the examiner has concluded the hearing and issues his decision. Now the point is that they became a party to the proceeding. They became advocates in the proceeding.

Mr. MOULDER. They make their record.

The CHAIRMAN. They make their record. This is to prevent them from coming to the Commission, taking advantage of the advocates on the other side.

Mr. MOULDER. It doesn't apply to the other members of the professional staff?

The CHAIRMAN. Oh, no; not at all.

Mr. MOULDER. I see.

The CHAIRMAN. Those who have become a party to the proceeding are advocates in the proceeding.

Mr. HOWZE. Chairman Kuykendall, on page 3 of your prepared statement in the second paragraph you say that:

> The definition of section 2(3) may be too narrow for it would exclude from on-the-record proceedings hearings which are not required by law but which are in fact held, the record thereof being the basis of the agency's action.

I think one of the reasons for this bill was to give the agencies concerned the authority to say that, sizing up the circumstances of a proceeding before them, that whether or not we have before us a proceeding that is required by the statute to be on the record, we will say that the provisions of H.R. 14 will apply. Now section 6(a) of the bill begins:

> Whenever an agency determines that the issues involved in any proceeding to which clause (A) of section 2(3) shall apply are of such a nature as to make such action appropriate, it may designate a time, earlier than the time specified in such clause (A), when such proceeding shall begin to be on-the-record proceeding for the purpose of this act.

Does that not furnish or does it give the Federal Power Commission the authority to state in advance of a proceeding that even though a particular proceeding may not be required by statute to be on the basis of a public record, that it shall be so and the provisions of H.R. 14 with respect to ex parte communications shall apply?

Mr. KUYKENDALL. I didn't think it did. I read six as merely being authority to fix a date earlier than the time fixed in the statute as to when such proceeding shall begin to be an "on-the-record proceeding." But I didn' think it enlarged the statutory provisions here as to what is an "on-the-record proceeding."

Mr. HOWZE. The definition of "on-the-record proceeding" in section 2 refers to "required by statute or agency rule." Would it be your feeling that the agency could take a look at a given proceeding before

it which might have unique characteristics, and promulgate an agency rule to the effect that this proceeding shall be on-the-record and that section 7 of H.R. 14 shall apply? I ask that question because I think that is one of the things that the draftsmen of the bill intended.

Mr. KUYKENDALL. I think that rather than use the phase "agency rule" which to me is like legislation, it encompasses a field, it might say "rule or agency decision in a particular case."

Mr. HOWZE. Or "order" perhaps?

Mr. KUYKENDALL. Or "order," yes. That would cover it.

The CHAIRMAN. Any further questions? Mr. Kuykendall, thank you very much for your testimony here. I would ask this further question. Is the Commission unanimously in accord with the statement made here today?

Mr. KUYKENDALL. Yes, all three of us, Mr. Chairman.

The CHAIRMAN. Abbreviated. Thank you very much for your testimony on this subject. As I stated earlier, we certainly will give consideration to the suggestions you have made.

Mr. KUYKENDALL. Thank you very much.

The CHAIRMAN. We will be glad to have the further comments regarding this section.

Mr. KUYKENDALL. We will submit them. I heard you ask this morning if comments could be in by the time these hearings close. When do you expect to close them?

The CHAIRMAN. I hope to conclude them by Friday of this week.

Mr. KUYKENDALL. We will have our comments in not later than Friday.

(The following letter was later received from Chairman Kuykendall:)

FEDERAL POWER COMMISSION,
Washington, June 9, 1961.

Hon. OREN HARRIS,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request, made June 6 during the course of the hearing on H.R. 14, for comment with respect to certain portions of the bill.

First, Chairman Boyd of the CAB expressed fear that section 10(a) of the bill, which in effect deletes the exceptions to the separation-of-functions provisions of the Administrative Procedure Act would disqualify an agency member who had participated, for example, in the decision to issue an order instituting an investigation, from taking part in the rendition of the final decision of the case.

While this interpretation is possible, I do not believe it tenable. It is true that participation in an order instituting an investigation constitutes, in a sense, the performance of an investigative function, but, to apply the analogy provided by judicial procedures, it could hardly be said that the judge who signs an order to show cause based on an ex parte presentation would be disqualified from rendering a final decision. Furthermore, I do not interpret "officer, employee, or agent" as used in the third sentence of section 5(c) of the APA to include "members of the body comprising the agency," as used in the last sentence of that section.

Of course, since the question has been raised, steps should be taken to make it it clear that agency members are not disqualified from making final decisions in such situations but, in my opinion, a statement in any report which the committee may issue on the bill would be adequate for the purpose, though I would have no objection to any clarifying amendment that might be thought necessary for this purpose.

The other question with respect to which you requested further comment was raised by Mr. Howze (transcript, p. 93) who referred to the statement in our report that the definition of section 2(3) of the bill may be too narrow for it

would exclude from on-the-record proceedings hearings which are not required by law but which are in fact held.

I feel I must confirm what I then said (transcript, p. 94) that I read section 6(a) of the bill as merely being authority for the agency to fix a date earlier than the time fixed in the bill as to when such a proceeding will begin to be an on-the-record proceeding.

Further consideration does not alter my view that section 6(a) would not authorize the agency to include proceedings which are not already included in the definition in section 2(3). However, I believe with Mr. Howze that the problem would be resolved by changing the words "required by law or agency rule" in line 13 of page 2 to read "required by law or by agency rule or order."

With this language included in section 2(3), the Commission would be clearly authorized to include within the definition of on-the-record proceeding any proceeding whether or not required by law.

I trust that the foregoing is entirely responsive to the questions raised. Do not hesitate to call on us for any further information or assistance, technical or otherwise, which we might be able to render.

Sincerely yours,

JEROME K. KUYKENDALL, *Chairman.*

The CHAIRMAN. Thank you very much.

In the morning we will have with us the Interstate Commerce Commission. That will be the only agency we have scheduled for tomorrow, the Chairman of the Interstate Commerce Commission.

The committee will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 2:45 p.m., the committee adjourned, to reconvene at 10 a.m., Wednesday, June 7, 1961.)

INDEPENDENT REGULATORY AGENCIES ACT OF 1961

WEDNESDAY, JUNE 7, 1961

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 1334, New House Office Building, Hon. Peter Mack presiding.

Mr. MACK. The committee will come to order.

We are continuing our hearings this morning on H.R. 14. Yesterday we heard from the Chairman of the Federal Power Commission and the Chairman of the Civil Aeronautics Board. This morning we will hear the Chairman of the Interstate Commerce Commission, which, incidentally, is the oldest regulatory commission of our Government.

We are pleased to have Everett Hutchinson, the Chairman of the Interstate Commerce Commission, here this morning.

STATEMENT OF HON. EVERETT HUTCHINSON, CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY RUPERT L. MURPHY, VICE CHAIRMAN; KENNETH H. TUGGLE, COMMISSIONER; ABE MacGREGOR GOFF, COMMISSIONER; HAROLD D. McCOY, SECRETARY; CHARLIE JOHNS, ASSOCIATE GENERAL COUNSEL; HIRAM SPICER, LEGISLATIVE COUNSEL; AND DALE HARDIN, CONGRESSIONAL LIAISON OFFICER

Mr. HUTCHINSON. Mr. Chairman and members of the committee, my name is Everett Hutchinson. I am the present Chairman of the Interstate Commerce Commission, and have served in that capacity since January 1 of this year. I am appearing today on the Commission's behalf to testify on H.R. 14, which is concerned principally with ex parte communications in proceedings before the Interstate Commerce Commission and five other independent regulatory agencies.

The definitions contained in section 2 of this measure are of basic importance because of their effect on the scope of the sections that follow. First, the phrase "agency employee involved in the decisional process" is defined as including any agency employee subject to the immediate supervision of a member of the agency and any agency employee charged with the preparation of decisions with respect to proceedings before the agency.

The language "subject to the immediate supervision of a member of the agency" appears somewhat broad since it would, insofar as the Interstate Commerce Commission is concerned, include secretarial, stenographic and clerical employees in the members' offices. More-

over, in the case of the Chairman's office, the Commisison's legislative and congressional liaison staff would also be included. As a matter of fact, these persons are not "charged with the preparation of decisions" and have no duties or responsibilities in connection with the determination of cases. We therefore recommend that this definition be clarified by excluding from its scope employees such as those I have just mentioned.

An "on-the-record proceeding," on the one hand, is described as any proceeding in—

which agency action is required by law or agency rule to be based on the record of an agency hearing—

beginning with—

(A) the time that such proceeding has been noticed for hearing, or (B) such earlier time as the agency may designate * * *.

An ex parte communication, on the other hand, is defined as a communication—

with respect to a proceeding, or with respect to the consideration or decision of a proceeding * * * if reasonable notice thereof is not given, in advance of such communication, to all interested parties * * *.

However, requests for information respecting the status of a proceeding are specifically excluded from the bill.

Section 3 of this measure contains a declaration of congressional policy which is implemented in greater detail in later sections.

Subparagraph (c) of section 4 requires that each agency, for the purpose of carrying out the declaration of congressional policy in section 3(a), prescribe regulations to implement and supplement the provisions of subsections (a) and (b) of section 4.

These latter subsections relate to the use of improper means to influence any vote, decision or other action by an agency or member or employee of the agency, as well as to improper conduct of agency members and employees.

The Commission is somewhat concerned over section 4(a) of the bill. The provisions of this section are not limited to "on-the-record proceedings" as defined in section 2(3), but apply rather broadly to—

any vote, decision or other action by an agency or by any member or employee of such agency, in any proceeding or matter before the agency.

As a practical matter, there are thousands of informal administrative actions taken by the Commission and its staff each year. We are therefore of the opinion that if the Commission were to prescribe, for all such actions, established procedures for "fair and open presentation of facts and arguments" the only result would be formality and delay without corresponding benefits.

In this connection I would like to quote from our report to your committee, Mr. Chairman, dated November 19, 1959, on a somewhat similar provision contained in H.R. 4800, which was introduced by the chairman Mr. Harris during the 86th Congress:

We are in complete accord with and endorse the purpose of section 103(a) to prohibit various and subtle methods by which attempts could be made to influence improperly the administrative process. Nevertheless, while we seek to avoid a hypercritical reading of section 103(a), we are inclined to believe that it illustrates the difficulty of drafting broad prohibitions which will cover all possible forms of impropriety without stripping the administrative process of its characteristic advantages of flexibility and relative informality.

We recognize the dangers of relying upon interested and one-sided presentations from representatives of parties and others, and, as representatives of the public interest, we can assume neither accuracy nor objectivity in statements untested by publicity or reply. At the same time, the proper discharge of the functions entrusted to the Commission by the Congress frequently requires action upon the basis of essentially ex parte statements and representations. For example, it has been our experience in some uncontested finance proceedings that it is only in informal discussions with the applicant that certain matters can be resolved in the public interest without injury to the financial standing of the applicant * * *.

The Commission believes that it is impractical for any agency, by rule, to effectively prevent those subject to regulation, or their representatives, from expressing views and arguments outside of "established procedures" even though such expressions may well be intended to exert pressure on the agency or to build up a climate or pressure of public opinion.

We are aware, as I am sure members of this committee are aware, that officers, employees, and industry and employee representatives of carriers of all modes continually make speeches and write articles in which they express their views on the very issues that are involved in cases pending before the Commission.

These issues at times are also appropriate for legislative consideration and are matters of legitimate interest to the general public. For that reason we do not feel that it would be desirable to attempt to restrict the expressions of carrier, employee or shipper views to "established procedures," for example, on intermode rate competition. In view, therefore, of the more specific provisions contained in section 4(b), along with those of sections 5 through 8, we recommend that section 4(a) be omitted.

Generally speaking, it would be feasible for the Interstate Commerce Commission to prescribe regulations which would implement and supplement the provisions of section 4(b). As a matter of fact, the principles underlying section 4(b) of this measure may be found in sections 11, 17(3) and 205(i) of the Interstate Commerce Act and in regulations issued by the Commission.

However, there are certain specific problems to which we wish to invite the committee's attention.

Section 4(b)(1) would make it improper for any member or employee of an agency to—

engage, directly or indirectly, in any business transaction or arrangement for profit with any person, or any representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform.

We assume, of course, that in prescribing a rule to implement this provision, it would be entirely proper for us to except the purchase of transportation services, for example, from regulated carriers in accordance with their published tariffs.

Section 4(b)(2) would make it improper for any member or employee of an agency to—

accept or solicit any * * * employment * * * from any person, or representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform.

In this connection we assume that to the extent that section 4(b)(2) relates to "employment" this provision would be satisfied by a regula-

tion requiring that when a member or employee engages in talks or negotiations for employment with such a person, he must refrain from participating in the decision of any matter in which such person has either a direct or substantial pecuniary interest. For example, the Commission's restatement of ethical principles provides:

> If a member or employee of the Commission entertains a proposal for future employment by any person subject to regulation by the Commission, such member or employee should refrain from participating in the decision of any matter in which such person is known to have a direct or substantial interest, both during such negotiations and, if such employment is accepted, until he severs his connection with the Commission.

Such a regulation would, in our opinion, satisfy the salutary purpose of that portion of section 4(b)(2) which I have just quoted, without unduly penalizing public service.

Sections 5 through 8 of H.R. 14 relate to ex parte communications with respect to "on-the-record proceedings" as defined in section 2(3). Thus, section 7(a) prohibits, "except in circumstances authorized by law," ex parte communications (as defined in sec. 2(5)) between a party to an "on-the-record proceeding" (as defined in sec. 2(3)) or a person acting on behalf of such party, and any agency member, hearing officer, or "employee involved in the decisional process" (as defined in sec. 2(2)) "with respect to such proceeding."

Section 2(b) provides that:

> A communication with respect to a proceeding, or with respect to the consideration or decision of a proceeding, shall be considered to be "ex parte" if reasonable notice thereof is not given, in advance of such communication, to all interested parties; except that a request for information with respect to the status of a proceeding shall not be deemed to be an ex parte communication.

If we consider only this definition of ex parte communications, it seems to us to include communications which relate to procedural matters as well as those relating to the merits of proceedings before the Commission.

The prohibitions contained in section 7(a) are qualified, however, by the phrase "except in circumstances authorized by law." This exception, presumably, is intended to cover the routine or emergency procedural matters generally disposed of without notice and hearing. Such a provision appears, for example, in section 5(c) of the Administrative Procedure Act excepting "the disposition of ex parte matters as authorized by law."

The phrase "circumstances authorized by law" is not defined in this bill, H.R. 14. However, we are inclined to doubt the practicability of drafting a precise definition covering the variety of procedural situations and emergencies in which an agency should be able to act quickly upon the basis of ex parte communications. Accordingly, we recommend that the definition of ex parte communication in section 2(b) be revised by substituting the words "with respect to the merits of a proceeding" for the words "with respect to a proceeding, or with respect to the consideration or decision of a proceeding."

We are of the view that the evil at which these provisions are directed is the ex parte communication with respect to the merits of a proceeding. Unless they are clearly so limited, we believe that the criminal sanctions of section 7(f) would cause many agency members and employees simply to refuse to discuss informally anything that relates to a proceeding which has been noticed for hearing.

We submit that the result might very well be an excessive judicialization of regulatory procedures.

Section 8 of the bill would require that all written requests for information as to the status of on-the-record proceedings be delivered to the Secretary of the agency, and that both the request and the Secretary's reply be placed in the public file of the agency.

We see no objection to a requirement that such correspondence be placed in the public file or docket of the particular proceeding. This actually is our practice now. We are inclined to feel, however, that a requirement that all such requests be channeled to the Secretary could result in some delay in replying to those requests for information which are entirely proper.

Section 9 provides that—

> Notwithstanding any other provision of law, any member of an agency (subject to the bill) may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.

The effect of this section would be to repeal pro tanto—that is, as far as it goes—the provision of section 11 of the Interstate Commerce Act that—

> Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

Section 10 of the bill provides that in any on-the-record proceeding before an agency, subsection (c) of section 5 of the Administrative Procedure Act and the provisions of this bill, H.R. 14, shall apply as though the last sentence of subsection (c) had not been enacted.

It was pointed out in the legislative history of the Administrative Procedure Act that this exemption of the agency and its members from the separation of function provisions of section 5(c) of the Administrative Procedure Act was required by the very nature of the administrative agencies themselves, where the same authority is responsible for both the investigation and prosecution as well as the hearing and decision of cases (S. Rept. p. 18; H. Rept. p. 30; Senate document, pp. 204, 262).

We would suggest, therefore, Mr. Chairman, that section 10 be amended by inserting, after the word "the" in line 21, page 10, the phrase "first clause of the." This would retain the effect of the last clause of the concluding sentence in section 5(c) of the Administrative Procedure Act which reads:

> nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

For the reasons I have stated, the Commission does not recommend the enactment of H.R. 14 in its present form. We do hope, however, that the views which we have expressed will be of assistance to the committee in its consideration of this important matter.

Mr. Chairman and members of the committee, we very much appreciate this opportunity to appear and be heard on this bill. If there are any questions at this time I shall be glad to attempt to answer them.

Mr. MACK. Thank you, Mr. Hutchinson.

I notice that you approve of the section of the bill, section (c) of the bill, which would require written inquiries with respect to the stages of on-the-record proceedings to be channeled through the Sec-

retary. You did mention that this might delay replies to the legitimate inquiries.

Now my question is, How do you handle that matter today?

Mr. HUTCHINSON. Well, for example, many such requests are addressed to the Chairman. They come to me and I look them over and send them to the person directly concerned in the agency—in other words, to the person who has the information or has direct responsibility for the matter involved. Then, after the reply is sent out, copies of the request and of the reply go into the public file of the particular proceeding. It goes in the public docket if it is a matter on which there is a docket; if not, it goes in the general file of our Section of Mails and Files in the Secretary's office.

Mr. MACK. Then it goes in your public file today, presently?

Mr. HUTCHINSON. That is correct, Mr. Chairman.

Mr. MACK. Wouldn't the Secretary perform the same function under the provision of this bill, the same function that you perform today?

Mr. HUTCHINSON. Would he under the provision as written?

Mr. MACK. Maybe my question wasn't clear. Would not the Secretary also forward the communications to the appropriate person to make the reply to the inquiry?

Mr. HUTCHINSON. Yes, I think that is true if all such inquiries were addressed to the Secretary. Actually the bill as drawn, as I see it, would simply add a step to our inquiry and reply procedures.

Mr. MACK. Well, that is the reason I raise the question. I can't see any reason why it would unless your position is that the Chairman's office is more efficient than the Secretary's office.

Mr. HUTCHINSON. No, that is not what I mean.

Take, for example, an inquiry that comes to the Chairman's office and pertains to a matter which is in process in the Bureau of Operating Rights, say, pertaining to a motor carrier license or something of that sort. It would go from me to the Director of the Bureau, whereas under the bill, as drawn, it would as I understand it, have to go from me to the Secretary and then to the Director of the Bureau of Operating Rights for research and draft of reply.

Mr. MACK. The extra step would involve having it addressed to you and then to the Secretary. Then, under the provisions of this bill, wouldn't it eliminate that step if the people addressed their communications to the Secretary rather than to the Chairman?

Mr. HUTCHINSON. I think it would, Mr. Chairman. I don't see why it wouldn't.

Mr. MACK. If this were a standard procedure in all the administrative agencies don't you think that the people making inquiries generally would begin to address their communications to the Secretary's Office? And in that way I would think that it would relieve the Chairman of this responsibility and permit him to devote more time to consideration of cases and administrative matters within the agency.

Mr. HUTCHINSON. If this would be the result, it would seem to me to be desirable. I think I would agree with the Chairman. However, our experience would not indicate that this would be the case. For example, most of our inquiries pertaining to matters in process come from Members of the Congress, and in years past we have endeavored to encourage Members of the Congress to direct these inquiries to our congressional liaison officer. This is done to some extent.

I have not taken a census, but I believe the bulk of the inquiries from Members of the Congress are addressed to the Chairman of the Commission.

Mr. MACK. I have talked with every chairman of every commission we have in Government, and all of them advised me in the past to write to them about the status of any case pending before the Commission, that they, their reply has always been, would be delighted to handle the matter for me.

Mr. HUTCHINSON. I don't believe you have asked me that question, but, if you had, my answer would be the same.

Mr. MACK. The reason I haven't inquired is that I haven't communicated with you since you became Chairman of the Commission.

Mr. DINGELL. Mr. Chairman, would you yield to me very briefly?

Mr. Chairman, isn't it a fact also that you have a message center set up inside this agency, I assume, as do the other agencies, which receives the incoming mail, opens it, gives it a routine screening and then forwards it to the appropriate division or officer or employee within the agency?

Mr. HUTCHINSON. Yes. Somebody has to open it and sort it. That is correct. No matter who it is addressed to. If the telephone company, for instance, misdirects a bill to the office rather than spending it to the home, it has to be directed to the person to whom it is addressed. We have such a section, yes.

Mr. DINGELL. So what would happen under this would be actually that your receiving people who receive mail communications would, instead of—rather, correspondence of this type to the Chairman, they would simply direct it, instead, to the Secretary and there would actually be a very small loss of time, if any. Isn't that a proper statement?

Mr. HUTCHINSON. Well, under this provision of the bill, we would seem to be required, if it should be enacted, to direct such inquiries to the Secretary, and this we would do, of course.

Mr. DINGELL. Thank you very much.

Thank you, Mr. Chairman.

Did you have something you wanted to add to that? I notice one of your staff was talking to you.

Mr. HUTCHINSON. He simply reminded me that the mail is not opened when it is first received in the mails and files room. It is opened by, you might say, the action addressee—I mean in the office of the action addressee. For instance, mail addressed to me is opened by my secretary.

Mr. DINGELL. I see. Thank you, sir.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Chairman, I have this one last question I would like to raise at this time, and that is concerning the Commission's legislative congressional liaison staff.

You have indicated that they would come under the category of being subject to the immediate supervision of a member of the agency.

Mr. HUTCHINSON. The Chairman, Mr. Chairman.

Mr. MACK. Yes.

Well, do you seriously think that this bill would apply to these people?

Mr. HUTCHINSON. Well, I think it would as drawn, and our purpose in calling this to the attention of the committee was simply to point out that this section would apply to certain staff people, that we didn't feel the committee or the Congress cared to reach.

Our thought was and is that the thrust of the section is in the direction of people who have decisional responsibility in some degree and not to those who do not.

Mr. MACK. Well, do you think that this law applies to the legislative liaison staff which I understand has the responsibility of getting status reports?

Mr. HUTCHINSON. I didn't consider it to be limited to employees having decisional responsibility, and my answer to your question, Mr. Chairman, would be "Yes," I think the way it is drawn it would apply.

Mr. MACK. And also you feel it applies to your secretary and stenographic and clerical employees?

Mr. HUTCHINSON. That is our view, Mr. Chairman, the way it is drawn, yes.

Mr. MACK. You mean to say that all the commissioners believe that? Is that a unanimous opinion of the Commission?

Mr. HUTCHINSON. The position on the bill is a unanimous opinion; yes, sir.

Mr. MACK. Well, I certainly don't interpret it that way, and I would be interested in additional comments you might have.

Mr. HUTCHINSON. Well, perhaps we are overlooking something, but the language "subject to the immediate supervision of a member of the agency" would, in the case of the Chairman of the Interstate Commerce Commission, cover the legislative counsel and his staff and the congressional liaison officer and his staff, and that——

Mr. MACK. You are arguing again that it covers everyone employed in your agency. Isn't that right? Tell me who would be excluded under this program, this interpretation.

Mr. HUTCHINSON. Well, Mr. Chairman, the language is "subject to the immediate supervision of a member of the agency."

It wouldn't cover everyone in the agency, but it would cover, as we interpret it, those employees subject to the immediate supervision of a member of the agency, and, in the case of the Chairman, those people that I used here as an example happen to be under his immediate supervision.

Mr. MACK. Then what group, what category would be excluded under your interpretation?

Mr. HUTCHINSON. Well, everyone would be excluded except those subject to the immediate supervision of a member of the agency, and those involved in the decisional process.

Mr. MACK. Well, I really don't feel that thoroughly explains it as far as I am concerned.

Mr. HUTCHINSON. Well, of course, Mr. Chairman, we are here to assist the committee in any way that we can, but I don't really know anything else to say about that. To me, the language is rather clear.

Mr. MACK. And it is your opinion, as it is part of your testimony, that this provision should be narrowed; and that it should be limited to the decisional process to those who have immediate responsibility for decisions?

Mr. HUTCHINSON. Yes, I think so. That is our understanding, I believe, of the purpose of the bill.

Mr. MACK. As you interpret it, you would object to this wording, according to your interpretation, because it would be more difficult on the agency?

Mr. HUTCHINSON. Well, it is not——

Mr. MACK. Under your interpretation, what objection do you have to this, to this section?

Mr. HUTCHINSON. Well, our feeling is that the language we have been discussing covers staff and employees that are not reasonably within what we conceive to be the purpose of the bill. For example, I have in my office one messenger. I see no reason why he should be included in the provision, in this provision, because he has nothing to do with the decisional process.

Mr. MACK. Would there be some reason why he should be excluded?

Mr. HUTCHINSON. Only the reason that I have given, that I see no reason to include him. In other words, what public purpose would it serve to have a messenger or a clerk-stenographer under this sort of provision?

As I have said, Mr. Chairman, including employees in this category would seem to us to go beyond what we consider to be the purpose of the bill as set forth on page 2 of the printed bill. There seems to be an intention to limit its application to employees involved in the decisional process. So that is why we felt we should call this to the attention of the committee.

Mr. MACK. Mr. Springer, do you have any questions?

Mr. SPRINGER. Do you think that the language of section 2, subsection 2, page 2—how far down do you think it goes to the immediate supervision of a member of the agency, a member of your commission? How far down does that go?

Mr. HUTCHINSON. Well, it goes down through the commissioners' individual staffs.

Mr. SPRINGER. Well, now, when you say immediate supervision, that means those in your office?

Mr. HUTCHINSON. Yes, Mr. Springer.

Mr. SPRINGER. How far below your office?

Mr. HUTCHINSON. That is very difficult to answer, Mr. Springer, but it would apply to the individual staff of a commissioner and to other persons who are under the immediate supervision of a member.

Mr. SPRINGER. You are divided up into panels over there, aren't you?

Mr. HUTCHINSON. Yes.

Mr. SPRINGER. Which, therefore, we will say, on safety, there would be three commissioners on safety. Is that right? Or on something else?

Mr. HUTCHINSON. Well, that is——

Mr. SPRINGER. We will assume that is one of the panels.

Mr. HUTCHINSON. Motor carrier safety.

Mr. SPRINGER. All right. Does that mean that any employee in that department, in that panel, would be covered by this?

Mr. HUTCHINSON. I doubt that employees in the section of safety, for instance, the section of motor carrier safety would be so included because——

Mr. SPRINGER. Did you say every member, every employee?

Mr. HUTCHINSON. No. I said that I did not believe that employees in the section of motor carrier safety would come within the provision of this bill because, as I would interpret it, they are not subject to the immediate supervision of a member of the agency.

Mr. SPRINGER. Well, now, isn't there just as much chance for influence with those people as there is with people who are, we will say, in your office who have a decision-making capacity?

Mr. HUTCHINSON. Mr. Springer, maybe you and I are using the wrong example. These people are not involved, strictly speaking, in the decisional process in motor carrier safety.

Mr. SPRINGER. Now you are limiting this then, I take it, to people who actually don't physically make a decision even though they may be in the decisional agency. Is that correct?

Mr. HUTCHINSON. Well, we are suggesting to the committee that the committee might want to limit this provision that we have been talking about to those staff members and employees who are involved in the decisional process.

Mr. SPRINGER. That is the point. The point I am trying to get is that under this, how far do you think it goes down, we will say, in a panel? Every one of those employees in the panel? In motor carrier safety?

Mr. HUTCHINSON. I don't consider that it would go beyond those employees subject to the immediate supervision of the member, and it would not include, as you say, every member of the panel. Or, actually, it is under our organization a bureau.

Mr. SPRINGER. That is the point. You say those people not engaged in any decision-making policy would not be subject to this provision. I take it that is your understanding.

Mr. HUTCHINSON. Well , I don't know that this will answer your question, Mr. Springer, but the provision would not, as I have said before—at least I think I have said before—go beyond, as we interpret it, staff and employees in the comissioner's immediate office.

Mr. SPRINGER. All right. Now in his immediate office?

Mr. HUTCHINSON. Yes.

Mr. SPRINGER. Now in this subsection (2) there are two classes; the term "employees" includes any employee of an agency subject to the immediate supervision of the member of the agency. That is one class, isn't it?

Mr. HUTCHINSON. Yes.

Mr. SPRINGER. And, second, any employee of an agency who is concerned with preparation of a decision. Two different classes of people would be covered?

Mr. HUTCHINSON. Yes.

Mr. SPRINGER. Now the second class I understand, but the first class is why I am dragging this out, to try to determine what you think any employee of an agency who is subject to immediate supervision of a member of the agency would be. Now I take it that you say it is only your immediate staff.

Mr. HUTCHINSON. Well, it is not perhaps as simple as that. For instance, in the case of the Chairman, the General Counsel reports to the Chairman, and certain other heads of offices and bureaus do also. But in this section there are two categories. One is those employees who are——

Mr. SPRINGER. Let us take as an example, you have the General Counsel. You say he is not in this? The first category?

Mr. HUTCHINSON. Well, that is where you get into an area that is very difficult to handle. It is very difficult for me to answer your question.

Mr. SPRINGER. In other words, if you interpret it this way, if I go to the General Counsel about a problem and I present it to him, there is no influence involved because he is not subject, he is not within either one of these categories?

Mr. HUTCHINSON. We rather consider heads of offices and the top-level people in that category as being subject to the immediate supervision of the Commission itself. But, as I say, there is that relationship there in the case of the General Counsel as an example, that the General Counsel and the Chairman——

Mr. SPRINGER. It says——

Mr. HUTCHINSON. The provision, the second provision, you might say, of this section does cover other people who are involved in the decisional process other than those subject to the immediate supervision——

Mr. SPRINGER. That is the second——

Mr. HUTCHINSON. Of a member of an agency.

Mr. SPRINGER. Let me go to a second proposition here, just shortly. Do you have any rules with reference to Members of Congress or of the Senate pleading before the Commission?

Mr. HUTCHINSON. You mean concerning appearances before the Commission?

Mr. SPRINGER. Yes.

Mr. HUTCHINSON. For example, at oral argument in the matter?

Mr. SPRINGER. Yes.

Mr. HUTCHINSON. No, we have no such rule.

Mr. SPRINGER. Do your rules presently allow a Senator or a Congressman to appear on final argument——

Mr. HUTCHINSON. Yes.

Mr. SPRINGER. Without filing appearance?

Mr. HUTCHINSON. Yes, and some Members of the Congress take advantage of this from time to time.

Mr. SPRINGER. In other words, you have no prohibition against that, that, even though there has not been an entry of an appearance, there has not been an appearance for the taking of evidence or for cross-examination, even though that was not taken?

Mr. HUTCHINSON. No, we have no prohibition of that sort.

Mr. SPRINGER. You do not require initial appearance of a Congressman or Senator before your Commission in order to argue before the final hearing?

Mr. HUTCHINSON. No. A Member of Congress can come and argue if he lets us know that he wants to argue, and we will allocate some time to him.

Mr. SPRINGER. Now let me say I think, however, congressmen would be covered in this particular act with reference to off-the-record ex parte contacts just as anyone else would.

Mr. HUTCHINSON. Yes. I see no exclusion in the bill.

Mr. SPRINGER. Thank you, Mr. Chairman.

Mr. MACK. Mr. Dingell?

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Chairman, I am somewhat concerned by some of the things you have said with regard to section 4(a) and section 4(b) of the bill. I have tried to compare your statements on that to the statements of the other agencies which have appeared on this same subject.

You are familiar, I am sure, with that section 4(a) which prescribes no criminal sanctions, are you not?

Mr. HUTCHINSON. That is correct.

Mr. DINGELL. You mentioned in your testimony that this would preclude employees of the various regulatory bodies from discussing routine matters which may also be decisional with persons who might happen to have some interest in the proceeding. Am I correct on that? Is that the thrust of your testimony on pages, approximately, 4, 5, and 6?

Mr. HUTCHINSON. Well, I think it is.

Mr. DINGELL. The interesting thing to me was that as I read the testimony of the CAB was that the Chairman did not so read this section. They made some comments with regard to it.

I just wondered if you and I went over it if we would be able to come out with a little better understanding.

Section 4(a) says:

> The Congress hereby recognize that it is improper for any person, for himself or on behalf of any other person, to influence or attempt to influence any vote, decision, or other action by an agency or by any member or employee of such agency in any proceeding or matter before the agency by the use of secret and devious methods calculated to achieve results by the exertion of pressures, by the spreading of false information, by the offering of pecuniary or other inducements, or by other unfair or unethical means, rather than by reliance upon a fair and open presentation of facts and arguments in accordance with established procedures.

I have a hard time equating that to a communication by a person interested in some matter before the Commission, to a request for subpena, to a request for information from members of the bar on procedural questions from lower staff members, and for this reason I am very much concerned with your testimony.

I was wondering if you would want to comment further, Mr. Chairman.

Mr. HUTCHINSON. Well, I don't know that I understand your question, Mr. Dingell.

I might say that I did not have the benefit of the testimony of the Chairman of the Civil Aeronautics Board, I believe, so I am afraid I couldn't be too helpful on that.

Mr. DINGELL. He expressed some concern on subsection (b) of section 4, but as I read 4(a) I don't see any objection on his part to section 4(a). I was wondering whether you could address yourself very closely to these objectionable features of 4(a).

Mr. MACK. Could I ask the gentleman to yield on that same point?

Mr. DINGELL. Yes.

Mr. MACK. Do you feel that this restricts the expressions, public expressions, of members of the industry?

Mr. HUTCHINSON. Well, I don't believe this would be desirable.

Mr. MACK. I know. Do you feel that this section 4(a) would limit in any way or restrict parties who are interested in cases pending before your Commission from making public statements?

Mr. HUTCHINSON. Well, I don't see how it could, Mr. Chairman, under our system of freedom of speech.

Mr. MACK. Well, to clarify your statement then, on page 6, I did have that impression, that you were trying to say that these people would be restricted in expressing their opinions.

Mr. HUTCHINSON. Well, this is a very difficult area, and the statement is that the Commission does not feel that an attempt at such a restriction would be wise or desirable, and this——

Mr. MACK. I agree with that.

Mr. HUTCHINSON. This is one of the things that we felt we should call to the attention of the committee. Although perhaps the committee has it well in mind already that this sort of thing does go on and people who are interested in proceedings before agencies do make statements and they do make speeches, and that these could very well be calculated to create a climate or a pressure the same as something addressed through the mails to an agency or a member.

Mr. DINGELL. May I ask a question?

Mr. HUTCHINSON. People frequently make statements and speeches of this kind. We receive copies of such speeches through the mails although they are not made to the agency or to any member of the agency. Nevertheless, copies are distributed.

Mr. DINGELL. Mr. Chairman, is it the thrust of your testimony here that this will deny members of the industry opportunity to make speeches, write articles, or the general public to write speeches or articles which might find their way into the hands of a member of a regulatory commission which, on grounds of search, might have a way of unduly and improperly influencing the agency? Is that the thrust of your argument with regard to 4(a)?

Mr. HUTCHINSON. The problem is there; that is our purpose, to point out the problem.

Mr. DINGELL. I am sure you agree that we can't intelligently expect you and the regulatory agencies to exist in a vacuum and not to be aware of what is going on in the industry, nor could we intelligently want you to exist in a vacuum. I am sure you agree with me on that.

Mr. HUTCHINSON. I think we understand that.

Mr. DINGELL. Let me say this, Mr. Chairman.

I do not read section 4(a) as you do, and, while it may be wise to make some changes in 4(a) or 4(b), I don't feel that this is unduly hindering your agency. I am saying this in order to establish a legislative record which will protect you and also protect the other independent agencies in their consideration of these matters.

Let me go on a little further.

Mr. HUTCHINSON. Well, section 4(a)——

Mr. DINGELL. You made another——

Mr. HUTCHINSON. Section 4(a), Mr. Dingell, appears to be directed to the public. In other words, any person. And we receive communications—that is to say, copies of speeches and so forth, news releases, clippings from newspapers—through the mail on occasion.

Mr. MACK. If the gentleman will yield again on that same point.

I want to be certain I understand the views of the Commission. I don't feel that this section puts any limitation whatever on making of public speeches or free expression of opinion, and if a copy of these speeches was sent to the members of the Commission, even in that in-

stance I don't believe that it would be by use of secret and devious methods as included in section 4(a).

Mr. DINGELL. If the gentleman would yield.

As I recall the doctrine of statutory construction, it would be relevant that this would have to do with language that is pari materia. In other words, the nub of this question seems to be the unfair or unethical means rather than by reliance upon a fair and open presentation of the facts. In other words, all these other things are related.

Mr. HUTCHINSON. Well, then, perhaps we have the problem of what constitutes unfair means, for instance. But actually how much difference is there between a letter addressed to someone and a speech or newspaper release mailed to the same individual but addressed——

Mr. DINGELL. Would you say it would not be inconceivable that a speech Congressmen sent out without any intent to influence a Commissioner would be clear and proper whereas a speech obviously sent out, with the obvious intention of influencing a Commissioner or the Commission would be within 4(a) remembering that 4(a) is not a criminal section? It is merely a declaration of policy without penal sanctions.

Mr. HUTCHINSON. This is possible, but I don't know that you could say this would be the case in every situation.

Mr. DINGELL. Wouldn't it be better, Mr. Chairman, to direct ourselves to (b) and to regard (a) merely as a policy declaration as presently drafted?

Mr. HUTCHINSON. Well, we could take that approach.

Mr. DINGELL. That is the way I read it because there is apparently no criminal sanction involved in 4(a) as I read it, and as the chairman of the CAB read it, and I attach great credence to his comments.

Let me go in another direction now.

You made mention in your testimony here of two things, three things that concern me, where you said on page 11, in summation of a rather lengthy paragraph beginning on page 10:

> We are of the view that the evil at which these provisions are directed is the ex parte communication with respect to the merits of a proceeding.

In other words, the thrust of your statement here is that you seek to eliminate ex parte proceedings with regard to procedural matters.

I am very much concerned about that because it is my experience as an attorney that very frequently an attorney can get a tremendous advantage procedurally, and if he is able to direct his ex parte communications to procedural matters and to achieve a probable advantage, he may very well win the case substantially too.

Mr. HUTCHINSON. Well, that may be. That may be the case in some instances.

Mr. DINGELL. As a matter of fact, Mr Chairman, isn't it a fact that that is true?

Mr. HUTCHINSON. You start to create this vacuum that you mentioned a minute ago when you cut counsel off completely from the court and the clerk of the court, and in this case the agency and everybody connected with the agency. It is proper and necessary to have contact on some of these informal matters.

Now, of course, granted there may be a problem there because some counsel, for instance, may attempt to do just what I think you are suggesting, and that is to shade the procedure into the merits. But, at the same time, I wouldn't consider the likely evil in this area to justify a complete cutoff.

Mr. DINGELL. Let us analyze this a little bit further. Let us say I am counsel with a matter before your agency, and I seek to have, let us say, other parties excluded from an opportunity to present testimony and evidence. That is a procedural matter. But if I achieve that advantage by ex parte communications—and I want you to know that I am not expecting any counsel to achieve that from your agency; this is a hypothetical case—would this be an advantage which would be so enormous that, clearly, it should be banned under the provisions of this bill?

Mr. HUTCHINSON. Well, I don't know of any such approach, Mr. Dingell. Maybe your hypothetical counsel is a little more resourceful than those who normally appear before us.

Mr. DINGELL. I am not refering to any specific case, and I make no allegation that this would occur. Let us take a hypothetical agency and say some counsel seeks to foreclose outside parties from appearing and presenting evidence. That is a procedural question, but it is of enormous importance to an enormous number of people.

Mr. HUTCHINSON. In the first place, I am not sure I could agree that a matter of intervention was a procedural matter. It might run, rather, to the merits of the individual who sought to intervene and, likewise, to those who oppose the intervention.

Mr. DINGELL. Let us take the question of the date on which briefs are to be filed, or on which evidence is to be filed, the hearing date. It might be on the mere fixing of the hearing date. It might be unduly prejudicial to a party to a proceeding before——

Mr. HUTCHINSON. A party might think so; yes.

Mr. DINGELL. And the court might sustain him in that belief.

Hr. HUTCHINSON. Sometimes they do; yes.

Mr. DINGELL. So we have to be very careful to see to it that procedural matters are within the law, do we not?

Mr. HUTCHINSON. That is very true. But at the same time we have to be careful not to cut off all communications.

Mr. DINGELL. I think this would be a question of very careful draftsmanship. I appreciate your bringing it to our attention.

I want to mention the testimony on the bottom of page 12 of your statement with reference to the language which reads, in connection with section 11 of the Interstate Commerce Act:

> Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

Has your agency found any difficulty with removal for inefficiency? I mean with regard to not removing members who may have been removed for this cause but, more, with regard to the fact that inefficiency as a term within the law is so vague as to be difficult of understanding or to create a hardship or undue influence within the agency?

Mr. HUTCHINSON. If this answers your question, we have had no problem, no concern with it, and, so, we are not experienced as far as this provision is concerned.

What we are suggesting here is that perhaps the present law might be a little more desirable than what is suggested in H.R. 14.

Mr. DINGELL. Now you directed some very good testimony to an important part of the bill, section 10, on the bottom of page 13. I was wondering if you would want to elucidate further on that where

you suggest inserting, after the word "the" on line 21, page 10, the phrase "first clause of the", that that be inserted.

For my benefit, since I have not had great experience with this, would you want to amplify a little bit on that?

Mr. HUTCHINSON. Well, when the Procedure Act was passed the Congress evidently considered that it was necessary to exempt members of agencies from he separation-of-functions prohibition in section 5(c). We think that it is just as necessary now that this be done because of the very nature of the agencies, just as the Congress said then.

Mr. DINGELL. You mean because of the way it was previously?

Mr. HUTCHINSON. As it was then. And, so, we felt that we should call that to the attention of the committee and the Congress because actually, if this were adopted as written, we think the Congress would be undoing something that it very wisely did just 14 or 15 or 16 years ago and without any compelling reason as far as we know. We think the provision was valid then. We think it is just as valid now. And, so, we think it ought to be preserved.

Mr. DINGELL. Mr. Chairman, I would like to thank you very much. I appreciate the courtey of my colleague in yielding to me.

Mr. MACK. Mr. Younger?

Mr. YOUNGER. Very briefly, Mr. Chairman, I gather that one of the problems facing your Commission and the same one that was mentioned yesterday by the Federal Power Commission is that there is not a clear delineation between which of these various acts are criminal and which are not. In other words, the bill would be better if we could clear up some of the acts and clearly delineate those acts that would be subject to criminal action. Is that your belief?

Mr. HUTCHINSON. Yes; I think it is, Mr. Younger. It is a matter very difficult to reach. It is very difficult to draw these lines and be sure you have them in the right place. And, of course, our purpose, as I have said earlier, is to assist the committee in any way that we can, and that is what we seek to do by our appearance here this morning. The problem is not an easy one.

Mr. YOUNGER. Are you familiar with H.R. 351 which is the bill that I imagine the American Bar Association had introduced?

Mr. HUTCHINSON. I don't know that I am, Mr. Younger.

Mr. YOUNGER. The Commission hasn't considered the terms of that bill in connection with H.R. 14?

Mr. HUTCHINSON. As far as I know, Mr. Younger, we have not been asked or invited to comment on H.R. 351, and, so, my answer to your question has to be in the negative.

Mr. YOUNGER. One other question which is a little beside the point today, but I have had a lot of correspondence on it. As long as you are here, I would like to ask you a general question.

Does your Commission feel that the excise tax on transportation is retarding the railroads and buslines and steamship lines and all modes of transportation in the proper furnishing of transportation?

Mr. HUTCHINSON. Yes, we do, Mr. Younger. We have taken this position at least since 1948, and recently before the Ways and Means Committee, and prior to that, before the Senate Surface Transportation Subcommittee.

Mr. YOUNGER. Thank you, Mr. Chairman.

Mr. MACK. Mr. Hemphill?

Mr. HEMPHILL. I want to commend you for the statement you made a minute ago about a Member of Congress appearing before your Commission. I would like to ask if your Commission has in contemplation any such thing as a rule 14 as promulgated by the Civil Aeronautics Board.

Mr. HUTCHINSON. Is this the rule, Mr. Hemphill, that relates to appearances of Members of the Congress before agencies?

Mr. HEMPHILL. Yes.

Mr. HUTCHINSON. We have no such proposal under consideration.

Mr. HEMPHILL. I want to thank you for that.

I have before me an excerpt from the American Bar Association report in which they quoted the original task force of the Hoover Commission back in 1955 which pointed to private communications. Now it is my opinion that rule 14 as promulgated by the CAB is nothing more than empire building under the guise of righteousness.

I would like your opinion as to whether or not it is proper for a Member of Congress, trying to represent his people' to write a letter which is made a part of your file in any case which is contestable. Do you think that is proper?

Mr. HUTCHINSON. To write a letter?

Mr. HEMPHILL. Yes, sir; to be made a part of the public file on the hearing. Write a letter and express his views or ask for an appearance to be heard.

Mr. HUTCHINSON. Well, so far as I know, this has been permitted throughout the long history of the ICC. Letters are placed in the public file, as you say, and, as I indicated earlier, Members in the past—well, I wouldn't say frequently, but occasionally have argued matters before us in oral argument, and we have found nothing wrong in this procedure, and, as somebody suggested a minute ago, maybe we haven't always given the Member as much time as he would have liked, but we have certainly welcomed appearances by Members of the Congress.

Mr. MACK. Commissioner, are you speaking now of Senators or Congressmen?

Mr. HUTCHINSON. Well, may I pass that question, Mr. Chairman.

Mr. HEMPHILL. Well, our problem, as you probably recognize from the place that you hold, is exampled where a community writes to you and wants you to do something. You are elected to do something, if you can, to express their views.

Now, if rule 14 is adopted throughout the regulatory agencies, yours included, then the Congress is going to have to write back and say "I can't do anything" and that doesn't satisfy our constituency or carry out our representation, and I just wondered if you would propose any guidelines for Congress to appear in these matters rather than have the empire builders just shut the door in our face.

Mr. HUTCHINSON. Well, as I tried to indicate previously, Mr. Hemphill, we have seen no need for any guidelines, prohibitions or any other actions by the Commission in this area. This has been no problem to the ICC.

Mr. HEMPHILL. Thank you very much, sir. I appreciate your expressions.

Mr. HUTCHINSON. Thank you.

Mr. MACK. Mr. Collier?

Mr. COLLIER. Thank you, Mr. Chairman.

Mr. Hutchinson, first I want to compliment you on your statement because I think it points up some of the real difficulties that we get into in attempting to legislate in this area.

As you know, the statutory provisions of the bill are reinforced by requirements for public disclosure which bring many questions to my mind. Taking a hypothetical case, if an ex parte communicant contacted the Commission or a member of the Commission, made a verbal statement which was completely fallacious but which was derogatory and perhaps even libelous: as I interpret the provision of this bill it would require that this be made a matter of public record. Is that correct?

Mr. HUTCHINSON. Well, yes, I think so. I wouldn't say that the bill would require a member to publish a libel, but it does require these communications to be made public.

Mr. COLLIER. Now, if I might belabor that point, because I have a specific incident in mind where this was the situation and where an applicant was maligned by an ex parte communicant. Under the proposed legislation the irresponsible statements of an ex parte communicant in this case would then be a matter of public record. What, in effect, would this create? Certainly it would not be a healthy situation either for the Commission and certainly not for the party involved.

Mr. HUTCHINSON. Well, I believe I would have to recognize that there might be statements of the nature that you are concerned with that would be better not published.

Mr. COLLIER. But if this bill is passed in its present form you would have no choice but to publish it under the on-the-record provision of this law.

Mr. HUTCHINSON. I think perhaps that is correct; yes, sir.

Mr. COLLIER. The time is getting late. That is all I have.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Curtin?

Mr. CURTIN. Mr. Hutchinson, I was very much interested in your statement as to how far down the line you felt the employees of your Commission should be bound by this proposed legislation. I am somewhat curious as to why you feel all shouldn't be, even if they are not on a policymaking level?

Mr. HUTCHINSON. Well, let me attempt to answer your question in this way:

Legislation normally, in my conception of it at least, is usually in response to a need, and we simply see no need to extend this to people who have no responsibilities in connection with the problem itself. But in this connection may I say this, that these matters are no real problem to the Commission. We simply don't allow people, the parties or anyone else, to discuss these matters with us ex parte, and neither does our staff, and, so, really the subject matter that is under discussion is not, as we see it, any sizable problem at all to the Commission.

Mr. CURTIN. Of course, we all realize that normally these restrictive rules are required for one erring person rather than the vast majority who are not at fault.

Mr. HUTCHINSON. Yes, but I am inclined to feel that this language that has been under discussion here this morning would include many others. In other words, the people who really have no opportunity

to err so to speak because they have nothing to do with the subject matter.

Mr. CURTIN. Thank you.

That is all, Mr. Chairman.

Mr. MACK. Mr. Chairman, have you ever had anyone make an ex parte contact?

Mr. HUTCHINSON. Are you addressing the question to me personally?

I have never had one that I considered improper. I have had some situations, although I have no specific instance in mind, but I am sure I have had some where I have had to call a halt to a discussion. I do that freely and have done it and will continue to do it, and I think in this that I speak for every member of the Commission and the staff, too. We simply do not allow people to discuss things with us that are not proper.

Mr. MACK. You have had occasions when you have had to call a halt to the conversation?

Mr. HUTCHINSON. Yes, but if you asked me for a specific example I couldn't give it to you, at least not at this sitting.

Mr. MACK. Would this prejudice a case pending before the Commission as far as you are concerned?

Mr. HUTCHINSON. Not in the least. It has not prejudiced, has had no prejudicial effect at all.

Mr. MACK. You have indicated that ex parte contacts are appropriate and even necessary in your testimony. Is that correct?

Mr. HUTCHINSON. In some instances, yes; necessary and proper in order to meet the responsibilities that the Congress has given us.

Mr. MACK. Well, then your decisions are not made on the record. Is that correct?

Mr. HUTCHINSON. Oh, yes.

Mr. MACK. They are?

Mr. HUTCHINSON. They are made on the record.

Mr. MACK. Well, then, if that is true, why are the ex parte contacts necessary?

Mr. HUTCHINSON. In the off-the-record type of proceeding, in other words proceedings not on the record, and also related to those that are on the record in the area of procedure, for example.

Mr. MACK. Related to the record, off the record. Then it either influences your decision, has a tendency to influence your decision, or, else, it is completely unnecessary.

Mr. HUTCHINSON. Well, in these areas where so-called ex parte communications are proper, why, naturally we conduct a sizable portion of our business by this method. In the on-the-record cases where such contacts, such communications are not proper, we simply do not allow them. We don't listen to them.

Mr. MACK. Well, in yesterday's appearance the Chairman of the CAB said that they decide their cases on the record.

Mr. HUTCHINSON. We decide cases on the record, yes, sir. We have about 7,300 formal cases filed with us each year which we dispose of on the record.

Mr. MACK. It seems to me that if you decide them on the record it would not be necessary for the ex parte contact.

Mr. HUTCHINSON. Only in areas——

Mr. MACK. And the ex parte contact should become a part of the record.

Mr. HUTCHINSON. Only in areas relating to purely procedural matters. We believe, as I suggested in my testimony, that the provisions of this bill, if adopted, should be confined to the merits of on-the-record proceedings.

Mr. MACK. Well, now, wouldn't H.R. 14 tend to make what you refer to as ex parte contacts part of the record?

Mr. HUTCHINSON. Yes, in the sense that it requires that it be placed in the public file or docket.

Mr. MACK. That would not be objectionable as far as you are concerned, would it?

Mr. HUTCHINSON. No. As I indicated, we do this now.

Mr. MACK. That is written communications or does that include oral communications?

Mr. HUTCHINSON. I referred only to written communications.

Mr. MACK. Would most of your ex parte contacts be written or oral?

Mr. HUTCHINSON. Oh, I would judge that, far and away, the majority of such contacts or attempted contacts would be in writing, by letter.

Mr. MACK. They would be in writing?

Mr. HUTCHINSON. I think so.

Mr. MACK. Then do you think that what you do have, even if they are oral, that they should also be included as part of the official record?

Mr. HUTCHINSON. Well, this would be a very difficult matter to manage, so to speak. You would have to have someone take down the conversation and then you would probably have an argument after that about what the conversation was.

As long as the documentation of it was made by someone other than the communicant.

Mr. MACK. Could you have the substance of the conversation recorded without much difficulty?

Mr. HUTCHINSON. It could be done, but, as I say, it might produce a lot of arguments as to whether the conversation or the statements were faithfully recorded.

Mr. MACK. Don't you agree that if a request is made solely to secure information respecting the status of the case, that that might be appropriately handled by the secretary for the Commission.

Mr. HUTCHINSON. Well, we had some discussion previously on that, Mr. Chairman. It certainly could be handled that way.

As I said earlier in the case of the Interstate Commerce Commission, it would often simply add a step to the procedure and this might mean in some cases an extra day that the Member of Congress would have to wait to get the reply to his inquiry.

Mr. MACK. That would be the case if it were directed to the Chairman of the Commission.

Mr. HUTCHINSON. Well, as I explained earlier, if—yes, that is right.

Of course, if the communication were addressed to the secretary, then there would be no addition of a step.

Mr. MACK. Now is the secretary involved in the decisional process?

Mr. HUTCHINSON. No, he is not involved. As far as the decisional process is concerned, he corresponds, I suppose, more to the clerk of a court. He is the recork keeper, the official record keeper for the Commission in its proceedings cases.

Mr. MACK. Then don't you think, if any inquiry is a legitimate inquiry concerning the status of the case, that it would be preferable to have the secretary handle this matter so that the inquiry would not be expanded into the merits of the case?

Mr. HUTCHINSON. I think it would be fine.

Mr. MACK. That was my idea on this, of having this secretary.

Mr. HUTCHINSON. But, as I indicated earlier, Mr. Chairman, our experience has not indicated that we would be able to persuade the Members of Congress to direct all such inquiries to the secretary, and certainly I know of no way we could persuade the general public that it should address such inquiries to the secretary rather than to the head of the agency.

Mr. MACK. Mr. Chairman, could I ask you this question: Have you ever advised the Congressmen to make these requests to the secretary's office?

Mr. HUTCHINSON. I have not made that suggestion. I am advised by the Commission's secretary, who is a staff member of many years' standing, that we have not so requested or so asked the Members of Congress. I doubt that we would ask Members to do this. We might suggest it, but I doubt that we would ask that Members do it unless you pass a law directing us to do it.

Mr. MACK. Well, as a matter of fact, you have not asked the industry to indirect their inquiries to the secretary's office either?

Mr. HUTCHINSON. Yes, that is in our rules of practice. Some inquiries pertaining to a proceeding including the filing of pleadings and everything pertaining to the case are addressed to the Commission through the secretary. It is rule 1.3 of the Commission's general rules of practice.

Mr. MACK. And the status inquiry should be directed to the secretary's office?

Mr. HUTCHINSON. Under the rule that I have just referred to, yes, sir; that is correct.

Mr. MACK. Well, isn't it a fact that the industry applicants who are parties in cases pending before the Commission do not direct their status inquiries to the secretary's office?

Mr. HUTCHINSON. Well, there are inquiries that are otherwise directed, but the bulk of the inquiries pertaining to the status of proceedings and the filing of pleadings, everything pertaining to the case by and large are directed to the secretary in response to the invitation contained in rule 1.3. But the Chairman does get some inquiries, and I think perhaps other members of the Commisison get similar inquiries. It is true also that the examiners who handle cases get some inquiries. But the rule provides for addressing such communications to the secretary.

Mr. MACK. I think it is a very good rule.

Mr. HUTCHINSON. We would like to see it followed more religiously.

Mr. MACK. Do you consider it would be improper if some party invited you to have lunch with him, and in the course of the conversation he inquired about the status of a case before the Commission?

Mr. HUTCHINSON. Well, let me answer that this way: I wouldn't like it. If it were purely a status matter, that would make it a little more palatable than otherwise, but an inquiry of this kind from a party or his counsel should come to the Commission through the secretary. But even the strictest rule has to be enforced with some reason, and so I don't believe I would leave the luncheon table unless he persisted.

Mr. MACK. Would you consider referring him to the rule?

Mr. HUTCHINSON. Referring him to the rule?

Mr. MACK. Yes.

Mr. HUTCHINSON. Yes, I think I would in a courteous, diplomatic manner. I think one of the jobs of this ICC is to get along with people who are willing to be gotten along with, and I don't think you can just go about reading everybody off who doesn't do exactly as they should about every rule that we have in the book. I think you have to temper rigidity with reason.

Mr. MACK. I understand; I agree. But your rules should apply universally?

Mr. HUTCHINSON. It should. It does apply universally. I couldn't say that it is enforced 100 percent, but I would say that this is our purpose however good or badly we are doing in this area. We are trying all the time to do better.

Mr. MACK. Are there any further questions?

Mr. Chairman, thank you very much for your testimony. I notice you have several of your colleagues with you today. If any of them have additional statements they want to make——

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. MACK. Incidentally, Mr. Chairman, you did a good job.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

May I just indicate for the record those who are here: the Vice Chairman of the Commission, Commissioner Murphy, and Commissioner Tuggle who is a member of our legislative committee, was sitting with me at the table; Commissioner Abe MacGregor Goff; the Commission secretary, Harold D. McCoy; an Associate General Counsel, Charlie H. Johns; our legislative counsel Mr. Spicer; and our congressional liaison officer, Mr. Hardin, Dale Hardin.

Thank you, Mr. Chairman.

Mr. MACK. Thank you.

The committee will stand adjourned until 10 o'clock tomorrow.

(Whereupon, at 11:50 a.m., the committee adjourned, to reconvene at 10 a.m., Thursday, June 8, 1961.)

INDEPENDENT REGULATORY AGENCIES ACT OF 1961

THURSDAY, JUNE 8, 1961

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 1334, New House Office Building, Hon. Oren Harris (chairman) presiding.

The CHAIRMAN. The committee will come to order.

This morning we are glad to have Dr. George P. Baker, professor of transportation, Harvard Graduate School of Business Administration, and Mr. Baker is also president of the Transportation Association of America.

Mr. Baker is here to testify on H.R. 14, a bill to increase the effectiveness of regulatory agencies.

Mr. Baker, we are glad to welcome you back to the committee. We do appreciate the contribution you have made heretofore on this subject. We know of your interest in it, and we welcome you again today.

STATEMENT OF GEORGE P. BAKER, PROFESSOR OF TRANSPORTATION, HARVARD GRADUATE SCHOOL OF BUSINESS ADMINISTRATION; PRESIDENT, TRANSPORTATION ASSOCIATION OF AMERICA; ACCOMPANIED BY ROBERT E. REDDING, VICE CHAIRMAN AND GENERAL COUNSEL, TRANSPORTATION ASSOCIATION OF AMERICA

Mr. BAKER. I appreciate very much, Mr. Chairman, the chance to testify again.

I would appreciate having Mr. Robert Redding, who is vice chairman and general counsel of the Transportation Association, here with me, if I may.

The CHAIRMAN. Very well.

We are glad to have you, Mr. Redding, appear with Mr. Baker.

Mr. BAKER. My name is George P. Baker. I am professor of transportation at the Harvard Graduate School of Business Administration, Boston, Mass. I am appearing today as president of the Transportation Association of America, with general offices located at 1710 H Street NW., Washington, D.C.

My statement is offered in connection with H.R. 14, which is entitled the "Independent Regulatory Agencies Act of 1961." This bill is designed to "promote the efficient, fair, and independent" operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commis-

sion, the Interstate Commerce Commission, and the Securities and Exchange Commission. I wish to express the support of the Transportation Association of America for the prompt enactment of this excellent legislation, including only a few suggested changes which I shall describe in my remarks today.

I. For the information of the committee, TAA is a nonprofit research and educational institution made up of users, investors, and carriers of all modes who collectively devote thir efforts to the development and implementation of sound national policies aimed at the creation of the strongest possible transportation system under private ownership and operation.

All policy positions developed by the association are studied carefully by eight permanent committees or panels composed of representatives from users, investors, and air transport, freight forwarder, highway, oil pipeline, railroad, and water carriers. These panels, as in the case of the position stated on behalf of TAA today, make individual recommendations to the 100-man TAA board of directors, which then takes final action.

II. TAA has a deep interest in the subject matter of the legislation now under consideration by this committee. TAA members are concerned with the condition of our national transportation system which constitutes a vital and significant industry in our national economy and has become an integral part of our daily living. Its operation is regulated in many respects by many of the Federal administrative agencies here under review.

In recent times the independent agencies have become more and more influential in regulating the health of the transportation industry. In addition, as the regulatory functions of such agencies have broadened, it is important that the normal incidents of due process be followed. These include the assurance that agency decision following a hearing will be predicated on the evidence, pleadings, and other documents of record in the proceeding. In short, TAA believes the time to be ripe for legislation which will, as a matter of law, prohibit and effectively prevent the eroding influence of ex parte pressures and representations.

Approximately a year ago I testified before this committee on behalf of TAA to express the unanimous opinion of the TAA panels and board of directors that such legislation should be enacted with all possible dispatch. I believe that the Transportation Association of America was the one industry group which appeared before this committee to advocate such legislation. It is a privilege for me to appear once again to reemphasize our conviction that legislation such as H.R. 14 should, with the few changes listed below, be enacted by the Congress.

III. Following the hearing held by this committee in the 86th Congress, Mr. Chairman, you introduced H.R. 12731 which, on July 1, 1960, was reported unanimously by the Committee on Interstate and Foreign Commerce with some minor amendments. Thereafter the TAA panels carefully reviewed the contents of H.R. 12731 as reported, and the TAA board last January recommended its enactment except that it took no position on that part of the bill dealing with what now appears as section 11 of H.R. 14; namely, amendments to the Communications Act of 1934.

You will recall that last year I testified in support of legislation insofar as it pertained to the Interstate Commerce Commission, the Civil Aeronautics Board, and the Securities and Exchange Commission. In our later consideration of this subject, the TAA panels recommended that our policy position should be made applicable to the other three agencies covered by H.R. 12731; namely, the Federal Power Commission, the Federal Communications Commission, and the Federal Trade Commission. This view was based upon the belief that some decisions of each of these other three regulatory agencies do affect one or more of the modes of transportation. As a consequence, the TAA board of directors voted to endorse the contents of H.R. 12731 as it applied to all six regulatory agencies.

Inasmuch as H.R. 14, presently under consideration by this committee, is identical in content to the former H.R. 12731, as reported, our January 1961 position would equally apply.

We do wish to offer four specific additions and one limitation to H.R. 14 which we believe will further promote the efficient, fair, and independent operation of the agencies involved.

(1) Oral ex parte communications to an agency member, hearing officer, or employee involved in the decisional process: Section 7(a)(1) prohibits, except in circumstances authorized by law, a party to an "on the record proceeding" or person acting on behalf of such party, from communicating ex parte—

> with respect to such proceeding, directly or indirectly, with any agency member, hearing officer, or employee involved in the decisional process * * *.

This proscription is essentially similar to that stated in H.R. 6774 under consideration last year by this committee which embraced both written and oral communications. Indeed, the committee's report accompanying H.R. 12731 stated that such language was intended to apply "to oral as well as written communications."

Section 7(b) of H.R. 14 provides for the disposition of such ex parte communications, but only if they are written.

TAA would like to urge, as it did last year, that oral as well as written communications should be treated alike under the law, including being subject to the criminal penalties of section 7(f) of the bill.

While we acknowledge that the reduction to writing and filing of oral communications may involve a burdensome problem to the agencies, we believe a considerable amount of ex parte communications in the past have been oral in nature and that all reasonable steps should now be taken to minimize the continuation of such improper conversations.

(2) Oral ex parte communications by an agency member, hearing officer, or employee involved in the decisional process: The considerations I have just advanced relative to oral communications made to agency personnel should, in our judgment, apply equally to such communications by any agency member, hearing officer, or employee involved in the decisional process to a party to an "on the record proceeding" before the agency, or any person acting on behalf of such party. While such communication appears to be prohibited by section 7(a)(2) of H.R. 14, no provision is made in section 7(c) of the bill for recording any such communication, nor do the criminal penalty provisions of section 7(f) of the bill embrace oral communications by such personnel. We believe that these provisions should apply to oral as well as written communications of this nature.

(3) Disqualification of parties: You will recall that H.R. 6774, under consideration a year ago, provided in substance that any violation of the standards of conduct imposed in such bill—

> by any party to the proceeding, or by anyone acting for or in his behalf, shall be good cause, in the agency's discretion for disqualification of such parties.

At that time TAA supported a recommendation of the American Bar Association that it would be desirable to impose such disqualifications only in a proceeding wherein the ex parte offering occurred. This view was adopted by the committee in reporting H.R. 12731 and is set forth in section 7(d) of H.R. 14.

The committee did not, however, endorse another TAA recommendation in this connection, which we wish to resubmit for your careful consideration at this time. As we stated last year, TAA would, in addition, limit such disqualification to licensing proceedings as defined in the Administrative Procedure Act. We reached this judgment because in certain proceedings other than "licensing," such disqualification could be discriminatory to innocent participants. For example, disqualification of a carrier party in an adversary rate case involving different modes of transportation might well result in depriving a shipper party of a fair and reasonable rate in such proceeding.

We further submit that such disqualification in licensing proceedings should follow only if the violation of H.R. 14 would occur at the direction, acquiescence, or ratification of the party being disqualified.

We feel that, particularly where criminal penalties are involved, the party litigants are entitled to rely on and be protected by all reasonable statutory standards governing personal conduct. The applicability of statutory penalties should be clearly defined. We think this additional condition is desirable.

Finally, TAA would recommend that judicial remedies under the usual conditions for abuse of agency discretion in applying such sanctions continue to be available.

(4) Oral status inquiries: Section 8 of H.R. 14 pertains to written requests for information about the status of an "on the record proceeding" which, by definition in the bill, are not deemed to be ex parte communications. In the interest of maximum protection of the integrity of the independent regulatory agencies, we believe that H.R. 14, as finally enacted, should also embrace oral procedural inquiries, with provision for recording and filing the same in agency files.

(5) Noncriminal penalties for agency personnel: H.R. 14 provides only for criminal penalties—section 7(f) of the bill—for violations by agency personnel of the standards of conduct so imposed. The bill does not contain any noncriminal penalties similar to those prescribed in H.R. 6774, such as disqualification, censure, suspension or removal from office of such personnel. It is our belief that such penalties would serve to reduce further the extent of ex parte communications, particularly in instances where willful violations of H.R. 14 would not have occurred or would not be readily susceptible of proof.

Therefore, we recommend that the committee incorporate penalties of this nature into such legislation for application against agency personnel (a) transmitting ex parte communications to litigant parties or their representatives, (b) failing to make proper disclosure thereof, (c) giving improper consideration to ex parte communications re-

ceived from such outside parties, or (d) removing improperly the records of ex parte communications from agency files.

This, Mr. Chairman, completes my statement of the TAA position on the bill currently before you. I wish to commend the chairman and the members of this committee for their interest in improving the regulatory processes of the independent agencies. The TAA, which reflects the views of those who are regulated by these agencies, hopes that such legislation will be enacted during the current session of the 87th Congress.

Mr. Chairman, we have here representatives of several of the regulated industries whom I would like the privilege of introducing to you on the chance that they would like to make some supporting statements.

The CHAIRMAN. Very well, we would be pleased to have them.

Mr. BAKER. We have Mr. John Lawrence, managing director of the American Trucking Association.

STATEMENT OF JOHN LAWRENCE, MANAGING DIRECTOR, AMERICAN TRUCKING ASSOCIATIONS

Mr. LAWRENCE. Mr. Chairman, as indicated, my name is John Lawrence, and I am managing director of the American Trucking Associations.

I merely would like to state, if I may, to the committee that we concur in the statement and position presented by Dr. Baker on behalf of the Transportation Association of America.

The CHAIRMAN. Thank you, Mr. Lawrence. We are very glad to have you with us today and have your statement supplementing Dr. Baker's.

Mr. BAKER. We also have Mr. Gerald Finney, general attorney of the Association of American Railroads.

STATEMENT OF GERALD FINNEY, GENERAL ATTORNEY, ASSOCIATION OF AMERICAN RAILROADS

Mr. FINNEY. My name is Gerald Finney, as Dr. Baker has said. I am general attorney with the Association of American Railroads.

The railroad panel, which is one of the panels that operates through the TAA, did support and help formulate the position taken by Dr. Baker today, and I am only here to subscribe, on behalf of the railroads, to what he has said.

The CHAIRMAN. Thank you, Mr. Finney. We are glad to have you with us and to have your statement complementing the statement made by Dr. Baker.

Mr. BAKER. We have Mr. Frederick Poole, assistant general counsel of the Association of Oil Pipelines.

STATEMENT OF FREDERICK POOLE, ASSISTANT GENERAL COUNSEL, ASSOCIATION OF OIL PIPELINES

Mr. POOLE. As stated, the name is Fred Poole.

I would like to iterate that our oil pipeline panel participated in the formulation of the statement, and is glad to endorse and support it.

The CHAIRMAN. Mr. Poole, we are glad to have you with us representing your industry and complementing the statement made by Dr. Baker.

Mr. BAKER. We also have Mr. Donald Durand, assistant general counsel of the Air Transport Association of America.

STATEMENT OF DONALD DURAND, ASSISTANT GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA

Mr. DURAND. Mr. Chairman, my name is J. D. Durand, associate general counsel, Air Transport Association.

Through the air transport panel of the TAA, the airline industry participated in the formulation of the policy decisions on which Dr. Baker's statement was based, and, therefore, we subscribe to his statement. We support enactment of this bill.

Mr. Chairman, we may want to file in a short time a memorandum of suggested technical drafting changes in the bill. Would that be possible? Would the record be open for a short time to receive such a statement if that is necessary?

The CHAIRMAN. Well, Mr. Durand, we will be very glad to have such additional comments as you would like to file, within a reasonable time, of course.

Mr. DURAND. They would not reflect a different policy than that contained in Dr. Baker's testimony. They would be for technical and clarifying reasons.

The CHAIRMAN. The committee would be very glad to receive your suggestions.

Mr. DURAND. Thank you, sir.

The CHAIRMAN. And we are glad to have you with us.

STATEMENTS OF GEORGE P. BAKER AND ROBERT E. REDDING—Resumed

Mr. BAKER. Mr. Chairman, that completes our presentation.

The CHAIRMAN. Dr. Baker, let me thank you for your statement to the committee on this problem.

As you have had these several months to review and reconsider this entire problem, I want to compliment you for the work that you and your organization have done toward trying to perfect some appropriate legislation in this field. We are encouraged by these people coming with you here today and indicating their interest, substantiating what you have said in connection with this problem.

Mr. Mack, do you have any questions?

Mr. MACK. Dr. Baker, do you feel that enactment of this legislation would considerably improve the situation in the regulatory agencies regarding ex parte contacts? I should say improper ex parte contacts.

Mr. BAKER. I think it would, Mr. Mack, yes; I think it would if you look ahead over the years. I think right now that there has been so much publicity about this kind of thing over the past few years that I imagine there is great caution. But I think as you look ahead it would be highly desirable to have the law fairly clear on these matters.

Mr. MACK. Now, most of the agencies today have a code of ethics, we will say, that they are supposed to adhere to and abide by, but we have found application of this code less effective within the agencies. Do you feel this situation would be different, that application would be more effective?

Mr. BAKER. I do, sir. I think there is a difference between, apparently, the way human beings are made, living within a self-made code within the agency; that is, the breaking of a self-made code within an agency and the breaking of a law.

Mr. MACK. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Collier?

Mr. COLLIER. Yes.

Dr. Baker, we have not clearly established, or at least it has not been clearly established in my mind as to what would constitute a violation, if this law were passed, on the part of a Member of Congress who was acting in the role of an ex parte communicant.

With no intent to put you on the spot, just how far would you say that a Member of Congress should be permitted to go in the role of an ex parte communicant in dealing with any pending matters before an agency?

Mr. BAKER. Well, I would like to ask Mr. Redding to comment with respect to whatever I say on this. He is a lawyer, and I am not. But as I followed these considerations as they went through our panels and so forth, and we finally reached a position on it, it was my understanding that no distinction was drawn between a Congressman's right and privileges and dangers in this regard and that of any other citizen.

Mr. REDDING. Mr. Collier, to supplement Dr. Baker's statement, I was present when Mr. Boyd appeared on behalf of the Civil Aeronautics Board and answered a series of questions along this line, and I know that the members of the committee propounded various questions to him about who was a party and when does one become a party and what may a Congressman have to say on these matters.

As I understand the present practice of the Civil Aeronautics Board, the Members of the Congress are now proscribed from appearing at the oral argument stage in these cases heard by them, and I understood Mr. Boyd to comment that no Member of Congress would be permitted to appear in such a proceeding unless he had previously appeared in testimony at the hearing stage.

I would not question particularly the interpretation he places on their regulations, but I would only add that it does seem to me that if a community wished to be represented at an oral argument by a Member of the Congress and would appropriately advise the Docket Section at the Board that this individual was their counsel for that purpose, even though he had not testified at the hearing, that this would seem to me to be appropriate.

I want, of course, to state that I am speaking only from my own personal opinion. This matter has not arisen before the panels of the TAA, but it does seem to me that, certainly under that circumstance, a Member of the Congress would be permitted, and properly so, to appear formally as counsel for a party to the proceeding.

Mr. COLLIER. Dr. Baker, referring to the last——

The CHAIRMAN. Would the gentleman yield at that point before you go further?

Mr. COLLIER. I would be very happy to.

The CHAIRMAN. I think it is pretty important.

Mr. Redding, do you feel then that a Member of Congress should be given special status in connection with such matters before a regulatory agency, that he could appear at any stage that he might desire or feel necessary in serving the public so long as it is a matter of public notice and an open hearing, and in a proceeding whereby all parties are given an opportunity to be present?

Mr. REDDING. That would certainly satisfy my beliefs in this regard, Mr. Chairman. I feel——

The CHAIRMAN. The reason I suggest that, if the gentleman from Illinois would permit, there was some discussion, rather thorough discussion the other day. I have suggested heretofore a procedure in a matter of this kind before agencies where there could be or was an attempted ex parte contact to be made with the Commission about a given problem, that it would seem to me that if that party would seek an appointment with the Commission or a member of the Commission and notify all parties to the proceeding that such appointment is sought and a meeting will be held and they have an opportunity to be present at the meeting, it should seem to me that would be appropriate and would not be contrary to what is undertaken here, and could very well in many instances expedite the proceedings before the Commission, whatever they might be.

I make that statement again to my colleagues for our consideration because I intend to bring it up some time in the future.

It would seem to me that so long as it is a public proceeding where all parties to it have a right to be present when whatever the problem is is discussed with a commissioner or the commission, then it would be perfectly legitimate and of service to the people in whatever problem they have.

Mr. FRIEDEL. Will the gentleman yield on that for just one question?

Mr. COLLIER. I am pleased to yield.

Mr. FRIEDEL. You are speaking about appearing before the Commission. How about correspondence?

The CHAIRMAN. Correspondence is taken care of in the bill because it is provided in the bill that it should be referred to the Secretary, and the Secretary shall incorporate it in the public files.

Mr. FRIEDEL. The other day I mentioned to Mr. Boyd that if I were to write the CAB at the request of a Baltimore City civic group regarding something that had been delayed for 2 years, and ask them to expedite it and cite a few instances why it should be hurried, he said that that was a two-part issue: one, yes, I could make an inquiry but I couldn't state any facts in favor of it, although they would be in writing.

The CHAIRMAN. You could state any facts you wanted to, but they would be required to be put in the public file for observation by anyone who might want to see them. That is what the bill provides for.

Mr. COLLIER. I am inclined to pursue that just one step further.

In taking strictly a hypothetical case where an application for authority would be pending before a commission, if it came to the attention of a Member of Congress—and I repeat this is a hypothetical case—if it came to the attention of a Member of Congress that the

actions of an examiner were unethical or appeared so, would the Member of Congress then be restrained from submitting such information to the Commission?

Mr. BAKER. I would not think so. The point seems to me that what he does submit be available to all those who may be affected by it. The knowledge that he has given that information should be available to all the other parties at interest.

Mr. COLLIER. And that, in fact, would be the duty and responsibility of a Member of Congress if such information came to his attention during the course of a pending action.

Let me go, if I may, to the fourth page of your statement, Doctor, and specifically with reference to the matter of oral statements of an ex parte communicant. What protection would an ex parte communicant have against possible misquotation or the misconstruing of an oral statement in the process of reducing this to writing?

Mr. BAKER. This certainly is a problem. I suppose the only protection he has is that the law requires that the memo, let us say, that the commissioner would make and place in the file is in a public file and that if he feels that this is an incorrect statement, that he, thereby, is aware of it and can protest that it is an incorrect statement.

I suppose the main purpose is to try to discourage this kind of communication anyway. There are risks involved which perhaps make the risks themselves of misquotation act as one of the major incentives not to make the call.

Mr. COLLIER. Particularly if, in good faith, the oral argument, in the process of reducing it to writing, resulted in an omission which could be very significant in the purpose of the statement.

Mr. BAKER. Yes.

Mr. COLLIER. That is all I have.

Mr. MACK. Mr. Moulder?

Mr. MOULDER. I refer to your statement about the right of a Member of Congress to appear as counsel. Maybe you would like to clarify that. I may have misunderstood you.

Mr. REDDING. Well, Mr. Moulder, let me see if I can explain it in this fashion.

A party to a proceeding, to begin with, as I understand the matter, having practiced before the Civil Aeronautics Board and other agencies for some years, is either an applicant in an adjudicatory case or a party-intervenor. You acquire that status either by virtue of filing the application or by virtue of the agency granting you the privilege of intervention.

Such a party may be represented by counsel, and the Board's rules of practice, for example, provide for such a party to be represented by counsel of his choice. Such counsel normally are attorneys in the practice of law and, for the most part, here in Washington, who are versed in the complex field of administrative law.

At the hearing stage relevant evidence is normally offered in these proceedings before the hearing examiners, largely under the guidance of counsel, and may consist of testimony either by the parties or by a Member of Congress or any individual who wishes to present such evidence. The case moves along through the procedural stages for briefing purposes, and ultimately for the presentation of oral argument before the agency.

Now it would seem to me, having represented personally various States and cities and chambers of commerce, that any party, whether it be such a civic party or even a carrier party, would have the privilege, if it so desired——

Mr. MOULDER. Of employing——

Mr. REDDING. Of employing a Member of Congress, if you please, to represent it any procedural stage in the case provided this employment were placed on the record at the appropriate office of the agency as is the normal practice, and this is why I commented that, as I viewed the situation, if a community in your State would prefer to have you appear as its counsel of record at any stage in that proceeding, including oral argument, it would be privileged to so designate you if you were willing to do it.

I further feel, however, that in your presentation before the agency, your presentation should be based upon the facts of record, of course.

Mr. MOULDER. That is all.

Mr. MACK. Mr. Glenn?

Mr. GLENN. Well, do you think that, following the line of questioning by Mr. Moulder, there would be any conflict of interest in a Congressman appearing and receiving a fee as counsel for a party-litigant before the Commission?

Mr. REDDING. It is entirely possible that this might be the case, particularly if there were several communities in a given area seeking service and that the granting of service to one community might mean the loss or denial or service to an adjoining community. This is entirely possible, and I would think, Mr. Glenn, that you would have to evaluate this possibility in any particular instance.

Mr. GLENN. Do you think that burden should be on the Congressman or should be placed with the Commission to so advise him?

Mr. REDDING. I would personally feel it should be the burden of the Congressman himself to decide whether he, in good conscience, could properly represent a given community or an area in a given proceeding under the circumstances.

Mr. MOULDER. Would the gentleman yield?

Of course, in stating my position I don't think a Member of the Congress should be permitted to be authorized to serve as a counsel or an attorney before any Government regulatory agency and receive a fee for his services as counsel. I mean in the practice of his profession. I oppose that. I say that this would be wrong.

Mr. ROGERS of Florida. I think there is a criminal statute against that.

Mr. MOULDER. Whether it is a conflict of interest, Paul. Where the Government is a party to it, then, of course, it is prohibited by statute. But you are referring to where the Government is not a party-litigant to the proceeding.

Mr. REDDING. Yes, sir.

Mr. GLENN. That is all, Mr. Chairman. Thank you.

Mr. MACK. Mr. Friedel?

Mr. FRIEDEL. Mr. Redding, I am glad you were here the other day when I asked a question of Mr. Boyd, of the CAB. I mentioned that a civic group in Baltimore City filed an application and went through their procedure about inadequacy of service at Friendship Airport. That proceeding went on for 2 or 3 years. My question was this:

Would it be improper for me, as a Congressman—and I am not an attorney; I wouldn't receive a fee—to write to the CAB and complain about the delay and then cite some facts as to why I feel it should be speeded up, because it is causing Baltimore City great harm? Would that be unethical?

Mr. REDDING. I believe you are speaking of the inadequacy case involving the Baltimore-Washington area, are you not?

Mr. FRIEDEL. Yes.

Mr. REDDING. And your inquiry presumably was made or would have been made after the case was submitted to the Board for decision?

Mr. FRIEDEL. Yes; 2 or 3 years after.

Mr. REDDING. Yes, sir. Under the framework of the bill, H.R. 14, of course, it would seem to me that an inquiry of this nature involving the procedural status of the case would be proper and would be handled as the bill provides. When you indicate, however, that you would contemplate including facts in your communication of current situations which you feel should encourage the agency to move more rapidly, I think you are approaching a borderline situation because, as so frequently happens in these proceedings, there is considerable time which elapses from the close of the record until final decision by the agency.

The Board 2 weeks ago heard oral argument in a case that went to prehearing conference more than 3½ years earlier. It would seem to me that this is where the problem lies, that once the record has been closed, the Board's judgment should be based upon the facts of record which have been subjected to scrutiny and the crucible of cross-examination, and, therefore, in your communication, if you were to adduce additional facts that were not previously submitted even though later occurring, this would not be a proper submission. Your remedy would be to have a motion filed with the agency requesting the agency to reopen the case momentarily to receive these newly established facts, and the agency has done this on occasion.

Mr. FRIEDEL. Well, then, my interpretation, if we pass this bill, H.R. 14, is that the only procedure that a Member of Congress would have is to write and make an inquiry about the case, rather than ask to expedite it or anything else.

Mr. REDDING. Well, it seems to me that, certainly under the provisions of this bill, you are perfectly entitled to place such an inquiry before the agency requesting expeditious handling, as a part of your inquiry of procedural status. The difficulty arises in the basis for which you seek this expeditious handling and the extent to which in this communication you could refer to facts a, b, c, and d. This is the problem area, of course, and I can only——

Mr. FRIEDEL. I understand that, but you get these officials in the city of Baltimore, and these civic-minded groups that keep writing you letters saying:

This has been going on for 2 or 3 years. What is being done about it?

We are representatives of the people. If we can't do that, because we might be breaking the law, what are we elected for then? What would be the answer?

Mr. REDDING. Yes, this is understandable, an understandable reaction on their part, I quite agree.

Mr. FRIEDEL. I don't want my hands to be tied because I want to represent the people. I want to be sure the bill doesn't go too far. I don't want to violate the law in any way, but I still want to serve the people.

Mr. HEMPHILL. Will the gentleman yield?

I think if you don't pass some legislation, what is going to happen is that the empire building is going to keep on, like the CAB is trying to do, and under the guise of righteousness, and I think you have got to do something.

Mr. HEMPHILL. I think the people have a need for something to be passed.

Mr. FRIEDEL. Let's get more examiners and more help. They do prolong the cases.

Well, thank you very much.

Mr. MACK. Mr. Devine?

Mr. DEVINE. You would agree, would you not, that it is a legitimate function of a Member of Congress to at least make a status inquiry on a pending case?

Mr. REDDING. By all means.

Mr. DEVINE. Do you think that should be recorded in the files?

Mr. REDDING. Yes, sir.

Mr. DEVINE. Do you feel members of any of these regulatory agencies, of Federal Trade Commission, Federal Communications Commission, or Civil Aeronautics Board, when a congressional inquiry comes in merely asking the status, that that will influence any of the members of the Board or examiners to give it any special treatment?

Mr. REDDING. I don't know that it would necessarily do so, Mr. Devine, no, sir. However, it seems to me that the problem here is establishing ground rules for handling communications of all types and that a Member of the Congress, as much as any other party, is perfectly entitled to comply with these ground rules in seeking information, the basic objective being to eliminate to the maximum extent the type of ex parte communications that have occurred, at least we have heard occurred, and whether or not such an inquiry would in fact influence a member of the agency is difficult to say, of course, but my feeling about it is—and again I am speaking only personally and not for TAA—that, in the interest of expediting caseloads, we should have rules and regulations along the lines that you have here in H.R. 14, and that if there are to be any subsequent submissions of fact by a Member of Congress, that it should be through the channels which I characterize normally involving a motion to reopen the case. This is frequently the situation and——

Mr. DEVINE. It would be your feeling that H.R. 14 is designed to prevent those practices that are beyond the status inquiry?

Mr. REDDING. Yes, sir; of course.

Mr. BAKER. Mr. Devine, can I comment on that also? Mr. Redding has had experience much closer than mine. It is 20 years since I was on the CAB.

I think it is possible to have a situation where a simple status inquiry, if made often enough and by the chairman of a committee let us say, can have some effect. This isn't often but it isn't too hard to imagine a situation where fairly constant, strong inquiry from a Congressman who obviously, because of the group he represents geographically, the commissioner can well know that his interest is ex-

tremely strong in this case, and if it is even simply a question as to status, it can have some of the undesirable effects.

Mr. DEVINE. Two-way street.

Mr. BAKER. Yes.

Mr. DEVINE. That will be all.

Mr. MACK. Mr. Moss, do you want to be recognized at this time?

Mr. Moss. I haven't had an opportunity to read the statement, Mr. Chairman.

Mr. MACK. Mr. Rogers?

Mr. ROGERS of Florida. Yes, I have a question following that of just a moment ago.

Even though a Congressman may make inquiry in a number of instances, if he doesn't go into the merits of the case but he simply is asking for some decision to be made, what is your feeling about that?

Mr. BAKER. Well, as long as this is made clear, as long as this is his desire, that seems entirely proper to me.

Mr. ROGERS of Florida. And, also, he may say that he desires some service; he doesn't care who provides the service, but he feels that this community is entitled to service.

Mr. BAKER. Mr. Rogers, if the question of service to the community is not what is being decided but only who gets it, this, then, is not the question at issue that he is taking part in. If, of course, both issues are there, one, it seems to me, would be improper to get into; the other, it would not.

Mr. ROGERS of Florida. Well, if he desires service into a certain area, suppose they have no air service and he feels that this community is entitled to air service and he simply puts that, says that certainly someone should provide service here. It is our feeling the people of the area have expressed that to me as their representative. I feel this is a legitimate request for some service, but the Board is to decide who is to give it, of course. They do get into the problem, I realize, too, whether there will be an economic justification. But I think it becomes, there, a very narrow line as to what the Congressman could do, but to represent his people properly he is going to feel, I think, that he ought to make their views known as their representative that some type of service is necessary.

Now, certainly the CAB, if it were to go before the Board, realizes that the Congressman simply is giving an expression of the desires of the people there. That would be expected. I don't see why something like that would be improper. That is a normal course of events, that they would want some service if they are not getting it, but not to actually go into the merits as to representing one airline or the other to see that one gets a benefit. I think that is a broad, general area that is a normal course to take, that it should not have such great influence on a board as to bringing undue influence to grant a permit to a certain line.

Mr. BAKER. I would like to have Mr. Redding comment on this because his own experience is very much in this area, but my memory is that these are some of the toughest cases for the CAB to decide, that they are setting themselves up with a limited amount of money and they are often talking in such a case about a feeder airline service which is going to be subsidized and that there were competition, as it were, competition for money that the Government is going to put into

this kind of thing and where it may not be a clearly adversary party, nevertheless it is a difficult question for the Board to decide, and to some extent the thrust of this bill is to reduce pressures of one kind or another.

I wish Mr. Redding would comment on what point in the procedure he thinks this kind of valuable information should be fed into the record.

Mr. REDDING. Well, I don't know that I can improve very much on Dr. Baker's comment. I certainly feel that you should be entitled to place the inquiry you describe.

I frankly feel, Mr. Rogers, that if this bill were enacted to discourage the type of comunications we all agree should be discouraged and eliminated, and if, secondly, effective steps could be taken to expedite decisions in these proceedings, I think you would find the pressures for the kind of inquiry you describe and the occurrence of facts since the close of the record to be reduced, that is by closing the gap between the close of the record and the ultimate decision, it seems to me that a combination of this kind of legislation and effective steps to reduce this backlog of cases and urge effective and quick decisions would solve the problem as best we can hope for. I think this would tend to reduce the extent of inquiry by your constituents.

Obviously, if time has elapsed and they are anxious to get service, they are concerned about it, you are concerned about it. And, of course, the agency is concerned. And I think you should be privileged to make your inquiry. But, in my judgment, the most effective way to solve this general problem is a combination of these two steps I have suggested.

Mr. ROGERS of Florida. Well, where you ask for service, the problem that I just posed there, where you are asking for service, to me, I am not sure that that goes so deeply into the adjudicatory process as much as it is more on the administrative side of the agency as far as a Congressman is concerned. That is determining that the service should be extended to a certain community. In my mind, the area that is not proper for the Congressman is the adjudication as to who will benefit, what particular line or service going in there, where an improper influence by a Congressman would help determine what airline. But that is almost, it seems to me, a different degree.

Mr. BAKER. I think it is definitely a different degree. I think, however, there are situations—I may well be wrong in this—where really, instead of having airlines competing to get into a single point, you have got communities competing as to which one should be the nonprofit subsidized point on a longer route, and it is only to the extent that you have communities competing that you are likely to have a somewhat similar situation to airlines competing. That is all.

And it seems to me the question that comes here is at what point your desires reflecting those of your constituents get fed into the record.

Mr. Redding's point, I think, is that as long as—certainly they should be in the record. When the record closes the problem gets difficult because there is such a long gap between the closing of the record and the decision, and then the question of whether there should be a further urging on your part or an additional putting into the record, this is the problem. But that your views get into the record when the record is open, it seems to me there is no question at all.

Mr. ROGERS of Florida. Yes. Well, I don't think anyone would say there is going to be a question there. This is where you make an inquiry as to expeditious handling and service.

Mr. BAKER. It seems to me there is no problem even under this bill of expeditious handling if a little argument for something is thrown in at the same time.

Mr. ROGERS of Florida. Thank you.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Keith?

Mr. KEITH. I personally have no questions, Mr. Chairman, but I would like to yield to my colleague from Illinois, that he may ask a question.

Mr. COLLIER. I have had an afterthought question here. Actually it is one I directed to Mr. Hutchinson yesterday and one which has implications that bother me.

As you know, the statutory provisions of this bill are reinforced by a requirement for public disclosure of ex parte communications. If, then, an ex parte communicant made a statement that was entirely fallacious but which was derogatory or even libelous, as I understand it, if this measure is enacted into law that would become a matter of public record. Now this would be, of course, a statement that would not be made under oath. It could be most injurious to a party litigant and, yet, under this law, this libelous statement by, presumably, an irresponsible person would then become a matter of public record or subjected to public exposure. Is this a good thing?

Mr. BAKER. May I comment on that, Mr. Collier?

Mr. COLLIER. Yes.

Mr. BAKER. This did not come up in the discussions within our group, within the TAA. So my views would only be my own. But it seems to me you have raised a very real problem which we did not discuss, and my own hope would be that the difficulties you raise would not prevent your going along with the approach of this bill but that some particular, specific handling of this kind of problem could be dealt with, because, of course, that is a very real danger and if it is libelous and can hurt a man's reputation, because this is the kind of thing that gets on the front page whereas the correction gets on the inner page, I would hope that in any bill you pass you could handle this in some specific way as an exception, as it were, to the rule.

Mr. COLLIER. Because I have knowledge of an incident of this nature which did occur in the past. It would seem to me that we had better deal realistically with this possibility in forming final legislation.

That is all I have, Mr. Chairman.

Oh, I beg your pardon.

Thank you, Mr. Keith.

Mr. KEITH. I yield the floor back to the chairman.

Mr. MACK. Mr. Hemphill?

Mr. HEMPHILL. I'm sorrry to have missed part of your statement, Doctor. I was delayed by a phone call.

Do you believe that any Board should consider what the Congressman from the area affected thinks in making a decision?

Mr. BAKER. Well, I should think, Mr. Hemphill, this would be very pertinent information to the Board member. I would hope simply that it would be fed into the record at the time the Board is developing a record on the case.

Mr. HEMPHILL. I am happy to hear the first part of your statement. Now, the next statement I am going to address to what the gentleman on your right said about a Member of Congress being employed. I think a Member of the Congress is employed from the day he is elected. I think if a baby were born today, he is my employer as of that moment. I am employed to represent my people.

Now, I have no control over the stage at which my constituency demands my services. The only thing I can do when the constituency calls on me is to make some effort to carry out their individual or collective wishes. It has been my thinking, as long as it is open and aboveboard—and I think the press has a right to ask me any question any time about anything they want—I think a Congressman ought to be able to communicate because otherwise you are going to cut off these people from the representation that this particular form of government is supposed to guarantee.

That may be a little elementary but I think, to get back to basic things now, if I communicate with some board and such and such a community writes me and it is my firm belief, after looking into it, that this community would be best served by the activity in this connection, and I make it a part of the record, then what ethical bounds have I exceeded? It is part of the record; it is public. I have represented my people; I have received no fee other than the salary I get, which is for that and for all other services.

Now, where have I exceeded the bounds? This has troubled me because of the statement made by Mr. Boyd which I read, and I didn't get a chance to hear him.

Mr. REDDING. Well, I feel that one thing that must always be kept in mind here is the desirability of the agency proceeding as expeditiously as possible to decision. Therefore, it should establish clear-cut rules for the presentation of evidence at particular times. Everyone should be familiar with those rules. And, in my judgment, everyone should be required to comply with these rules.

Mr. Moss. Would you yield?

Mr. HEMPHILL. Go ahead. Finish your statement, sir.

Mr. REDDING. In my experience, I believe most communities are on notice of these proceedings at the early stages by virtue of prehearing conference notices, by virtue of any number of sources of information that cases are pending. And I believe that, generally speaking, they are on notice of when hearings are held. This is certainly more true today than it was over the past years. Therefore, if your constituents request you at some particular stage in this proceeding to make a representation on their behalf, it seems to me that in the interests of orderly processes and to discourage approaches by others because of the approach you might make that was out of keeping with orderly processes, that you should at that stage comply with the rules which prescribe the timing of your presentation and its content.

In other words, if you are requested prior to the hearing to make this comment or presentation, it seems to me you could properly do so at the hearing. If it develops that, as a consequence of briefs which are filed or somewhere along the line your community feels that you should take an active part in the case, it seems to me that that presentation, again, should be in keeping with the Board's rules that govern the presentations by all parties.

Mr. HEMPHILL. Let me make this statement.

I am not going to vote to be in a position of sacrificing the rule of justice for the rule of procedure because I am violently opposed to such a closed shop in the field of practice before regulatory agencies that a person down the line who normally pays taxes in this area doesn't have any chance at representation, and I am also violently opposed to saying to a community "You have a Congressman up there and he just can't even appear; his appearance is unethical," when it is not unethical in any sense of the word. It is what he is paid to do so long as he is honest, open, and above board about it. I don't think he should get a fee for it, of course.

But the thing that bothers me about the testimony I heard here is the fact that we are trying to wrap this up so that the people are no longer represented and the only things that are considered are technicalities which some very fine and experienced lawyers know something about.

Now I am a lawyer. I could make a motion. There wouldn't be any effort. I could just call down and get somebody to send me a form, and I could make the motion; I assume they are not too strict in their practice. But some Congressman who is not a lawyer is just at the mercy of the Phillistines, and that means his people down the line are, too. Or, perhaps, being a country lawyer, not knowing the technicalities, placing the procedural rules in such a way as to require certain things, and if you don't do that, then the justice of the situation is waived in favor of some procedural mistake, I don't want that to happen, and I say that not in any sense of argumentation but because I am trying to reconcile the ethics of the situation with the responsibility of public office. It is a very serious matter with me because my people don't have any other way to speak except through me up here. Most of them, as far as I know, are so financially distressed that they can't hire counsel sometimes to do the things they want. So they go to their Congressman and want it for free, and we give it to them if we can, and we do our best. I think that is perfectly proper.

I will be glad to yield.

Mr. Moss. You mentioned the fact that Congress should be willing to abide by the rules of the agencies. Don't you think, if we are to have rules which limit the right of the Congress to represent constituencies before these agencies, that these rules should be written by the Congress and not by the agencies?

Mr. Redding. I think that is perfectly appropriate if you care to do so, Mr. Moss.

Mr. Moss. Don't you think we should?

Mr. Redding. You can elect to do this as a matter of legislation, or you can delegate that authority to the agencies.

Mr. Moss. What we have delegated to the agencies is part of our authority, haven't we?

Mr. Redding. Yes.

Mr. Moss. The authority to regulate in these fields in each instance under the Constitution is with the Congress.

Mr. Redding. That is correct.

Mr. Moss. Now did we delegate, along with the authority, our responsibility to regulate?

Mr. Redding. I would think not. I would think that if the practices of the agencies develop in such directions that you of the Con-

gress feel that they exceed reasonable bounds, you are perfectly entitled at that stage to legislate on that specific area.

Mr. Moss. Don't you think we should?

Mr. REDDING. If you disagree with the point of view of the agency, I think it is an obligation to advocate——

Mr. Moss. I think it is an abdication if we have given the agency the right to circumscribe our action. I think the action of the CAB was improper in their rule 14. I don't think we ever told them they could limit our rights. I can find no place where we gave them that authority.

I think when Congress intends to give an agency the power to limit the rights of the Congress, that the Congress must speak specifically.

Now let us take a hypothetical case. The CAB now says that we have to enter a case at the time of the examiner's hearing. But suppose I am elected after the examiner's hearing. Am I then to be denied the right to represent the people who, through their free exercise of the franchise, have selected me?

Mr. REDDING. I would say not.

Mr. Moss, before you arrived I commented on that question, that it does seem to me to be perfectly appropriate for a community to request you to serve openly and of record as their counsel if the community so wishes.

Mr. Moss. Don't you think that the Members of Congress, being, we will say, somewhat competent politicians, when they intervene they want the credit openly and fully?

Mr. REDDING. Surely.

Mr. Moss. And I don't know of any of them that avoid this glory when it is possible to claim it. We usually operate quite openly. We release statements to our local papers, and we acquaint the people of our district with what we are doing in their behalf.

But now let us take a community. It isn't like, necessarily, an applicant for a route. In the community the question of adequacy of service becomes an issue in a municipal campaign, and it could conceivably.

Mr. REDDING. Sure.

Mr. Moss. It is very vital to some of these communities, and an administration falls because it has not acted. Then is that community denied through its Congressman the opportunity to present its views? It is the right of the public to be represented in matters of importance to them.

Now, here in Congress we can always bring a bill in at any stage of the proceedings on any of these matters if we want. This committee can act to report out a bill and order a route changed, or the certification of a carrier. Again we have not delegated but a part of what authority we have under the Constitution, and I think it would be wrong for this Congress to permit the milking away of its rights unless it acts and acquiesces. If it wants to consciously give away part of its powers and put the people on notice that it can no longer speak for them, then that, I think, would be a proper procedure. I might not approve it, but to have these agencies claim that they now have the right to do it, I think, is wrong and we shouldn't do it here by inference. If we are going to do it we should do it very directly, very specifically.

I want to thank the gentleman.

Mr. HEMPHILL. One of the things that concerns me—and you can comment on it as you like—is the fact that by not considering, which apparently the CAB has not done, the Congress roles and responsibilities individually and collectively, they are just making these regulatory agencies pray for executive grab sometime in the future, and while industry might think it would fare better under the executive branch of the Government than under the legislative branch, it would not, in my opinion. I think it would be one of the saddest days for the particular industries involved that they would ever hear of. And that concerns me a great deal because influence peddling is at its worst at the level of the executive branch of the Government. I think the *Goldfine* case certainly emphasizes that, and other cases of that nature.

I was happy to hear that one of the leaders of the House said, when I first came up here, that nobody ever approached him, and I am happy that nobody ever approached me on anything in any way that I thought was unethical or bribery or anything like that. And I am proud of the fact that we in Congress are not approached because they know they had better not approach us. If somebody approached me, I would try to put him in jail. And that concerns me in this question we have before us today, that we are going to generate a question, I am afraid, in which some people will try to justify taking these regulatory agencies out of the Congress and putting them into another branch of the Government.

I would like you to comment on that pro or con if you care to.

Mr. BAKER. Yes, sir, I would like to, Mr. Hemphill. I would like to make very clear, of course, that much of our discussion this morning has been in an area of naturally great interest to you but which was not the part I testified on for the TAA. These have been Mr. Redding's views against his own experience.

Certainly this group that I am representing does not lean toward more executive control and less congressional control of independent agencies, and I wouldn't want any possible idea of that kind to be left by anything I have said. The agencies get their power from the Congress. I personally think that is where they should get it.

We actually have a position in favor of having various agencies elect their own chairman, and, naturally, therefore, we would oppose any change in the ICC arrangement now whereby they elect their Chairman and he is not appointed by the President. So that, in general, my organization that I represent here leans away from any further executive control.

Mr. HEMPHILL. Thank you, sir.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Curtin?

Mr. CURTIN. Thank you, Mr. Chairman.

Mr. Redding, do I understand it to be your position that in matters of communications by Members of Congress that such a Congressman could have no greater or no lesser rights than an attorney who has been retained by one of the parties to the proceeding?

Mr. REDDING. This is, of course, a difficult problem area, Mr. Curtin, as to how far beyond the status of formal counsel you would be privileged to go.

Certainly I feel that the public interest would be served if such communications were matters of public record, and, further, if they were to refrain from including facts that were not previously authorized in the record, because for such a communication to contain such facts and to be received by the agency would encourage other parties to seek to follow the same practice.

So that, while I know that a number of the members of the bar would prefer to have it said that the Members of Congress should be no more or no less in terms of privilege than a party to a case or counsel for a party to a case, I would certainly feel that if you were to go further than that and to have the privilege of communicating to the agency at any time other than the proper time for filing pleadings that such communications should be of record and contain no facts outside the record.

I think that would definitely be a step in the right direction, and I think that fi it were possible to conform your filings with the procedural dates that are called for normally by the parties, this would be even a more desirable approach.

Mr. CURTIN. It has been mentioned by some of my colleagues that oftentimes we don't know about a case until it is practically at the point where an order is about to be issued. And, therefore, we could not make the necessary representations at the time some of these regulations—for example, rule 14—would require.

Do you think we should then be precluded from doing anything, such as making inquiries, because we, as Members of the Congress, have not met the early procedural requirements?

Mr. REDDING. It seems to me that at that stage of the case, if you were to address a letter to the chairman of the agency and inform him of the fact that you have just been notified of that, you feel under an obligation on behalf of your constituents to express yourself on the subject and you would request a privilege of a conference attended by other parties of record, that this would not be an inappropriate request.

I feel generally, however, that for the most part in these proceedings, more and more, the communities are on notice and alert to their rights and privileges and the rules of practice, and that the tendency will probably be less and less that you would be apprised of these matters at the very last procedural stage of the case.

Mr. CURTIN. Then you do feel that the rights of the Members of Congress should not go much beyond that of a retained attorney?

Mr. REDDING. I think, ideally stated, yes, I think so.

As a practical matter, if you could at least achieve the two points I have suggested, in my own personal opinion, I think this would be a considerable improvement.

Mr. Moss. Mr. Curtin, would you yield?

Mr. CURTIN. Yes.

Mr. Moss. You feel that rights should not go much beyond those of an attorney retained by the party. Do you think the responsibilities of a Member of Congress in this field go much beyond that of the attorney?

Mr. REDDING. I think you have great responsibilities in this area, Mr. Moss, and, of course, counsel is endeavoring to do his best to represent the community. You are equally endeavoring to do this. I think there is a great deal of equivalence here.

Mr. Moss. Is there a fundamental difference in the manner of selection of the counsel and the manner of selection of the Congressman?

Mr. REDDING. Of course, you are an elected representative of these people, and counsel is merely appointed; that is true.

Mr. Moss. They have a constitutional right to petition me. They have no constitutional right to petition counsel.

Mr. REDDING. That is so.

I think you are dealing with a difficult area here, and perhaps the proper way to handle this would be by legislative direction by the Congress to clarify it.

Mr. MACK. Mr. Dominick?

Mr. DOMINICK. Mr. Redding, it struck me in the earlier part of the testimony that what you were saying, in effect, is that all Members of Congress are parties to any decision-making process of the independent agencies.

Now if we are to be treated as parties, then, speaking as a lawyer, I would want to be appearing at the proper time, which is at the beginning of the case. So you might easily have 435 people in any particular big case appearing as parties of record on which the real parties of interest in this case would have to file all their briefs, all their statements and include them in all the proceedings that go on both at the hearings before the adjudication officer and also before the board itself. It certainly could do nothing but bog things down. I think everybody would agree with that.

So I wonder if we are not going too far in this congressional thing.

I subscribe wholeheartedly to what Mr. Hemphill was saying earlier on the obligations that we have to appear and the fact that on many cases what we are doing is simply expressing the opinion of those people, by whom we have been elected, to the agency, not with any intent of swaying them but simply making sure—swaying them in an improper manner—but making sure that this opinion of these people is made known not only through people who have a pecuniary interest by virtue of representing one line or another but as a general public concept.

Now do you think there is any justification in those statements that I have been making as to the possibility of delaying the situation rather than improving it?

Mr. REDDING. Well, I feel that you do, of course, as an elected representative of your area have a responsibility to represent that area. I don't know that I would consider each Member of the Congress to be a technical party to the case. I think we need to preserve the concept that the only persons who should be parties in a case are persons who have a relevant interest in the particular issue involved and that, whether this party is a carrier or happens to be a community, a community is as much an adversary party as a carrier. A community has a number of facts to present justifying its need for service. And, therefore, its presentation should largely be governed by the same rules that would govern the presentation by carriers, and in the present state of the aviation art the CAB is now moving in a direction of airports which would serve a number of communities which in the past have been served individually.

So my reaction to your comment is that I feel that the communities deserve representation and they deserve to be heard, but essentially under the same ground rules that apply to carriers, and I would doubt that there would be very much delay involved in a presentation by you, sir, on behalf of a community or of your own point of view on a matter at the hearing stage if you were apprised of the pendency of the case at that time.

It seems to me that, on the whole, the most desirable thing here to achieve, whether it is a presentation by you as an attorney, not a Member of Congress, or by a Member of the Congress, is that that presentation be of record and that that presentation consist of facts, evidence that is of record.

Those are the two principal objectives in my judgment.

Mr. DOMINICK. Well, now, going on to the particular bill before us for a minute, it is my understanding that if we are to present anything of record here we must do it either at the time of the original hearing or must file a motion to reopen the record for this, and in the latter event, if we reopen the record, then we have to go ahead and file a motion, have a hearing on this and go all through it just as though we were a counsel of record. Is that correct?

Mr. REDDING. No, sir; that is not my judgment of the matter. My view may very well be at variance with that of Mr. Boyd. My view of it is that you would be privileged to communicate, send a communication to the board at the oral argument as counsel of record at that stage for a community, the facts and evidence that were either developed at the time of the hearing or were stipulated into the record reflecting later traffic flows and the like which were published in known reference works.

It seems to me you do have that privilege of making such a presentation on behalf of the community if it requests you to do so.

Mr. DOMINICK. As a lawyer in Colorado, for example, there have been occasions before the agencies that I know of where the effect of their decision in a wholly different case in which we have no part may have considerable bearing on what we are going to do representing a client in another area, and under those circumstances it is prefectly possible—in the past at least—to call up and find out what the status of the case is, and to find out where it is, whether legal briefs are being required or what the possibility is in the opinion of the lawyers handling the case for the agency of filing a brief as an intervenor or as an amicus—something of that kind.

I would gather that this type of activity would also be prohibited then if this was an ex parte teelphone call of this kind. Would you think that would be right under the terms of this bill?

Mr. REDDING. It seems to me that your representation to the agency would be appropriate if requested by a party to the case, a community already a party or an applicant or an intervenor to the case. The agency has processes by which any community in another area may express a desire to participate in this case, and if its interest can be shown to be relevant and if it can be affected by the outcome of that case, the agency has provision for granting intervention to such communities.

The problem you are posing is one, I suppose, of this not being the case, the community not being a participant, not being an inter-

venor and not having participated and then requesting you to present a point of view to the agency on its behalf. In my judgment, I feel that if this practice were followed it would tend to encourage similar practices in the future on a compounding basis that I feel would be undesirable.

It seems to me that if you make such a presentation at a stage in the proceeding when this other community is privileged to appear and, in fact, can present evidence under a CAB rule short of intervention, that this would satisfy the requirements.

Mr. DOMINICK. I think you went off on a subject which I was not dealing with at that particular moment, just to set the record straight.

What I was concerned with was the possibilty of the fact that, in order to get information on what was happening on a case, any lawyer anywhere would have to file a motion or would have to have a written document in which all parties were notified that you were seeking information instead of picking up the telephone and finding out how it stands.

Mr. REDDING. I see.

Mr. BAKER. I might comment on that.

As I understand the bill and with the suggested changes that we are for, this would be perfectly proper for you to ask and to be given the information, but there should be a record that you had so asked for it, in the files.

Mr. DOMINICK. Thank you, Mr. Chairman. That is all.

Mr. MACK. Mr. Staggers?

Mr. STAGGERS. I have no questions. I would like to make a comment, if I may, because I didn't hear your testimony, Mr. Chairman. But on this fundamental theory or philosophy of the Government, where the Congress turns over its authority to an agency and says "We give you the authority that has been delegated to us by the elected people," and then we shouldn't have any hand in how it goes except just by one way or another, I think it goes back to a fundamental thing, to me, as Bob Hemphill of South Carolina said, that in the bill of rights the people said they wanted one office that the King couldn't touch, no other person in their land, only responsible to them and responsive to them, and that was the members of the House of Commons.

Well, when this Constitution was set up it was the same way here, that the people said we want one office that is responsible to us that we can go to and that can't be appointed. It is the only office in America that can't be filled by succession or appointment. It has to remain vacant until it goes back to the people either by special election or a general election.

Now we represent the people, and when they can't come to us and say "Here, we want some help" I think then we have delegated our authority to someone else that we were elected to do, and I think that this Congress, if it passes a law giving away its rights to an agency that is not responsible to the people, appointed by the President, appointed by the executive office, the right to make rules and regulations and other things, and if we proscribe or prohibit ourselves from appearing and giving our views or the views of the people whom we represent, I think then we are not following our constitutional government.

And I would like to say this, that I can remember before this very committee a few years ago the chairman of an agency came here, even admitted that some of the things he had done were wrong but he had the right to do them under the authority that we had given him, and I don't mind even citing the case. It was in the *Tucker Automobile* case in which the chairman found out certain information and gave it to the public and ruined that automobile agency, took it out of existence, and he did it on his own by releasing private information that was given to him, and no one on earth can persuade me that it wasn't done because of influences that were brought on him. I so stated when the case was here before this committee. And I believe when we have an agency that the Congress can go to and it is not responsive to the Congress, then we don't have a democracy.

I say we have the right to appear before any agency constituted by the Government, to speak the views of our people. So I think if we pass a law that prohibits that, I think we are going to be in a sad way sometime in America soon. That is only my view, and I just wanted to make that because I believe that a democracy divorcing the people and especially the weak people, the kind of people that don't have the money, as Bob Hemphill said, to hire counsel to do this, we are their voice and that is what democracy is for, to represent those who don't have the money and the power; not that we try to destroy those above. We try to make it kind of better and to help them. But they can take care of themselves. It is those that can't that we have to take care of.

That is my philosophy and I hope that we don't give away that authority.

That is all, Mr. Chairman.

Mr. MACK. Mr. Younger?

Mr. YOUNGER. Thank you, Mr. Chairman.

I would like to ask a question in regard to a statement that was recently made by the Chairman of the CAB which was to this effect. They have recently approved or adopted a rule that anyone who does not appear at the hearing cannot appear at the oral argument before the Board. Many times there are cases with regard to applications for routes. We know nothing about the hearing. The company doesn't appeal to us on it. They go through the hearing, and the hearing examiner, may find that the hearing examiner rules adversely to their case and then they have the oral argument before the board, and they come to us.

Now under those conditions and under that rule we could not represent our constituents. We are deprived of that privilege even though our oral argument would be of record, made in public.

Now do you think that that is good business as far as a rule that would affect Congress?

Mr. BAKER. Mr. Younger, this was not discussed within our organization, so that I have no idea, frankly, exactly what our groups and committees and panels would think on this. And, so I say, it is 20 years since I was on the CAB.

You make a very persuasive statement, but I don't know enough to answer you.

Mr. YOUNGER. It seems to me no rule should be made by a regulatory body that would exclude a Member of Congress from participating in oral argument whether he appeared in the trial examination or

not. I think there is a fundamental principle here. I think the CAB is wrong in that rule though we only learned of that, or I only learned of it just the other day when the Chairman of the CAB appeared before us.

That is all I have, Mr. Chairman.

Mr. MACK. Mr. Moss, do you have anything more?

Mr. MOSS. No, sir.

Mr. MACK. Thank you very much.

Mr. BAKER. Thank you very much, Mr. Chairman.

Mr. MACK. Our next witness this morning will be William L. Cary, Chairman of the Securities and Exchange Commission.

Mr. Chairman, we are very happy to have you here this morning. I understand this is your first appearance before the House Interstate and Foreign Commerce Committee as Chairman of the Securities and Exchange Commission.

STATEMENT OF HON. WILLIAM L. CARY, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION; ACCOMPANIED BY EDWARD N. GADSBY, COMMISSIONER; BYRON D. WOODSIDE, COMMISSIONER; J. ALLEN FREAR, COMMISSIONER; WALTER P. NORTH, GENERAL COUNSEL; DAVID FERBER, ASSISTANT GENERAL COUNSEL; ARTHUR FLEISCHER, JR., LEGAL ASSISTANT TO THE CHAIRMAN; GEORGE P. MICHAELY, JR., SECURITIES AND EXCHANGE COMMISSION

Mr. CARY. It is, sir, and I am delighted to be here.

Mr. MACK. We are very happy to have you here this morning.

Mr. CARY. Mr. Chairman, members of the committee, I am William L. Cary of New York, Chairman of the Securities and Exchange Commission. I am accompanied today by three of my colleagues.

Mr. MACK. Mr. Chairman, would you like to introduce your colleagues at this time?

Mr. CARY. Commissioner Gadsby, Commissioner Woodside and Commissioner Frear. I also have a number of members of the General Counsel's Office, our General Counsel, Walter North, Assistant General Counsel, David Ferber, George Michaely, and my legal assitant, Arthur Fleischer.

This is an area involving procedures with which I have not been very familiar before my taking office, and, as a consequence, I thought I should be well fortified by members of the General Counsel's Office in the event that there were questions of a technical nature which I could not answer.

We are here at your invitation to testify on H.R. 14. The Commission recently submitted to this committee a memorandum of comment on the bill.

With your permission, Mr. Chairman, I should like to offer a copy of that memorandum for the record.

Mr. MACK. Without objection, that will be included in the record.

(The document referred to is as follows:)

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, ON H.R. 14, 87TH CONGRESS

H.R. 14 is intended to promote the efficient, fair, and independent operation of certain administrative agencies, including this Commission. The bill does not differ in substance from H.R. 12731, 86th Congress, as reported out by this committee.

In the 86th Congress extensive hearings were held on H.R. 4800 and H.R. 6774 which were bills to promote the efficient, fair, and independent operation of regulatory agencies and to establish standards of conduct for agency hearing proceedings of record, respectively. After the conclusion of the hearings on those bills comments were requested on a committee print (June 7, 1960) "Possible Substitute for the 'Off-The-Record Communications' Provisions of H.R. 4800 and H.R. 6774." After having received comments from administrative agencies and others, this committee reported out H.R. 12731, 86th Congress (H. Rept. No. 2070, 86th Cong.), which embodied the provisions of the committee print.

H.R. 14 deals with improper influence exerted by parties and others, improper conduct of Commissioners and agency employees, off-the-record communications and publicity as to such communications, and contains provisions for amendment of the Administrative Procedure Act. Thus, section 4 of the bill declares that it is improper to use, or attempt to use, specified methods to influence agency action and enunciates standards of conduct for agency members and employees; section 7 of the bill proscribes ex parte communications between agency members or employees and parties, or persons acting on behalf of parties, to an on-the-record proceeding (as defined in sec. 2(a)(5) of the bill); and section 10 of the bill specifically modifies the application of section 5(c) of the Administrative Procedure Act (5 U.S.C. 1004(c)) to an on-the-record proceeding and provides further that the provisions of the bill would modify and supersede the provisions of the Administrative Procedure Act to the extent that the bill is inconsistent therewith.

This Commission is in complete accord with efforts to eliminate the use of improper methods of influencing the action of regulatory agencies, and to assure that parties to an agency adjudicatory proceeding are informed of their adversaries' communications to the agency and that agency action will be founded solely on the merits of each case. The Commission has bent every effort to achieve these purposes by its rules and general method of operation. In this regard, the Commission has long been sensitive to the need for prescribing rules of conduct and ethics for both its members and employees and for those who appear before it. To that end we have adopted a Regulation Regarding Conduct of Members and Employees and Former Members and Employees of the Commission ("Conduct Regulation") and Canons of Ethics for Members of the Securities and Exchange Commission and Rules of Practice, copies of which are attached. These rules, which essentially cover the same areas encompassed by sections (1) to (8) of H.R. 14, coupled with self-discipline of the Commission members and personnel based on a personal sense of integrity, have operated effectively to assure that Commission action is based solely on the merits of each case and not as a consequence of improper influence.

This is not to say, however, that additional legislation may not be necessary. But any such legislation must be workable from the standpoint of the administrative agency. If established procedures are changed, care must be taken not to destroy the flexibility and relative informality of the administrative process, which permits the agency to accomplish its duties effectively and expeditiously. The problem of eliminating covert influence on agency action while preserving the agency's capacity to operate effectively is one of extreme complexity. This was emphasized by President Kennedy in his recent special message on conflicts of interest to the Congress of the United States (April 27, 1961) wherein the President stated:

"This problem [ex parte communications] is one of the most complex in the entire field of government regulation. It involves the elimination of ex parte contacts when those contacts are unjust to other parties, while preserving the capacity of an agency to avail itself of information necessary to decision. Much of the difficulty stems from the broad range of agency activities—ranging from judicial type adjudication to wide-ranging regulation of entire industries. This

is a problem which can best be resolved in the context of the particular responsibilities and activities of each agency."

In the comments which follow we shall point out some of the difficulties that certain provisions of H.R. 14 might engender in connection with this Commission's operations.

1. Section 2: The definition of the term "agency employee involved in the decisional process" contained in section 2(2) is not clear insofar as it relates to the operations of this agency. Although this Commission maintains an independent Office of Opinion Writing to assist the individual Commissioners in the preparation of opinions, at times personnel of the division of the Commission which participated in the hearing will, with the consent of the other participants, also assist in the preparation of the opinion. This consent ordinarily is not given until the end of the hearing. The Commission assumes that the division personnel do not in these circumstances become "employees involved in the decisional process" until such consent has been obtained. Otherwise, communications with such personnel prior to their participating in the decisional process would become retroactively illegal.

2. Section 4: The language of section 4(a), which applies not only to an "on-the-record proceeding," but to any matter before the agency, is so broad that it could render unfeasible the whole technique of conferences between private persons and the Commission or its staff, which in certain areas is indispensible to the administrative process and prompt compliance with the statutes.

Even with respect to on-the-record proceedings, the Commission should in appropriate areas be free before a hearing is noticed to hold informal conferences not of record. For example, in proceedings such as those relating to effecting compliance with statutory standards, as exemplified by the simplification provisions of the Public Utility Holding Company Act of 1935, informal conferences between the Commission and its staff and the representatives of the companies to be regulated are not only desirable but essential. Although we do not think it was so intended, section 4(a) might be interpreted to prevent such prehearing conferences. We should like to point out that such conferences have had judicial approval. In *Phillips* v. *S.E.C.* (153 F. 2d 27, 32 (C.A. 2, 1946)), the court stated:

"These conversations seem to us no more than legitimate prehearing conferences of the kind which the commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man. Certainly a court would not be justified in interfering with such helpful preliminary conferences to expedite the settlement of details without a very definite showing of prejudice to an aggrieved party or eventual denial of a fair hearing. Here the Commission, as it showed at its hearings, did not hold itself bound by any of the preliminary steps, but gave the final judgment upon its view of the law—which coincides with our own, as we have shown—and in the exercise of a discretion which appears rational and reasonable."

In this connection, we note further that the Attorney General's Committee on Administrative Procedure complimented the Commission on being "highly successful in simplifying and diminishing the usual formal litigious process through its conference technique" S. Doc. No. 10, 77th Cong., 1st sess., Pt. 13, p. 41 (1941)).[1]

The Commission agrees in general with the recognition by the Congress that the type of conduct enumerated in section 4(b)(1) is improper. However, this section is capable of being interpreted to include within the type of conduct recognized as improper the purchase by members and employees of the Commission

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[1] The report of the Attorney General quoted with commendation from an address made by the late Judge Jerome Frank, then Chairman of the Commission, before the Association of the Bar of the City of New York, in which he said: "In the exercise of its powers to give advance absolution, we on SEC try to approach business problems with informed understanding of business needs and ways. While to be sure, when we consider a case after a hearing and argument, we act quasi-judicially, we and our staff, before a hearing, try to assist the companies and their lawyers, accountants and engineers so that the facts presented will lead to decisions which are both in accordance with the statute and businesslike. In those preliminary discussions, we employ the informal method of round-table conference. We do not stand on false dignity. We recognize that, although we have official titles, we are still human beings and do not know it all. We do not wear frock coats, and we do not think frock coatedly. We and those with whom we confer think out loud and in the vernacular; we and they put our feet on the table and unbutton our vests. We want to understand and be understood. Ours is a practical problem, a problem to be worked out, under the requirements of the statute, with business men. We seek decisions which will carry out the law and yet be workable. We think that that is the best means of bringing about cooperation between Government and business."

of any securities subject to the requirements of the Federal securities laws. The Commission does not understand this section as intending such an outright proscription, and views its scope in this regard as being similar to that of our conduct regulation. Thus rule 3 of that regulation absolutely prohibits the purchase of any securities issued by investment companies or public utility holding companies. In addition, no member or employee may purchase any security which to his knowledge is involved in an investigation by, or proceeding before, the Commission, or to which the Commission is a party; nor may any member or employee purchase any security which is the subject of a registration statement under the Securities Act of 1933, or a letter of notification filed under regulation A, or any other security of the same issuer, while such registration statement or letter of notification is pending or during the first 60 days after its effective date. The rule also contains other proscriptions.[2]

Section 4(b)(2) is unduly broad. Its prohibition encompasses the acceptance of any "favor" or "thing of value." We suggest that this be modified so that common courtesies are not precluded. In this connection, rule 1 of the Commission's conduct regulation and rule 6 of its canons of ethics, both dealing with the same subject, refer to "any valuable gift, favor, or service" and "presents or favors of undue value."

In addition, section 4(b)(2) in dealing with employment provides an unduly rigid prohibition. As written, this section could be construed to preclude a file clerk from being employed by any company if his duties with the Commission had included the filing of the company's reports. Our conduct regulation, by rules 1 and 5, concerns the employment problem, which is concededly not simple of resolution, in a manner which is more flexible and equitable.[3]

3. Section 7: General prohibitions against off-the-record communications in an "on-the-record proceeding" are contained in section 7 of the bill. The term "except in circumstances authorized by law", which appears several places in this section, is not defined. It is assumed that the exception embraces the area covered by the analogous exception in section 5(c) of the Administrative Procedure Act and permits the type of conduct covered by the Attorney General's Manual on the Administrative Procedure Act.[4]

Section 7(d) provides that a party's use of an ex parte communication "shall be good cause, in the agency's discretion, for disqualification of the party who made the communication, or on whose behalf the communication was made." The application of this provision to administrative proceedings of the Commission is not clear. For example, in a proceeding to determine whether a broker's registration should be revoked under the Securities Exchange Act of 1934, section 7(d) might appear to mean that if the broker makes an off-the-record communication, the Commission would be authorized to revoke his registration on the basis of that alone, without regard to whether or not he has committed a violation of the Securities Exchange Act, and without regard to whether it is in the public interest to revoke his registration, the present standard for revocation.[5]

4. Section 8: It should be noted that section 8 deals only with written requests for information with respect to the status of any on-the-record proceeding. To the extent that communications which include an inquiry as to status of a proceeding may also contain other statements which might be regarded as an ex parte attempt to influence agency action, this section would require public dis-

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[2] In addition, rule 1 provides, inter alia:

"It is deemed contrary to Commission policy for a member or employee of the Commission to—

"(a) engage, directly or indirectly, in any personal business transaction or private arrangement for personal profit which accrues from or is based upon his official position or authority or upon confidential information which he gains by reason of such position or authority."

[3] It should be noted that sec. 4(b)(1) of the bill is covered adequately by rules 1, 3, and 4 of our conduct regulation and by our canons, sec. 4(b)(3) by rule 1(a) of the conduct regulation, sec. 4(b)(4) by rule 1(g) of the conduct regulation, and sec. 4(b)(5) by rules 1(f) and 4 of the conduct regulation.

[4] H.R. Rept. No. 2070, in commenting on the use of this term, stated (p. 13): "This is the same language used in the Administrative Procedure Act in making an exception from the operation of certain provisions of subsec. (c) of sec. 5 of that act. It is the understanding of the committee that this will exempt ex parte communications with respect to such matters as requested for subpenas, adjournments, and continuances, and the filing of papers."

[5] See hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 4800, 86th Cong., 2d sess., pp. 613–614.

closures of only such communications as might be received in written form. We note the absence of any provision covering oral requests for information on status for whatever consideration the committee may care to give it.

5. Section 10: The bill provides in section 10(a) that in the case of any on-the-record proceeding the provisions of section 5(c) of the Administrative Procedure Act shall apply as though the last sentence of that section had not been enacted. This section of the bill could engender serious difficulties in the operations of this agency. For example, since the Commission authorizes the institution of investigations, it might be urged that the individual Commissioners are "engaged in the performance of investigative or prosecutive functions" and thus none of them could participate in the decision in that case or in a factually related case. It should, therefore, be made clear that the authorization for the institution of such proceedings is not an investigative or prosecutive function.

In addition, the provisions of section 10(a) of the bill would affect adversely the procedure under the Public Utility Holding Company Act of 1935. Proceedings under section 11 of that act, which provides for the simplification of holding company systems, come within the definition of rulemaking under section 2(c) of the Administrative Procedure Act. However, under section 20(c) of the Holding Company Act, all determinations made by the Commission under that act must be after notice and opportunity for hearing, and thus would fall within the definition of an "on-the-record proceeding" under the bill. In proceedings held under section 11 of the Holding Company Act, if waivers had been obtained from all the parties to the proceeding, the Commission's Division of Corporate Regulation, which participates in those proceedings, frequently assisted the Commission in the preparation of its opinion. If waivers were not obtained, the Commission often designated that Division to prepare the initial decision. This procedure, which has been helpful in expediting proceedings, would not be permitted under the bill.

Section 701: Conduct Regulation

701.01 *Authority.* This Conduct Regulation, as amended, was approved by the Commission on November 2, 1956. It was signed by Orval L. DuBois, Secretary of the Commission, and became effective immediately with respect to members and employees having actual knowledge of the Regulation.

701.02 *Purpose.* The Securities and Exchange Commission is adopting a comprehensive regulation to restate the ethical principles which it believes should govern and have governed the conduct of members and employees and former members and employees of the Commission. The regulation includes a general statement of policy following essentially language used by a Subcommittee of the Senate Committee on Labor and Public Welfare in its report on Ethical Standards in Government, and in the related bill, S. 2293, 82nd Cong., 1st Sess., 1951. The regulation also deals more specifically with limitations on outside or private employment, securities transactions, disclosure to superiors of personal interests which might conflict with official duties, negotiation for private employment by persons interested in matters pending before the Commission, and practice before the Commission by former members and employees of the Commission.

The more specific regulations are largely a revision of existing rules set forth in memoranda of instructions which have been issued to the staff from time to time, and previously published opinions concerning the propriety of practice by former employees. Among other things, the revision makes clear that the substantive rules apply to members of the Commission as well as employees. Some of the rules (particularly Rules 4 and 5) contain procedural provisions for reference of questions arising under the rules by an employee to his superior. While the Commissioners themselves cannot refer such a problem to a superior, it is contemplated that, in case of doubt as to the applicability of the substantive provisions, they will either refrain from participation in the matter or will request the advice of their associates, in accordance with past practice.

Paragraph A of Rule 6 prohibits without limit of time former members and employees from appearing before the Commission in a "particular matter" with respect to which they had a prior official responsibility or specific knowledge. This rule is intended to be declaratory of the practice which the Commission has applied in the advisory rulings that have been rendered from time to time in the past concerning the propriety of specific appearances by former members and employees. In attempting to state the rule in concrete terms, it is recognized that the concept of what constitutes a "particular matter" will require interpretation.

In rendering such interpretations the basic policy consideration underlying the rule will require consideration of whether the appearance in question will involve an unethical conflict with prior official responsibilities.

Following is an illustration of the way the Commission believes Rule 6 A should be interpreted. An accountant on the Commission's staff has had occasion to deal officially with a registration statement or annual report for a particular company and after leaving the Commission joins an accounting firm which does accounting work for that company. In the absence of unusual circumstances, such an accountant would not be barred from doing accounting work in connection with future registration statements or annual reports for the same company. If, however, the accountant's official responsibilities had involved an investigation or accounting controversy of a continuing character, subsequent activities for the company involved, although pertaining to new filings, might be so related to the continuing investigation or controversy as to constitute an appearance in respect to the "particular matter" previously dealt with on behalf of the Commission.

Paragraph B of Rule 6 is a new provision which is designed to aid in the administration of the first part of the rule by requiring the filing of reports covering all appearances before the Commission during the first two years after ceasing to be a member or employee of the Commission.

The new regulation supersedes the previous memoranda on Outside or Private Employment (dated Feb. 14, 1949) and on Employees' Securities Transactions (Office Memorandum No. 51–F, dated July 14, 1950) and the statement of Commission policy on negotiation for private employment, as set forth in the minute of June 14, 1939. Rule 6 is intended to be the primary provision governing practice before the Commission by former members and employees and to make more specific and implement the principles enunciated in the statement of the Commission on that subject contained in Securities Act Release No. 1761 and in the opinion of general counsel contained in Securities Act Release No. 1934. However, the new regulation does not repeal the more general provision of Rule II(e) of the Rules of Practice relating to denial of the privilege of practicing before the Commission for unethical or improper professional conduct, on which Releases 1761 and 1934 were based.

The Commission deems this regulation to be included within the exception to Section 4(a) of the Administrative Procedure Act applicable, among other things, to "general statements of policy, rules of agency organization, procedure or practice," and deems notice and public procedures of the character specified in that section to be unnecessary. The Commission, of course, is open to suggestions with respect to the scope and content of the regulation, whether received before or after its effective date.

701.03 *Rule 1. General Statement of Policy.* It is deemed contrary to Commission policy for a member or employee of the Commission to:

A. engage, directly or indirectly, in any personal business transaction or private arrangement for personal profit which accrues from or is based upon his official position or authority or upon confidential information which he gains by reason of such position or authority;[1]

B. accept, directly or indirectly, any valuable gift, favor, or service from any person with whom he transacts business on behalf of the United States;[2 3]

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[1] Members of the Commission are subject also to the following prohibition in Section 4(a) of the Securities Exchange Act of 1934:

"* * * No commissioner shall engage in any other business, vocation, or employment than that of serving as commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this title * * *."

Detailed provisions regarding outside or private employment and transactions in securities and commodities are set forth in rules 2 and 3. Further provisions regarding use and disclosure of confidential information are set forth in paragraph D of this rule and in the note appended thereto.

[2] Members and employees of the Commission are subject also to provisions of the Federal Criminal Code which prohibit any officer or employee of the United States from asking, accepting or receiving any money or other thing of value in connection with any matter before him in his official capacity (18 U.S.C. § 202), and from accepting anything of value for giving or procuring a Government contract (18 U.S.C. § 216). (Footnote added by Release SA–4221, 5/12/60.)

[3] See note 701.03 B following end of rules.

C. discuss or entertain proposal for future employment by any person outside the Government with whom he is transacting business on behalf of the United States; [4]

D. divulge confidential commercial or economic information to any unauthorized person, or release such information in advance of authorization for its release; [5 6]

E. become unduly involved, through frequent or expensive social engagements or otherwise, with any person outside the Government with whom he transacts business on behalf of the United States; or

F. act in any official matter with respect to which there exists a personal interest incompatible with an unbiased exercise of official judgment.[7]

G. fail reasonably to restrict his personal business affairs so as to avoid conflicts of interest with his official duties.

701.04 *Rule 2. Outside or Private Employment.*

A. No member or employee shall permit his name to be associated in any way with any legal, accounting or other professional firm or office.[8]

B. No employee shall have any outside or private employment or affiliation with any firm or organization incompatible with concurrent employment by the Commission. This applies particularly to employment or association with any registered broker, dealer, public utility holding company, investment company or investment adviser or directly or indirectly related to the issuance, sale or purchase of securities. It applies also to any legal, accounting, or engineering work for compensation involving matters in which the Federal Government or any State, Territorial or municipal authority may be significantly interested.

C. No employee shall accept or perform any outside or private employment which interferes with the efficient performance of his official duties. An employee who intends to perform services for compensation or engage in any business shall report his intention to do so to the Director of Personnel prior to such acceptance or performance.

D. No employee shall accept or perform any outside or private employment specifically prohibited to Federal employees by statutes or executive order.[9] For example:

(1) 18 United States Code, Section 283, provides, among other things, that Federal employees are prohibited from acting as agent or attorney in prosecuting any claim against the United States or from aiding or assisting in any way, except as otherwise permitted in the discharge of official duties, in the prosecution or support of any such claims, or from receiving any gratuity, or any share of an interest in any claim from any claimant against the United States.

(2) 18 United States Code, Section 281, provides, among other things, that Federal employees are prohibited from directly or indirectly receiving or agreeing to receive any compensation whatever for services rendered or to be rendered to any person in relation to any matter in which the United States is a party or directly or indirectly interested.

(3) 5 United States Code, Section 62, provides that no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other [Federal] office to which compensation is attached unless specially authorized thereto by law. The provision, however, does not apply to retired members of the armed forces under certain circumstances.

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[4] Detailed provisions regarding negotiations for future employment are set forth in rule 5.

[5] The policy regarding confidential information stated in paragraphs A and D of this rule is intended to cover cases where, apart from specific prohibitions in any statute or other rule, the disclosure or use of such information would be unethical. Detailed prohibitions regarding disclosure or use of confidential information are set forth in rule 122 under the Securities Act of 1933; Section 24(c) and rule 0–4 under the Securities Exchange Act of 1934; Section 22(a) and rule 104 under the Public Utility Holding Company Act of 1935; Section 45(a) and rule 45a–1 under the Investment Company Act of 1940, and Section 210(b) under the Investment Advisers Act of 1940.

[6] See note 701.03 D following end of rules.

[7] Rule 4 provides a procedure for relieving employees from assignments in certain cases, including those covered by paragraph F of rule 1.

[8] With respect to members, this paragraph supplements the statutory prohibition of outside employment contained in Section 4(a) of the Securities Exchange Act, quoted in footnote 1. The remaining provisions of this rule are not made applicable to members in view of the provisions of Section 4(a).

[9] See note 701.04 D following end of rules.

(4) Executive Order No. 9 of January 17, 1873, prohibits, subject to exceptions, Federal employees from accepting or holding office under a State, Territorial, County or municipal authority.

(5) 18 United States Code, Section 434, provides in substance that no person shall act both as agent for a business entity and for the United States in a transaction between the business entity and the United States. (Added 5–12–60 by Release SA–4221.)

(6) 18 United States Code, Section 1914, provides in substance that no government official or employee shall accept any salary in connection with his government service from any source other than the United States. (Added 5–12–60 by Release SA–4221.)

E. No employee shall appear in court or on a brief in a representative capacity (with or without compensation) or otherwise accept or perform legal, accounting or engineering work for compensation unless specifically authorized by the Commission. Requests for such authorization shall be submitted to the division or office head or regional administrator concerned, together with all pertinent facts regarding the proposed employment, such as the name of the employer, the nature of the work to be performed, and its estimated duration. Division and other office heads and regional administrators shall forward all requests, together with their recommendations thereon, to the Director of Personnel for presentation to the Commission.

F. No employee shall publish any article or treatise or deliver any preprepared speech or address relating to the Commission or the statutes and rules that it administers without having obtained clearance from the Commission. The proposed publication or speech will be examined to determine whether it contains confidential information or whether there is any reason why the publication or delivery of the employee's private views on the subject matter would be otherwise inappropriate. Clearance for publication or delivery will not involve adoption of or concurrence in the views expressed, and any such publication or speech shall include at an appropriate place by way of footnote or otherwise the following disclaimer of responsibility:

"The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

G. No employee shall hold office in or be a director of any company which has public security holders, except not for profit corporations, savings and loan associations, and similar institutions, whose securities are exempted under Section 3(a)(4) or 3(a)(5) of the Securities Act of 1933.

701.05 *Rule 3. Securities Transactions.*

A. This rule applies to all transactions effected by or on behalf of a member or employee. Members and employees are considered to have sufficient interest in the security and commodity transactions of their husbands or wives so that such transactions must be reported and are subject to all the terms of this rule.

B. No member or employee shall effect or cause to be effected any transaction in a security except for bona fide investment purposes. Unless otherwise determined by the Commission for cause shown, any purchase which is held for less than one year will be presumed not to be for investment purposes. Any employee who believes the application of this paragraph will result in undue hardship in a particular case may make written application to the Commission (through the Branch of Personnel, attention of Director of Personnel) setting out in detail the reasons for his belief and requesting a waiver.

C. No member or employee shall effect any purchase or sale of a future contract for any commodity without the prior approval of the Commission.

D. No member or employee shall carry securities on margin; nor shall any member or employee borrow funds or securities with or without collateral for the purpose of purchasing or carrying securities or commodities with the proceeds unless prior approval of the Commission has been secured.

E. No member or employee shall sell a security which he does not own, or the sale of which is consummated by the delivery of a security borrowed by or for such member's or employee's account.

F. No member or employee shall purchase any security which is the subject of a registration statement filed under the Securities Act of 1933, or of a letter of notification filed under Regulation A, or any other security of the same issuer, while such a registration statement or letter of notification is pending or during the first sixty days after its effective date.

G. No member or employee shall purchase securities of (1) any holding company registered under Section 5 of the Public Utility Holding Company Act of 1935, or any subsidiary thereof, or (2) any company if its status under such Act or the applicability of any provision of the Act to it is known by the employee to be under consideration.

H. No member or employee shall purchase any securities issued by any investment company prima facie subject to the jurisdiction of the Commission under the provisions of the Investment Company Act of 1940.

I. No member or employee shall purchase any security which to his knowledge is involved in any pending investigation by the Commission or in any proceeding before the Commission or to which the Commission is a party.

J. No member or employee shall purchase any securities of any company which is in receivership or which is undergoing reorganization under Section 77–B or Chapter X of the Bankruptcy Act.

K. The restrictions imposed in paragraphs F to J above do not apply to the exercise of a privilege to convert or exchange securities; to the exercise of rights accruing unconditionally by virtue of ownership of other securities (as distinguished from a contingent right to acquire securities not subscribed for by others); or to the acquisition and exercise of rights in order to round out fractional shares.

L. Members and employees shall report every transaction in any security or commodity within five business days. (Reports submitted by employees in field offices must be placed in the mails within five days of the date of each transaction.) Other changes in holdings resulting from inheritance or from reclassifications, gifts, stock dividends or split-ups, for example, shall be reported promptly. These reports shall be prepared on the official form provided for this purpose, copies of which may be procured from the Branch of Personnel (Form SE–P–3, revised). These reports shall be transmitted to the Director of Personnel. The envelope should be marked "Confidential—Securities Transactions." [10]

M. At the time of taking the Oath of Office a new member or employee shall fill in the information required on Form SE–P–4, revised, relating to securities owned by him or his spouse or any trust or estate of which he is a trustee or other fiduciary or beneficiary, and relating to accounts with securities firms, and relatives who are partners or officers of securities firms, investment companies, investment advisers, or public utilities.

N. This rule does not apply to personal notes, individual real-estate mortgages, United States Government securities, and securities issued by building and loan associations or cooperatives.

O. Any member or employee who is a trustee or other fiduciary or a beneficiary of a trust or estate holding securities not exempted by paragraph N of Rule 3 shall report the existence and nature of such trust or estate to the Director of Personnel. The transactions of such trust or estate shall be subject to all the provisions of Rule 3 except in situations where the member or employee is solely a beneficiary and has no power to control, and does not in fact control or advise with respect to, the investments of the trust or estate, and except to the extent that the Commission shall otherwise direct in view of the circumstances of the particular case.[11]

701.06 *Rule 4. Action in Cases of Personal Interest.* Any employee assigned to work on any application, filing, or matter of a company in which he then owns any securities or has any personal interest or with which he has been employed or associated in the past shall immediately advise the division director or other office head or regional administrator of the fact. Division directors, other office heads and regional administrators are authorized to direct the reporting employee to continue with the assignment in question where this appears in the interest of the Government, taking into account (a) the policy stated in Rule 1 F and G, (b) the general desirability of avoiding situations that require a question of conflict of interest to be resolved, (c) the extent the employee's activities will be

[10] See note 701.05 L following end of rules.
[11] See note 701.05 O following end of rules.

supervised, and (d) the difficulty of assigning the matter to some other employee. Where the employee in question is not relieved of the assignment, his written report concerning the nature of his interest shall be forwarded to the Director of Personnel with a notation that he has been directed to continue the assignment together with such explanation, if any as may seem appropriate. In the event that a division director or other office head or regional administrator deems that he has, himself, such personal interest in a transaction as may raise a question as to his disinterestedness, he may delegate his responsibility in the matter to a subordinate, but in that event shall submit a brief memorandum of the circumstances to the Director of Personnel.

710.07 *Rule 5. Negotiation for Private Employment.*

A. The provisions of Rule 1 C are deemed to preclude negotiation for private employment by an employee who is immediately engaged in representing the Commission in any matter in which the prospective employer is opposing counsel or person chiefly affected. With the approval of his superior or the Commission an employee may be relieved of any assignment which, in the absence of such relief, might preclude such negotiation.[12]

B. No employee shall undertake to act on behalf of the Commission in any capacity in a matter that, to his knowledge, affects even indirectly any person outside the Government with whom he is discussing or entertaining any proposal for future employment, except pursuant to the direction of the Commission, his division director or other office head, or his regional administrator, as provided in Rule 4.

701.08 *Rule 6. Practice by Former Members and Employees of the Commission.*

A. No person shall appear in a representative capacity before the Commission in a particular matter if such person, or one participating with him in the particular matter, personally considered it or gained personal knowledge of the facts thereof while he was a member or employee of the Commission. As used in this paragraph, a single investigation or formal proceeding, or both if they are related, shall be presumed to constitute a particular matter for at least two years irrespective of changes in the issues. However, in cases of proceedings in which the issues change from time to time, such as proceedings involving compliance with Section 11 of the Public Utility Holding Company Act, this paragraph shall not be construed as prohibiting appearance in such a proceeding, more than two years after ceasing to be a member or employee of the Commission, unless it appears to the Commission that there is such identity of particular issues or pertinent facts as to make it likely that confidential information, derived while a member or employee of the Commission, would have continuing relevance to the proceeding, so as to make the participation therein by the former member or employee of the Commission unethical or prejudicial to the interests of the Commission.

B. Any former members or employee of the Commission who, within two years after ceasing to be such, is employed or retained as the representative of any person outside the Government in any matter in which it is contemplated that he will appear before the Commission shall, within ten days of such retainer or employment, or of the time when appearance before the Commission is first contemplated, file with the Secretary of the Commission a statement as to the nature thereof together with any desired explanation as to why it is deemed consistent with this rule. Employment of a recurrent character may be covered by a single comprehensive statement. Each such statement should include an appropriate caption indicating that it is filed pursuant to this rule. The reporting requirements of this paragraph do not apply to communications incidental to court appearance in litigation involving the Commission.

C. As used in this rule, the term "appear before the Commission" means personal appearance before or personal communication with the Commission or any member or employee thereof, in connection with any interpretation or matter of substance arising under the statutes administered by the Commission. As used in this rule, the term "representative" or "representative capacity" shall include not only the usual type of representation by an attorney, etc., but also representation of a corporation in the capacity of an officer, director, or controlling stockholder thereof.

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[12] See note 701.07 A following end of rules.

D. Persons in doubt as to the applicability of this rule may apply for an advisory ruling of the Commission.

701.09 *Rule 7. Employees on Leave of Absence.* The provisions of these rules relative to employees of the Commission are applicable to employees on leave with pay or on leave without pay other than extended military service.

701.10 *Rule 8. Violation and Participation in Violation of Rules.* Knowing participation in violation of this regulation by persons not within the scope of the foregoing rules shall likewise be deemed improper conduct and in contravention of Commission Rules. Departure from any of these rules without specific approval may be cause for removal or for disqualification from appearing and practicing before the Commission.

701.11 *Rule 9. Payment of Tax Obligations of Employees.* Failure of an employee to pay his just tax obligations (except where there exists a bona fide dispute as to the employee's liability therefor) may be a cause for removal or other disciplinary action.

NOTES TO CONDUCT REGULATION

701.03 B. Securities Act Release No. 4221, dated May 12, 1960, amended Rule IB by appending Footnote No. 2, effective May 12, 1960. Succeeding footnotes have been renumbered accordingly.

701.03 D. Various provisions in the statutes administered by the Commission and certain of the rules promulgated thereunder prohibit the disclosure of confidential information by employees of the Commission. The disclosure, or the use for personal benefit, of information contained in any document filed with the Commission which is not made available to the public is made unlawful by the Securities Exchange Act of 1934, Section 24(c); the Public Utility Holding Company Act of 1935, Section 22(c); and the Investment Company Act of 1940, Section 45(a). The following Commission rules prohibit the disclosure of information or the production of documents, whether demanded by subpoena or not, which are obtained by employees of the Commission in the course of any examination or investigation, unless made a matter of public record, or unless such disclosure or production is expressly authorized by the Commission as not being contrary to the public interest: Rule 122 under the Securities Act: Rule 0–4 under the Securities Exchange Act; Rule 104(c) under the Public Utility Holding Company Act; Rule 0–6 under the Trust Indenture Act of 1939; and Rule XIII(i) of the Rules of Practice. The validity of these rules has been sustained by the courts.

In an opinion dated December 29, 1950, the Office of the General Counsel advised the same prohibitions apply to *former* employees of the Commission with respect to information of the types discussed above which was acquired by them while in the employ of the Commission. Accordingly, a *former* employee may not disclose such confidential information to anyone. Should he be served with a subpoena to give testimony based upon his former employment with the Commission, he should immediately advise the Office of the General Counsel of that fact so that the matter may be given appropriate consideration by the Commission.

701.04 D. Securities Act Release No. 4221, dated May 12, 1960, amended Rule 2D by adding two additional subparagraphs designated as (5) and (6), effective May 12, 1960.

701.05 L. "Form SE–P–3, revised, Employees Report of Securities Transactions, now consists of three parts: an original, an employee copy, and a division or office copy. When reporting a securities transaction, employees are requested to use the three parts and submit *all* copies to the Director of Personnel. The employee copy will be date stamped and returned to the employee for his records. The division or office copy, without information as to number of shares and price, will be forwarded to the employee's division or office head, to assist him in connection with making case assignments." (Memorandum of February 6, 1957, from A. K. Scheidenhelm, Executive Director, to all members of the staff.)

701.05 O. Securities Act Release No. 4061, dated April 1, 1959, revised Rule 3 O, effective April 1, 1959.

707.07 A. "The Commission has noted two recent instances in which employees have advertised in New York papers for positions. In each case, current employment by the Commission was mentioned.

"The Commission does not wish to deny to any employee the right to advertise for a position, but considers it in bad taste and a source of possible embarrassment both to the Commission and the employee to reflect in the advertisement present employment with the Commission. This does not preclude a claim of general SEC experience or of special experience in a particular division." (Office Memorandum No. 154, dated July 29, 1947.)

Canons of Ethics for Members of the Securities and Exchange Commission

PREAMBLE

Members of the Securities and Exchange Commission are entrusted by various enactments of the Congress with powers and duties of great social and economic significance to the American people. It is their task to regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens. Their success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jepoardize the strength of our economic institutions.

It is imperative that the members of this Commission continue to conduct themselves in their official and personal relationships in a manner which commands the respect and confidence of their fellow citizens. Members of this Commission should continue to be mindful of, and strictly abide by, the standards of personal conduct set forth in its Regulation regarding Conduct of Members and Employees and Former Members and Employees of the Commission, most of which has been in effect for many years and which was codified in substantially its present form in 1953. Rule 1 of said Regulation enunciates a General Statement of Policy as follows:

"It is deemed contrary to Commission policy for a member or employee of the Commission to—

"(a) engage, directly or indirectly, in any personal business transaction or private arrangement for personal profit which accrues from or is based upon his official position or authority or upon confidential information which he gains by reason of such position or authority;

"(b) accept, directly or indirectly, any valuable gift, favor, or service from any person with whom be transacts business on behalf of the United States;

"(c) discuss or entertain proposals for future employment by any person outside the Government with whom he is transacting business on behalf of the United States;

"(d) divulge confidential commercial or economic information to any unauthorized person, or release any such information in advance of authorization for its release;

"(e) become unduly involved, through frequent or expensive social engagements or otherwise, with any person outside the Government with whom he transacts business on behalf of the United States; or

"(f) act in any official matter with respect to which there exists a personal interest incompatible with an unbiased exercise of official judgment.

"(g) fail reasonably to restrict his personal business affairs so as to avoid conflicts of interest with his official duties."

In addition to the continued observance of these foregoing principles of personal conduct, it is fitting and proper for the members of this Commission to restate and resubscribe to the standards of conduct applicable to its executive, legislative and judicial responsibilities.

1. CONSTITUTIONAL OBLIGATIONS

The members of this Commission have undertaken in their oaths of office to support the Federal Constitution. Insofar as the enactments of the Congress impose executive duties upon the members, they must faithfully execute the laws which they are charged with administering. Members shall also carefully guard against any infringement of the constitutional rights, privileges or immunities of those who are subject to regulation by this Commission.

2. STATUTORY OBLIGATIONS

In administering the law, members of this Commission should vigorously enforce compliance with the law by all persons affected thereby. In the exercise of the rule-making powers delegated this Commission by the Congress, members should always be concerned that the rule-making power be confined to the proper limits of the law and be consistent with the statutory purpose expressed by the Congress. In the exercise of their judicial functions, members shall honestly, fairly and impartially determine the rights of all persons under the law.

3. PERSONAL CONDUCT

Appointment to the office of member of this Commission is a high honor and requires that the conduct of a member, not only in the performance of the duties of his office but also in his everyday life, should be beyond reproach.

4. RELATIONSHIP WITH OTHER MEMBERS

Each member should recognize that his conscience and those of other members are distinct entities and that differing shades of opinion should be anticipated. The free expression of opinion is a safeguard against the domination of this Commission by less than a majority, and is a keystone of the commission type of administration. However, a member should never permit his personal opinion so to conflict with the opinion of another member as to develop animosity of unfriendliness in the Commission, and every effort should be made to promote solidarity of conclusion.

5. MAINTENANCE OF INDEPENDENCE

This Commission has been established to administer laws enacted by the Congress. Its members are appointed by the President by and with the advice and consent of the Senate to serve terms as provided by law. However, under the law, this is an independent Agency, and in performing their duties, members should exhibit a spirit of firm independence and reject any effort by representatives of the executive or legislative branches of the government to affect their independent determination of any matter being considered by this Commission. A member should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety; so also he should be above fear of unjust criticism by anyone.

6. RELATIONSHIP WITH PERSONS SUBJECT TO REGULATION

In all matters before him, a member should administer the law without regard to any personality involved, and with regard only to the issues. Members should not become indebted in any way to persons who are or may become subject to their jurisdiction. No member should accept loans, presents or favors of undue value from persons who are regulated or who represent those who are regulated. In performing their judicial functions, members should avoid discussion of a matter with any person outside this Commission and its staff while that matter is pending. In the performance of his rule-making and administrative functions, a member has a duty to solicit the views of interested persons. Care must be taken by a member in his relationship with persons within or outside of the Commission to separate the judicial and the rule-making functions and to observe the liberties of discussion respectively appropriate. Insofar as it is consistent with the dignity of his official position, he should maintain contact with the persons outside the agency who may be affected by his rule-making functions, but he should not accept unreasonable or lavish hospitality in so doing.

7. QUALIFICATIONS TO PARTICIPATE IN PARTICULAR MATTERS

The question of qualification of an individual member to vote or participate in a particular matter rests with that individual member. Each member should weigh carefully the question of his qualification with respect to any matter wherein he or any relatives or former business associates or clients are involved. He should disqualify himself in the event he obtained knowledge prior to becoming a member of the facts at issue before him in a quasi-judicial proceeding, or in other types of proceeding in any matter involving parties in whom

he has any interest or relationship directly or indirectly. If an interested person suggests that a member should disqualify himself in a particular matter because of bias or prejudice, the member shall be the judge of his own qualification.

8. IMPRESSIONS OF INFLUENCE

A member should not, by his conduct, permit the impression to prevail that any person can improperly influence him, that any person unduly enjoys his favor or that he is affected in any way by the rank, position, prestige or affluence of any person.

9. EX PARTE COMMUNICATIONS

Matters of a quasi-judicial nature should be determined by a member solely upon the record made in the proceeding and the arguments of the parties or their counsel properly made in the regular course of such proceeding. All communications by parties or their counsel to a member in a quasi-judicial proceeding which are intended or calculated to influence action by the member should at once be made known by him to all parties concerned. A member should not at any time permit ex parte interviews, arguments or communications designed to influence his action in such a matter.

10. COMMISSION OPINIONS

The opinions of the Commission should state the reasons for the action taken and contain a clear showing that no serious argument of counsel has been disregarded or overlooked. In such manner, a member shows a full understanding of the matter before him, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute some useful precedent to the growth of the law. A member should be guided in his decisions by a deep regard for the integrity of the system of law which he administers. He should recall that he is not a repository of arbitrary power, but is acting on behalf of the public under the sanction of the law.

11. JUDICIAL REVIEW

The Congress has provided for review by the courts of the decisions and orders by this Commission. Members should recognize that their obligation to preserve the sanctity of the laws administered by them requires that they pursue and prosecute, vigorously and diligently but at the same time fairly and impartially and with dignity, all matters which they or others take to the courts for judicial review.

12. LEGISLATIVE PROPOSALS

Members must recognize that the changing conditions in a volatile economy may require that they bring to the attention of the Congress proposals to amend, modify or repeal the laws administered by them. They should urge the Congress, whenever necessary, to effect such amendment, modification or repeal of particular parts of the statutes which they administer. In any such action a member's motivation should be the common weal and not the particular interests of any particular group.

13. INVESTIGATIONS

The power to investigate carries with it the power to defame and destroy. In determining to exercise their investigatory power, members should concern themselves only with the facts known to them and the reasonable inferences from those facts. A member should never suggest, vote for or participate in an investigation aimed at a particular individual for reasons of animus, prejudice or vindictiveness. The requirements of the particular case alone should induce the exercise of the investigatory power, and no public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law has been violated and that the public welfare demands it.

14. THE POWER TO ADOPT RULES

In exercising its rule-making power, this Commission performs a legislative function. The delegation of this power by the Congress imposes the obligation upon the members to adopt rules necessary to effectuate the stated policies of

the statute in the interest of all of the people. Care should be taken to avoid the adoption of rules which seek to extend the power of the Commission beyond proper statutory limits. Its rules should never tend to stifle or discourage legitimate business enterprise or activities, nor should they be interpreted so as unduly and unnecessarily to burden those regulated with onerous obligations. On the other hand, the very statutory enactments evidence the need for regulation, and the necessary rules should be adopted or modifications made or rules should be repealed as changing requirements demand without fear or favor.

15. PROMPTNESS

Each member should promptly perform the duties with which he is charged by the statutes. The Commission should evaluate continuously its practices and procedures to assure that it promptly disposes of all matters affecting the rights of those regulated. This is particularly desirable in quasi-judicial proceedings. While avoiding arbitrary action in unreasonably or unjustly forcing matters to trial, members should endeavor to hold counsel to a proper appreciation of their duties to the public, their clients and others who are interested. Requests for continuances of matters should be determined in a manner consistent with this policy.

16. CONDUCT TOWARD PARTIES AND THEIR COUNSEL

Members should be temperate, attentive, patient and impartial when hearing the arguments of parties or their counsel. Members should not condone unprofessional conduct by attorneys in their representation of parties. The Commission should continuously assure that its staff follows the same principles in their relationships with parties and counsel.

17. BUSINESS PROMOTIONS

A member must not engage in any other business, employment or vocation while in office, nor may he ever use the power of his office or the influence of his name to promote the business interests of others.

18. FIDUCIARY RELATIONSHIPS

A member should avoid serving as a fiduciary if it would interfere or seem to interfere with the proper performance of his duties, or if the interests of those represented require investments in enterprises which are involved in questions to be determined by him. Such relationships would include trustees, executors, corporate directors and the like.

19. ORGANIZATION

Members and particularly the Chairman of the Commission should scrutinize continuously its internal organization in order to assure that such organization handles all matters before it efficiently and expeditiously, while recognizing that changing times bring changing emphasis in the administration of the laws.

Mr. CARY. In my statement today I shall limit myself to certain of the highlights of that memorandum and to such supplementary statements as may appear necessary.

I. We are in accord with the purposes of H.R. 14 to eliminate the use of improper methods intended to influence the action of regulatory agencies and to attempt to assure that agency action will be founded solely on the merits of each case. We have endeavored to achieve these goals by our own rules and by our general method of operation.

We have long been sensitive to the need for prescribing rules of conduct and ethics for Commissioners and employees and also for persons who appear before the Commission. To that end we have adopted a regulation regarding conduct of members and employees and former members and employees of the Commission—"Conduct

Regulation"—and "Canons of Ethics For Members of the Securities and Exchange Commission, and Rules of Practice," copies of which have been attached to our memorandum on H.R. 14 which you have accepted for the record.

Our "Conduct Regulations and Canons," coupled with the integrity of the Commission and its staff, have resulted in Commission action being based upon the merits of a particular matter rather than any improper influence. This is not to say, however, that additional legislation may not be necessary. But any such legislation should not unnecessarily impede the effective functioning of this agency.

II. We recognize that the problem of eliminating covert influence on agency action while preserving the agency's capacity to operate effectively is one of extreme complexity. It was the subject of extensive hearings before this committee on H.R. 4800 and H.R. 6774 in the 86th Congress, and was recently the subject of concern by the President in his special message on conflicts of interest to the Congress of the United States.

H.R. 14, which is the subject of the hearings, resembles in large part H.R. 12731 as reported out by this committee on July 1, 1960. H.R. 14 eliminates certain of the problems in H.R. 4800 and H.R. 6774 that were discussed in the Commission's testimony on those latter bills, from which H.R. 12731 evolved. However, there are provisions of H.R. 14 which create, or might produce, problems in connection with the operations of this agency.

III. Section 4 of H.R. 14 deals generally with improper conduct by agency members, employees, parties or persons acting on behalf of parties. We agree with the judgment of Congress that the types of conduct enumerated in this section are improper. Such agreement is evidenced by examination of our "Conduct Regulation and Canons of Ethics," which generally coincide in coverage with section 4.

We express concurrence with the philosophy of section 4(b). But we should like to point out the possibility of unnecessarily broad interpretations of this section. For example, we do not interpret the language of 4(b)(1) as intending to prohibit the purchase by members or employees of this Commission of any securities subject to the requirements of the Federal securities laws. We believe that the purpose of this subsection will be satisfied by our "Conduct Regulation".

I might say, to summarize, that, in general, we proscribe the purchase of securities which are involved in an investigation or in respect of which a registration statement is pending or which are subject to regulation under the Investment Company Act or the Public Utility Holding Company Act. That is the general purport of our present rules.

We further note that section 4(b)(2) might provide an unduly rigid prohibition in dealing with employment. This section could be interpreted to preclude a file clerk from being employed by any company if his duties with the Commission had included the filing of the company's reports. It is thought that rules 1 and 5 of our "Conduct Regulation" treat the employment problem—concedely not simple of resoluton—in a manner which is more flexible and equitable.

IV. Sections 5 through 8 of the bill deal with the problem of protecting the integrity of on-the-record proceedings as that term is de-

fined in section 2(3). Prohibitions are imposed against ex parte communications during the course of such proceedings. My remarks today on this topic will be limited to the provisions of section 7.

Section 7 is intended to accomplish several purposes. It prohibits ex parte communications except in circumstances authorized by law and imposes criminal and administrative sanctions upon violators. In addition, this section is designed to give publicity to the contents of certain proscribed communications. We believe that section 7 presents several serious problems.

First, the term "except in circumstances authorized by law," which appears twice in section 7(a), is not defined in the bill. In H.R. 12731, 86th Congress, identical language was employed. The committee report on H.R. 12731 stated, at page 13, that the term was understood to exempt ex parte communications with respect to such matters as requests for subpenas, adjournments and continuances, and the filing of papers. We assume that the exception in H.R. 14 embraces the same matters. However, since the sanctions imposed for violations of section 7(a) include criminal penalties, we think it is essential that the term be clearly defined in the bill itself.

Second, the status of agency personnel who, by stipulation of the parties to a particular proceeding, have been permitted to participate in the decisional process is unclear. Respondents not infrequently agree to this procedure in order to expedite decisions by permitting the agency to have the advice of persons particularly familiar with the case. This is particularly common in the consideration of offers of settlement pursuant to section 5(b) of the Administrative Procedure Act.

Where all interested parties prefer free communication by and with agency personnel to a rigid limitation of such communications to formal proceedings on the record, there seems no reason why this preference should not be respected and the disabilities of section 7 deemed inapplicable.

Third, we should like to point out an anomaly created by sections 7(b) and 7(c), which require that written ex parte communicants be placed in the public file of the agency and that notice of all such communications be given to all parties to the proceeding with respect to which such communications were made. The disclosure required is apparently intended to assure that all parties will be informed of the contents of a written ex parte communication.

We note the absence of any requirement for disclosure of an oral ex parte communication, the need for publication of which is as important as in the case of a written communication. We appreciate, however, that there are difficulties involved in requiring a written statement for the record by the recipient of an oral communication.

Finally, section 7(d) provides that a party's use of an ex parte communication—

> shall be good cause, in the agency's discretion, for disqualification of the party who made the communication, or on whose behalf the communication was made.

The application of this provision to administrative proceedings of the Commission is not clear. For example, in a proceeding to determine whether a broker's registration should be revoked under the Securities Exchange Act of 1934, section 7(d) might appear to mean that if the broker makes an off-the-record communication, the Com-

mission would be authorized to revoke his registration on the basis of that alone without regard to the present statutory conditions for revocation.

V. My concluding remarks relate to section 10 of the bill. This section provides that, in the case of any "on-the-record proceeding," the bill and section 5(c) of the Administrative Procedure Act shall apply as though the last sentence of section 5(c) had not been enacted. Section 10 of the bill further provides that the provisions of the bill shall supersede and modify the Administrative Procedure Act to the extent that the bill is inconsistent with that act.

The Commission objects to the inclusion of section 10 and believes that it creates difficulties which were not intended. The effect of this section is to impose upon certain rulemaking and initial licensing activities the same conditions as to separation of functions as are required of adjudications generally under section 5(c) of the Administrative Procedure Act. Thus, under the first sentence of section 5(c), the same officers who preside at the reception of evidence pursuant to section 7 would be required to make the recommended or initial decision required by section 8.

In its comments in an early draft of the Administrative Procedure Act, the Commission pointed out that the process of preliminary consideration by an examiner, the making of advisory findings by the examiner, and Commission consideration upon briefs and argument upon exceptions to the examiner's report, while affording a fair and efficient procedure where substantial issues of fact were involved and the range for policy determinations narrow, was neither necessary nor efficient with respect to proceedings such as those under the Holding Company Act. In this area every case—

> represents a segment of a nationwide problem which must be determined on the basis of a uniform congressional policy.

The Commission further noted that there were rarely issues of fact in such a case and that the examiner—

> whatever his personal qualifications may be, has no opportunity to see more than dismembered segments of the overall picture.

Where the issues involve the interpretation of earning statements, balance sheets, statistical data, and the application of policy standards to these interpretations, the Commission stated that the interposition of an intermediate decision by a hearing examiner would almost invariably be a wasteful process.

For such reasons we understand the Administrative Procedure Act was written to include within the definition of "rulemaking" or "initial licensing" proceedings under the Holding Company Act as well as under the Investment Company Act. The Commission has developed procedures with respect to these proceedings which adequately protect the rights of the parties involved. Thus, in proceedings under the Holding Company Act, which ordinarily involve numerous parties and are concerned with issues of extreme complexity, we often have designated our Division of Corporate Regulation to prepare the recommended decision, and, where waivers have been obtained from all the parties, the Commission has been assisted in the preparation of its decision by that Division. The enactment of the bill would outlaw this type of procedure and, thereby, impede the efficient and expeditious handling of such cases.

Section 10 of the bill further creates problems in its deletion of the last sentence of section 5(c) of the Administrative Procedure Act which, among other things, essentially relieves the agency from certain of the prohibitions with respect to separation of functions.

If the last sentence of section 5(c) were deleted, it might be argued that, where the Commission authorizes the institution of an investigation, or of an administrative proceeding, individual Commissioners are engaged in the performance of investigation or prosecutive functions, and, to that extent, may not participate in the decision in any resulting case or a factually related case. Such an interpretation would be unfortunate because the Commission itself clearly must have the responsibility of instituting any major investigation or administrative proceeding and should thereafter not be precluded from adjudicating such cases.

This concludes my prepared statement. I shall, of course, be happy to answer any questions.

Mr. MACK. Thank you, Mr. Chairman.

Mr. Younger, do you have any questions?

Mr. YOUNGER. No, thank you.

Mr. MACK. Mr. Chairman, I was wondering about your statement at the bottom of page 3:

> We express our concurrence with the philosophy of section 4(b).

Under your interpretation there is no limitation placed on members or employees of the Commission to invest in securities?

Mr. CARY. There are these limitations, sir:

The first group that I mentioned involve prohibitions; namely, if a registration statement is pending with respect to a security, or if the issuer is subject to an investigation or is a public utility holding company or an investment company subject to our particular acts. There is one further limitation I do want to stress. It isn't a prohibition, but it is, in a sense, regulatory. One may buy securities, but must hold them for investment purposes. In other words, no employee of the Commission, for example, may purchase a security and sell it within a year's time unless otherwise determined upon written application by the Commission for cause shown. This restriction applies to all the securities which may be purchased. There is, of course the group which I mentioned which may not be purchased at all.

Mr. MACK. That is by rule of——

Mr. CARY. That is by rule of our Commission. As I recall, it is rule 3 of our conduct regulation, entitled "Security Transactions." I suppose it would limit every employee and Commissioner to Government bonds, if we didn't allow investment purchases subject to those regulations and proscriptions, which I have mentioned.

Mr. MACK. In other words, you do not permit all of the employees to invest in most all of the securities other than those which are being contested or those which are before your Commission directly or indirectly for some kind of action?

Mr. CARY. Or are under our regulation pursuant to the Public Utility Holding Company Act or Investment Company Act. For example, that keeps us from buying mutual funds. But it is true that our employees may purchase, and the Commissioners may, securities of, shall we say, standard companies on the exchanges.

Mr. MACK. Well, I understand the President sold all of his securities after he became President. Do you think that was an appropriate thing for the President to do?

Mr. CARY. Far be it for me to comment on an action taken by the President. I certainly think that his role is somewhat more significant than our own.

Mr. MACK. Off the record.

(Discussion off the record.)

Mr. MACK. Back on the record.

I thought that perhaps he had done this because he felt that the people in authority who had the responsibility of making major decisions should not be holding these securities.

Now it would raise the same question, I think, in regard to your agency, as to whether or not members of your agency hold various securities.

Mr. CARY. I have seen comments with respect to that. And Commissioner Gadsby just reiterated the point I was going to make, that in the event a matter comes before us involving any company in respect of which we hold a security, we disqualify ourselves.

Furthermore, we have a very rigid disclosure program so that there is filed with our Director of Personnel all our holdings. Those are two major protections, I think, that arise in that connection.

Mr. MACK. That is required also by your rules?

Mr. CARY. That is required by our rules. That is also under section 3.

Mr. MACK. Mr. Chairman, I want to thank you very much for your testimony this morning.

Mr. CARY. I enjoyed being here. Thank you very much, sir.

Mr. MACK. The committee will stand adjourned until 2 o'clock this afternoon, and at that time we will hear the Federal Trade Commission.

(Whereupon, at 12:10 p.m., the committee recessed until 2 p.m., this same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

This afternoon we are privileged to have as our witness on H.R. 14 the Honorable Paul Rand Dixon, Chairman of the Federal Trade Commission.

I believe this is your initial appearance before this committee since your assuming the important duties and responsibilities of that great organization, Mr. Dixon.

Let me, on behalf of the committee, extend you a cordial welcome. I have a feeling we will probably be having you before this committee on numerous occasions in the future.

STATEMENT OF HON. PAUL RAND DIXON, CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY J. V. BUFFINGTON, ASSISTANT TO THE CHAIRMAN; J. N. WHEELOCK, EXECUTIVE DIRECTOR; J. M. HENDERSON, GENERAL COUNSEL; AND CHARLES GRANDEY, ASSISTANT TO GENERAL COUNSEL

Mr. DIXON. Mr. Chairman, let me say how pleased I am to come before this committee because I know this to be our parent committee.

May I introduce, before I read this statement, several of the staff I have brought with me.

The CHAIRMAN. We will be glad to have them noted for the record.

Mr. DIXON. On my left is Mr. Charles Grandey, Assistant to the General Counsel.

And this is Mr. John Victor Buffington, my assistant.

And this is Mr. John N. Wheelock, the Executive Director of the Federal Trade Commission.

And Mr. J. M. Henderson, the General Counsel.

The CHAIRMAN. Do you want a chair for the General Counsel up there? That can be quickly arranged.

Mr. DIXON. Well, I think if I get into difficulty, they can dash up here.

Mr. Chairman and members of the committee. I have been Chairman of the Federal Trade Commission now since March 21 of this year. Of course, I am appearing here today to offer comment with respect to H.R. 14.

At was stated in my letter to this committee of May 25, 1961, with regard to H.R. 14, the Commission is in complete agreement with the purposes and objectives of the bill. We did not in our letter endeavor to comment on each of the specific provisions or the express language thereof but, rather, expressed our agreement with the substance of the provisions, with two exceptions.

With regard to section 7, we deferred to the opinion of the Attorney General as to whether the provisions of that section were sufficiently definitive and specific to meet the constitutional requirements for a criminal statute, and we noted, without objection, that section 9 of the bill would amend the Federal Trade Commission Act so as to omit "inefficiency" as a cause of removal of a Commissioner.

The Commission, as you know, is a quasi-judicial administrative agency which, by its very nature, was created for and does exercise judicial, investigative, and prosecuting functions. It must continue to exercise all three of those functions if it is to carry out the congressional intent in its creation.

Any legislation, therefore, which deals with the separation of functions within the Commission and ex parte communications must be carefully considered by our Commission with the twofold purpose of conforming our procedures and rules and regulations to the principles and purposes expressed in H.R. 14, and, at the same time, preserving the ability to exercise our investigative, prosecuting and judicial functions in as efficient and expeditious a manner as is possible in the public interest.

As you know, the Commission and its representatives expressed their views in considerable detail on this general subject matter in connection with H.R. 4800 and H.R. 6774, which were considered by the second session of the 86th Congress and dealt with substantially the same subject matter as H.R. 14.

I am glad to note that in the succeeding bill, H.R. 12731, introduced as a result of the committee's hearings on H.R. 4800 and H.R. 6774, many of the Commission's comments and suggestions designed to accomplish the purposes I have just referred to in the Commission's consideration of this general problem were adopted.

There are a number of provisions in H.R. 14 which it is important to comment on, for the purpose of advising the commmittee of the problems which they may create for our agency and explore the meaning intended by the particular provisions I shall comment on, in order to be as helpful as is possible in your consideration of this very important matter.

In subsection (2) of section 2 the term "agency employee involved in the decisional process" is defined as including any employee of an agency who is subject to the immediate supervision of a member of the agency and any employee of an agency who is charged with the preparation of decisions with respect to proceedings before the agency.

It is not clear what the term "decisional process" and the phrase "preparation of decisions with respect to proceedings before the agency" encompass.

I am confident that the committee is aware of the fact that many members of the Commission's staff participate in making various kinds of decisions at different stages in the processing of individual case matters. These decisions include but are not limited to those with respect to initiation of investigations and conclusions and recommendations of supervisory personnel in the investigational and litigation processes in cases which are first presented to the Commission for its initial determination as to whether a complaint shall issue.

Similarly, staff employees make decisions in individual cases where informal settlements are effected. In many such matters the Commission makes the final determination. The same is true with regard to the Commission's substantive rulemaking proceedings under statutory authority, specifically in connection with the Wool Products Labeling Act, the Fur products Labeling Act, the Textile Fiber Identification Act and the Flammable Fabrics Act. The Commission does, upon a consideration of all of the facts presented in those rulemaking proceedings, adopt rules and regulations which have the effect of law.

Inasmuch as the meaning of the terms "decisional process" and "the preparation of decisions with respect to proceedings before the agency" is not clear, it is believed that it would be advisable to clarify their meaning to enable the Commission to adopt regulations which would accomplish the purposes expressed in section 7(a)(1). It is especially important to clarify the meaning since a violation of section 7(a)(1) involves criminal penalties.

With regard to section 2, subsection (3), the term "on-the-record proceeding" is defined in this section to include—

> any proceeding before an agency in the case of which agency action is required by law or agency rule to be based on the record of an agency hearing. * * *

It is believed that it was the intent of this definition to limit the meaning of the term "on-the-record proceeding" to those matters where the decision or action of the Commission is to be based solely or entirely on the record of an agency hearing. However, the absence of the word "solely" in that portion of the definition is possible of being construed so as to include any Commission action or decision which is based in part but not entirely upon the record of an agency hearing.

This possibility is of concern especially in connection with the Commission's substantive rulemaking duties in the administration of the Wool, Fur, Flammable Fabrics, and Textile Fiber Acts. In the formulation of those rules it is essential that the Commission have available to it in its consideration of the rules to be promulgated unbiased expert opinions, trade secrets, and technical guidance and advice from practical experts in the field which the Commission would be unable to obtain for various business and competitive reasons if it were necessary to make that information and advice a part of the record.

The promulgation of these rules is not adjudicatory in nature, and they have no effect on past acts or practices of individual concerns affected by them. On the contrary, they apply to all within the particular industry in general and are designed to govern future conduct.

In order to preserve access to these very essential sources of expert and technical information in such matters, it is believed that it would be desirable to add the word "solely" after the word "based" in the third line of subsection (3), in order to clearly preclude the section being later construed to include all proceedings where Commission action or decision is based in part on the record of an agency hearing.

This suggestion is in harmony with the President's suggestion in his message on ethical conduct in the government of April 27, 1961, Public Document 145, section 2, page 7.

In regard to section 2, subsection (5), an "ex parte" communication is defined in this section to be one with respect to a "proceeding" or with respect to the consideration or decision of a "proceeding" where reasonable notice thereof is not given, in advance of such communication, to all interested parties with the exception noted in the subsection.

It is believed that the failure to further define the term "proceeding" in this section as an "on-the-record proceeding," as is done in subsection (3) of section 2, may permit of a construction of the unqualified word "proceeding" to include any matter of an informal nature and our rulemaking proceedings.

In the event such a construction were to be placed upon the meaning of the word, the section would then require an advance notice of all communications regarding such matters to all interested parties, with the exception noted in the section. It would, in my opinion, seriously impair the effectiveness and expeditious handling of all informal matters within the Commission, and additionally it would seriously handicap the Commission in its investigational and rulemaking functions.

The Commission has always preserved the confidentiality of the identity of applicants and potential witnesses in the informal stages of its various procedures. That protection, the Commission has found,

is essential to its ability to obtain the requisite information to enable it to make initial determinations with respect to future action in individual cases prior to the issuance of complaint and to the promulgation of rules and regulations in its rulemaking procedures.

It is not believed that it was the intent of Congress to include communications relating to such matters in the term "ex parte communications."

In order to clarify the applicability of that definition and to preserve the Commission's informal sources of information prior to formal proceedings in case matters and in proceedings leading to the adoption of rules and regulations in rulemaking proceedings, it is suggested that the word "proceeding" in lines 1 and 2 of subsection (5) of section 2 be preceded by the words "on-the-record."

This suggestion would conform the definition to the one contained in subsection (3) of section 2. My suggestion in this respect would also seem to be in harmony with the purposes of the bill as expressed in the declaration of policy contained in section 3, subsection (a) (3), which section would only prohibit "off-the-record" communications in proceedings in which agency action is required by law or agency rule to be based on the record of an agency hearing.

I am in complete agreement with the declaration of policy and provisions thereof contained in section 3.

There is a possible difficulty in the wording of a portion of section 4(a) of the bill. I am also in complete accord with that section as it is now worded, ending with the word "means" in the third line from the last line of the paragraph. The remainder of the sentence and the paragraph does, however, present a difficulty for the Commission.

That sentence reads "rather than by reliance upon a fair and open presentation of facts and arguments in accordance with established procedures."

Subsection (c) of section 4 requires the Commission to prescribe regulations implementing and supplementing the provisions of subsection (a). If that provision of subsection (c) is construed to require the adoption of regulations by the Commission which would necessitate an "open presentation of facts and arguments" in all matters, including those of an informal or rulemaking nature, then the requirement would, in effect, preclude all informal disposition of matters, however trivial, by the Commission, because of the requirement that they be disposed of only upon "open presentation of facts and arguments."

The same difficulty is confronted in connection with consent settlements. It is believed that the purpose and the effectiveness of section 4(a) can be fully preserved by closing paragraph 4(a) after the word "means" in the third-from-the-bottom sentence of that subsection, and eliminating the remainder of the sentence and paragraph as it now appears in the bill.

This suggestion would, in my opinion, prevent the use of improper influence without a possibility of the subsection as now worded being construed to require an "open presentation of facts and arguments" in all matters.

In considering section 4(b), subsection (2), it is noted that it is prohibited for a member or employee to accept "* * * or thing of value" from any person, et cetera.

While I am in complete accord with the purpose of this subsection, I would bring to the committee's attention the problem which that particular phraseology of the subsection raises.

As you know, Commissioners and employees of the Commission, in the performance of their official duties, frequently are required to participate in many kinds of industry gatherings and meetings, either as speakers or panelists, and it is not unlikely that in many such instances there will be present industry members or their representatives who have a pecuniary interest in a proceeding or matter before the Commission. In practice, these meetings frequently occur in connection with meals, as at banquets in trade association and other industry group conventions. In addition, it infrequently happens that the particular industry meeting where the Commission member or employee is a speaker or panelist may be held in a hotel where the rates are such that the Commission representative cannot be fully reimbursed under present Government limitations. In the case of meals under the circumstances above referred to, it is believed that it would be contrary to the very purposes for which the Commission representative is present to be forced to decline the meal.

It is suggested that the committee consider adding to subsection 4(b)(2) the following:

> Nothing herein shall preclude:
> (a) Receipt of bona fide reimbursement, to the extent permitted by law, for actual expenses for travel and other necessary subsistence * * * in which no Government payment or reimbursement is made: *Provided, however,* That there shall shall be no reimbursement or payment on behalf of the official for entertainment, gifts, excessive personal living expenses, or other personal benefits.

The above is taken from the language of section 5(a) of Executive Order 10939 entitled "To Provide a Guide on Ethical Standards to Government Officials", issued May 5, 1961.

Section 4(b)(2), as amended, is not understood to prohibit the usual entertainment incident to conventions, annual bar meetings, et cetera.

In respect to section 7 it is noted that the subsections thereof are limited by subsection (a) to "on-the-record proceeding." In the event my suggestion with respect to section 2, subsection (3), containing the definition of "on-the-record proceeding", namely, that the word "solely" be added before the word "based" in the third line of that subsection is followed, much of the difficulty with the section will be removed.

In our May 24, 1961, letter to the committee, commenting on H.R. 14, with respect to section 7 thereof, the Commission advised that it would defer to the Attorney General as to whether or not the provisions of that section are sufficiently definitive and specific to meet the constitutional requirements for a criminal statute.

As the Commission said in connection with its letter to the committee of July 13, 1960, commenting on H.R. 12731, among the reasons for concern in this respect was the indefiniteness of the sentence "except in circumstances authorized by law" with emphasis on the words "authorized by law" in subparagraphs (1) and (2) of section 7(a).

In addition, it is pointed out that subparagraphs (1) and (2) cover all ex parte communications as that term is defined in section 2, subsection (5) of the bill, whether or not the communication is oral or

in writing, and, more important, whether or not the communication bears on the issues or merits involved in the proceedings.

The difficulties involved in handling oral ex parte communications under section 7 have been previously explained in full in connection with prior bills, but it is believed that, in addition to the uncertainty as to the exact communications which must be dealt with in accordance with the provisions of section 7, the fact that violations of the subsections of that section are made a crime and subject to severe punishment would result in the filing of a large number of such communications with the secretary in order to avoid the possibility of violation and subjection of the offender to the criminal penalties.

It is believed that it would be desirable to more fully define the excepted communications, other than "in circumstances authorized by law" and limit the covered communications to those dealing with the merits or issues in adjudication proceedings.

As was pointed out in the Commission's May 25, 1961 letter, section 9 of the bill does amend the Federal Trade Commission Act so as to eliminate "inefficiency" as a cause for removal of a Commissioner.

With respect to section 10(a), it is believed that the amendment contained therein of section 5(c) of the Administrative Procedure Act, so as to eliminate the following sentence in that provision of the APA:

"Nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency," does present substantial difficulties for the Commission in the handling of its "on-the-record" proceedings.

I recognize the desirability of the "separation of functions" provided by section 5(c) of the APA. The Commission has by organizational structure and the adoption of procedural rules and regulations, precluded all ex parte contacts in connection with "on-the-record proceedings" between it and members of the investigative and prosecuting staffs in a particular case or in a factually related one. Section 10(a) of H.R. 14, by making the Commission and Commission members subject to the provisions of section 5(c) of the APA, raises serious questions as to whether or not the Commission would be precluded from performing its normal functions concerning investigation and prosecution in a case and still render the final decision.

The Commission has delegated many of its investigational and prosecution functions to its staff and contemplates some further delegations of these functions.

At present, in accordance with section 5(b) of the Commission Act, which provides in effect that whenever the Commission shall have reason to believe that any person, et cetera, has been or is violating section 5 of its act and if it appears to the Commission that a proceeding by it in respect thereof would be in the interest of the public it shall issue its complaint, the Commission considers all investigated cases presented to it by the staff with recommendation that complaint issue and makes the necessary initial determination required by the referred to portions of 5(b) of its act and directs that complaint issue. This consideration of the matter by the Commission may be construed to be in the nature of both an investigatory and prosecution function.

In addition, under section 5(a)(6) of the Federal Trade Commission Act, the Commission is charged with the duty of preventing

violations of its act. In accordance with that duty, the Commission frequently, on information available to it from various sources, including its own investigational and other files, on its own motion directs the staff to instigate investigations of particular matters. Section 10(a) of H.R. 14 could possibly be construed to preclude them from adjudicating any case based on these investigations—and I call the committee's attention to (see Attorney General's Manual on the APA, p. 58 (1947)).

Further, in connection with investigations, section 6(b) of the Commission Act authorizes the "Commission" to require the filing with it by special order reports or answers in writing to specific questions, and under section 9 the Commission is authorized to issue subpenas which the statute requires be signed by any member of the Commission. These two procedures or functions may be investigatory in nature within the meaning of section 5(c) of APA. It would appear that the exercise of any of these above-described functions, which are incidental to the very nature of a quasi-judicial administrative body, might preclude the Commission, or in the case of subpenas the Commissioner who signs them, from taking part in the ultimate decision in the particular case of classes of cases and thereby prevent the Commission or Commissioner from exercising its or his judicial function. I believe that section 5(c) of the Administrative Procedure Act adequately prevents contacts between the staff having any connection with the investigatory or prosecution function in any case or related case or cases from contact or communication with the Commission in connection with an adjudicated matter. I think any such revision of this section, as is contemplated by section 10(a) of the pending bill should be given most serious consideration.

In closing, I would like to reiterate that the Commission is fully in accord with the purposes of H.R. 14. My comments are submitted for the purpose of presenting to the committee the possible difficulties which some of the language and provisions of the bill as now worded present for the Commission, with the view of being as helpful as possible to the committee in its consideration of this very real problem, with which both the committee and we are deeply concerned. I will be happy to answer any questions the committee may have at this time.

The CHAIRMAN. Thank you, Mr. Dixon, for your very forthright and explicit statement on this question. We are glad to have your suggestions as well as your comments. Mr. Hemphill, do you have any questions?

Mr. HEMPHILL. No, Mr. Chairman. I have enjoyed the statement.

The CHAIRMAN. Mr. Sibal?

Mr. SIBAL. No.

The CHAIRMAN. Mr. Dominick?

Mr. DOMINICK. I would like to ask a couple of questions, Mr. Chairman. Would you say that part of the concern that has been created giving rise to this bill is the fact that the three functions of an investigatory, prosecution, and judicial decision are all within one agency?

Mr. DIXON. Well, the reference in my statement certainly to section 10(a) of the bill points up one of the fears that I would have if the bill were passed in its present form, because it is very clear that when

this Federal Trade Commission was created there was vested here part of the legislative investigative powers of the Congress itself. They will be found in section 6 and section 9 of the Commission Act.

Also, there was vested there the responsibility for the Commission to do this investigating, and after they had done the investigation, if they had reason to believe based upon that, that the basic laws they are sworn to administer are being violated then they would issue their complaint.

Once the complaint is issued, as I would understand it, we then move in to adjudication.

In a sense, let us say, we wear two hats—one the investigator and prosecutor, the other the judge.

Now the Administrative Procedures Act came along in 1946 aimed at this specific criticism. Since the Administrative Procedures Act has been passed by virtue of the internal reorganization and procedures within the Commission there have been separated completely from adjudication those members that participate in investigation and trial, from those people that participate with the Commission in adjudication and judging. But, if the bill were passed with this section (c) in it I would not concede that it would do this, but I think that this committee would want to know, perhaps, what you might accomplish will be in one sense creating a special trial board where these type of matters are tried, and then there would be removed completely from the responsibility of the Commission and, specifically, from me as Chairman, any responsibility or ability to determine what cases would be brought, how the money the Congress gives us would be spent, what areas we would go in.

Since I have been Chairman of the Commission I have been before several committees and I think I sense one thing the committees of Congress are a little worried about, is that these commissioners who are appointed by the President, approved by the Congress, are getting too far away from the animal that the Congress created. And I would be fearful here, sir, that unless we retain the language that is presently in the Administrative Procedures Act in the form of making clear that this does not apply to Commission members, only to staff people, that more harm than good would come from it.

Mr. DOMINICK. Would you read back for me the last sentence?

(The record was read.)

Mr. DIXON. In this connection, sir, I read you what appears in the Attorney General's manual on this point. The last sentence of section 5(c) sets forth certain exemptions from the requirements of the subsection and these have already been discussed, except the provision that—

> nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency. It was pointed out that this exemption of the agency itself or the members of the board who comprise it is required by the very nature of the administrative agency where the same authority is responsible for both the investigations, prosecution, and hearing and decision of the cases.

I pointed that up in my statement that I have read.

Mr. DOMINICK. At what point, Mr. Dixon, do inquiries and letters and factual material received from Congressmen create the most problems in the decision that you may be making?

Mr. DIXON. Well, I do not think that letters from Congressman or Senators create any problems.

I have worked my adult life since 1938 with members of the staff of the Federal Trade Commission and various parts of the Commission, and since 1957 I served as counsel for the Senate Antitrust and Monopoly Subcommittee. I saw both sides of it. And we welcome the letters and inquiries that some people may think may worry these agencies. The interest, I think, of the public is being served, you might say.

We get a great number of letters from Congressmen and Senators. This is by nature of the fact, in my opinion, that the people throughout the country are conversant—they know you—that if they have a troublesome problem they write you—they write to you first—and if it is in a particular area, such as the area we are sworn to perform in, it is but natural that you would send it there for attention. When it comes there, obviously, it must be determined whether it is something that we do have something to do with. If it sets forth a nature of complaint that we should within our sworn duty do something about we put it in the hopper and try to find out what it is all about. If it then appears to be a matter that is within our statutory authority within the public interest, that we should proceed, we will then develop it.

This is going on down on the staff level. This is what staff people have to do.

We do this in many ways.

I now, since going to the Commission, want this Commission to raise its eyes and quit going after one, one, one person in a whole industry, but use the tools you gave us 47 years ago, such as section 6(b), where we can move into a whole industry and get a great deal of information to determine whether this is an isolated matter or a matter that a whole group is participating in.

Mr. DOMINICK. Mr. Dixon, would you then be in agreement with an amendment to the bill that should exclude Members of the Congress from its provision?

Mr. DIXON. I would not be in approval of any amendment that would exclude any Congressman from calling me at any time on anything that has to do with investigation and prosecution, nor would I object to the Congressman or Senator ever calling me and asking me what any member of the public can ask me, "What is the state of this docket? What is the status of this case?" I have no objection to that. And I do not think it should be made a matter of record, either, because it would encumber the record. And I think that is what is clear going through here. It is when you get over into my judging function that we are talking about—we are talking about when do I become a judge. Now if you ever get yourself in the position where you cannot call me and say, "Why haven't you done something about this complaint?" or, "Tell me, what are you doing down there on a complaint you issued 6 years ago? What is the status of it? When are you going to get through with it?" If you ever get in that position, how are you going to answer your constituent, I do not know.

Mr. DOMINICK. That is the point I was trying to bring out. Let me ask you just a couple more questions.

You actually make a determination as a member of the board when you decide whether or not to issue a complaint because after that time, when a complaint is issued, the person against whom the complaint is issued has the burden of proof to show that it is not correct?

Mr. DIXON. That is wrong.

Mr. DOMINICK. That is true in certain cases.

Mr. DIXON. Not here, because this is not true. The burden remains with the Federal Trade Commission to prove that the law is being violated. The issue will be drawn; we charge someone with a matter and the complaint is served, and he is afforded the opportunity to answer or default under our rules. Let us assume——

Mr. DOMINICK. As a lawyer I will not get into an argument with you on that, although I think I could. Let me ask you this: You do reach a decision at that point as to whether or not a complaint should be issued. Now if this is true, if this wording were determined to be a part of that decision, this would mean that we would have to come in as Members of Congress, and so would everybody else who was involved in this, and becomes parties while you were still conducting a secret investigation, would not that be true?

Mr. DIXON. I think that, probably, is one of the effects. In other words, if it means that we could do nothing else every time we moved that you were advised and given a chance to come in and kept fully aware, I do not think that we would get anywhere.

Mr. DOMINICK. Thank you. That is all.

The CHAIRMAN. Mr. Sibal.

Mr. SIBAL. I would like to ask one question. I was very much interested in your testimony, and I compliment you on it. On this question of the activity by a Member of Congress, a representative public official, in his capacity of responsibility to look after the interests of his constituents, he contacts you at the Commission at a time when you are adjudicating the case. I clearly understand that you feel that he must be able to do this in order to carry out his responsibility.

Mr. DIXON. Provided, of course, that the status of the case was such as you might ask the clerk of the court about it.

Mr. SIBAL. He is asking about the status, but you do not include——

Mr. DIXON. Merit.

Mr. SIBAL (continuing). Merit?

Mr. DIXON. No, sir.

Mr. SIBAL. You think it would be improper for him to comment on the merits?

Mr. DIXON. I do not think anyone would ask or argue with me about the merits. I have served with the Commission, in my background from time to time, on detail in the office, and even in that capacity answered calls from Congressmen and Senators, and I never in my experience had a Congressman or a Senator, as soon as the case has gone to complaint or you told them, but who immediately did not tell you that he was not interested in trying to influence you—he was merely trying to find out what was the situation, what was the status of the case, how long has it been issued, where is it now, when is it likely to get finished.

Mr. SIBAL. In your experience has it, also, been true that other people accept this as the role that you play that when you do have

a conversation with a Member of Congress concerning the status of a case which you know to be highly proper and the Congressman knows to be highly proper—have you been able to sell everybody else the idea that the only communication you had was regarding the status of the case?

Mr. DIXON. I never was involved in one of them where the question came up, so I could not say.

Mr. SIBAL. Do you know of any?

Mr. DIXON. I could not answer that. I have read about such instances in the paper that have been developed. Sometimes I'm quite sure that they can be misunderstood.

But let us take the on-the-record proceeding complaint, and such a call would come to me, if I understand this bill imposed upon me would be the necessity for me to immediately write a memorandum of it and put it in the record. If this bill passes, I want it perfectly understood that I, as Chairman of the Federal Trade Commission, Mr. Chairman, am going to get most of these calls just by nature that they will come to me as Chairman, and if I would find myself in that position because of the difficulty that will arise in writing that memorandum, I intend to tell the party who is calling me, Congressman so-and-so, or Senator so-and-so, "I want you to know that I am under compulsion of this act to call it to his attention, and if we are going to have a conversation on this matter I am going to ask my secretary to get on the telephone and take it down so that the burden is not on me to try to put that in writing as to what was said or what the person would be saying. I might misunderstand." And as soon as that would be transcribed, I would put it in the record and send a copy to the person I have been talking to. I think that would be the common sense way that I would handle it, if this was passed into law.

Mr. SIBAL. That is all. Thank you.

The CHAIRMAN. Of course, this bill does not require that.

Mr. DIXON. As I understand H.R. 14 today an oral conversation as to status does not apply, so we do not even have to worry about that.

The CHAIRMAN. That is right. Neither does this bill apply to such matters as you discussed with Mr. Dominick.

Mr. DIXON. I understand that.

The CHAIRMAN. Nothing in this bill would prohibit a Member of Congress from inquiring about the status of any proceeding before you at any time.

Mr. DIXON. I understand that.

The CHAIRMAN. I do not think that anyone would contend that a Member of Congress has any more right to try to influence a decision or to discuss the merits of a case off the record ex parte that way than anyone else.

Mr. DIXON. I have never heard anyone argue otherwise.

The CHAIRMAN. I think there are many people, though, who have a feeling, certainly Members have indicated have a feeling that this would prohibit a Member of Congress from performing his duty and obligation and responsibility to his own people.

Mr. DIXON. I think that you could make that clear, Mr. Chairman. I think you could make it clear.

The CHAIRMAN. It is not so intended, nothing here will prohibit a Member of Congress from doing that.

I am not sure that I go all the way with the Civil Aeronautics Board, which was here a day or so ago. They have adopted a rule of procedure in which no Member of Congress can appear before the Board in open public hearing unless he has previously participated in the hearing proceeding. It seems to me that—notwithstanding the fact we had that as an important matter of discussion a year ago and the members of the Board did express concern and objected to Members of Congress taking up time at these oral proceedings—I think that actually the Board has gone a little overboard and too far on that. It would seem to me that notwithstanding how other people look at this, these agencies are creatures of the Congress; in other words, they are set up to do for the Congress what the Congress cannot very well do for itself; and, therefore, on any matter which the agency itself has under consideration on behalf of the Congress, that the Members of Congress are in the position in which they could discuss appropriate matters in connection with the duties and responsibilities that they have; not, of course, to tell you or any other agency how to decide the case or to argue the merits of the case with you, but in open proceeding to inform the Commission what his problem is as a public servant.

Mr. DIXON. I have certainly enjoyed what you just said. I think it would be well for everybody in America on an occasion like this to get out their civic books and read them occasionally and learn what our Government is about. If they will just trouble to read article 3, section 8, they will find out that the Congress shall regulate foreign and interstate commerce. It does not say that the Federal Trade Commission, or the Antitrust Section, or the Civil Aeronautics Board, but it says the Congress. This is where the power was vested, in the Congress.

The Congress cannot take care of the intricate problems of commerce. You created these creatures to do this job.

These are good bills to clarify the atmosphere with the public, but there will never be any tool for good old-fashioned American honesty. Any person who goes down to these agencies and holds his hand up swears to enforce them. Mr. Truman said, "If you cannot stand the heat, get out of the kitchen." That is another way of saying it.

I am going to do my job as I understand the law. And I understand this law that I am trying to administer, at least I think I do, and I am going to do it honestly.

The CHAIRMAN. Sometimes we get into a rut and let things drift along and not intentionally become involved in things that are most unfortunate. We have developed the information that that has been the case over the last 20 years at various times. I think there could be a way to avoid that.

Mr. DIXON. It is perfectly possible that we might find that a Congressman, or a Senator, even a respondent in one of our cases, where, if we had a rule where he could not even come in, he would be in bad shape. In other words, he might have business interests.

The CHAIRMAN. I must confess, not as a respondent, but as an interested party I recently had that experience.

Mr. DIXON. It could happen.

The CHAIRMAN. In order to avoid just what we have been discussing—we were interested in a certain airline in my area—I went down before the examiner and appeared as a witness and told him exactly why I was there, so that there would not be any misunderstanding. And when we got to the oral argument I stated that I intended to appear, and I wanted it made very clear that I was subjecting myself to the hearing proceeding so that no one would have any question about it. I did that this past year.

I do not think it should have been necessary, however. I do not think that I had too much to do with the hearing, very frankly. I did take up some time, however.

What worries me more than anything about this proposal—I think the suggestions which you and the other agencies which have been here have made have all been very good, generally speaking, and I think, probably, it can be worked out, except this provocative problem you mentioned with reference to section 5(c) of the Administrative Procedure Act—the thing that worries me about that is an instance where a certain prominent attorney in an agency case did go to individual commissioners in a certain agency and did discuss with them the matter before them. It is quite obvious there must have been some question about it, or the commission members themselves would not have voluntarily come up and reported that fact to me as chairman of the committee and some of the staff members. I am sure they must have been uneasy about what had taken place; the question of the advisability of it, or whether or not it was the thing to do. However, during the course of the hearing when he was questioned about this particular thing he read this language to us and said that "the law says, I can do it. I did it under the law. And if I need to do it, I will do it again."

Mr. DIXON. Not if you pass this bill and this is in it if you pass the bill and leave 5(c) as it is written, he cannot do it, in my opinion. If you do not change the exemption of the commission or the members of a board, he still could not do it because, in my opinion, he would be——

The CHAIRMAN. He relied upon this. As a matter of fact, our staff went into it very thoroughly and wrote an opinion on it in which they agreed with him. I recall one member of the committee disagreed and he wrote his own opinion on it.

Mr. DIXON. We have a rule at the Commission which we have issued under the authority—the basic statute—which may preclude this.

The CHAIRMAN. It could be done by rule.

Mr. DIXON. We have a rule, rule 3.28 on ex parte consultation:

> No official, employee of an agency, engaged in the performance of his investigative or prosecutive functions for the Commission, and no party respondent or his agent or counsel in any adjudicative proceedings shall, in that or a factually related proceeding, participate or advise ex parte in any decision of the hearing examiner or of the Commission therein.

The CHAIRMAN. Or the Commission therein. You get——

Mr. DIXON. We got it.

The CHAIRMAN. And when you go beyond——

Mr. DIXON. If he comes in while it is there, the complaint has issued, and we are trying to adjudicate the matter, he would violate that rule.

The CHAIRMAN. That becomes more complicated. The Commission cannot by rule go beyond what the provisions of the statute are.

Mr. DIXON. No, sir.

The CHAIRMAN. As you well know.

Mr. DIXON. I would say so.

The CHAIRMAN. This gentlemen justified himself with this exemption in the subsection that it shall not apply in determining applications for an initial license or in proceedings involving validity or the application of rates—and this was a license matter, was it not?

Mr. HOWZE. Yes.

The CHAIRMAN. There was a rate of return controversy which was involved where the staff had taken one position before the commission—that is in the hearings—and the attorney justified himself by saying that he was advised that the staff was talking to a member of the commission, and he thought that he ought to be permitted to talk, too. And then he went ahead and read the subsection.

Mr. DIXON. Well, there is the problem here, but look at the horn of the dilemma. On the other horn, if you were, in my opinion, to pass this language and strike from the Administrative Procedure Act the immunity of the commissioner or the agency head——

The CHAIRMAN. Would that satisfy you?

Mr. DIXON. No, sir. I want that retained, because I think that you would want to realize this.

The CHAIRMAN. Why would you want it to be retained when you include it in your rules?

Mr. DIXON. I will tell you why, because if you exclude me from participating in any investigation or in determining how we shall proceed, or whom we shall proceed against, you must clearly understand then that I will have to completely delegate that authority to staff people who do not come before the Congress for approval or anybody else to determine how the money is going to be spent that you have appropriated, whom we will proceed against, and how they shall proceed. Then we will, in effect——

The CHAIRMAN. I do not believe that it goes that far, with all due deference to you—it is not applicable—it is not on the pending proceedings.

Mr. DIXON. We, certainly, worked out this, and I say that I want you to look at it very carefully.

The CHAIRMAN. I am glad to have that comment.

Mr. DIXON. Because there has been a lot of talk about creating a special trade court and these kinds of things here. And this, in my opinion, would cast some question upon the commissioners themselves doing anything other than judging. If they were just judging, but do not know, and I do not know whether the Attorney General's manual applies on this point or not. I read a certain part of it on page 58, and I stopped at this point and I will continue reading this next sentence which follows, where they point out that 5(c) did not apply in any manner to the agency or member or members of the body comprising the agency, and they point out that it was required by the very nature of the agency itself that this be done, and in the next sentence there appears:

> Thus, if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case he will not be precluded from participating with his colleagues in the decision of the case.

That is very plain as the law is written today, but if you strike the exemption of the agency head or the board member it will be cloudy. I know you are trying to solve that problem—you referred to happening in an actual case, but I, also, sense that the Congress is very desirous that these members who are directly answerable to the Congress have complete responsibility for the direction of where these agencies are going, what they are going to challenge as well as judging the matters after they have challenged them.

The CHAIRMAN. Do you have some questions, counsel?

Mr. HOWZE. Perhaps, Chairman Dixon, you can shed some light on this. It is with respect to section 5(c). If we divided the last sentence into two parts, the part prior to the semicolon and the part coming after it, the part we have been discussing——

Mr. DIXON. Let me get it first—10(a), is that what we are talking about that you would divide?

Mr. HOWZE. I am speaking of 5(c) of the Administrative Procedure Act.

Mr. DIXON. You were?

Mr. HOWZE. Yes.

Mr. DIXON. All right. I have it.

Mr. HOWZE. What would be your feeling about an amendment to 10(a) of H.R. 14, which would maintain the exemption as to the separation of functions for the members of an agency but which would not exempt initial licensing and the other matters mentioned before the semicolon in that last sentence of 5(c)?

Mr. DIXON. We would not object to that. I have no objection. In other words, then you would, perhaps, accomplish both purposes and it would be clear, because I have the understanding that the desire of Congress is to maintain these creatures as you have created them, but to clear up the dilemma of the case that the Chairman called attention to. And if you adopt such language as that, I think it would, certainly, be desirable.

Mr. HOWZE. The thing that bothered us about that case was that we were dealing with an initial license proceeding to which the provisions of 5(c), separation of functions, did not apply, because of that last sentence.

Mr. DIXON. I know.

Mr. HOWZE. The feeling was that in the future those provisions should apply to such cases.

Mr. DIXON. I think I have some sympathy for the tremendous dilemma that the committee must be laboring under, because these agencies range all the way from pure regulatory agencies over to my agency which is a prosecuting and adjudicatory agency.

Mr. HOWZE. You have no objection whatever to the separation-of-functions provision being applied?

Mr. DIXON. Not at all.

Mr. HOWZE. To the Administrator Procedure Act as it is applied?

Mr. DIXON. None whatever.

Mr. HOWZE. You mentioned on page 7 of your statement, in discussing the confidentiality that the Commission maintains as to the identity of applicants and potential witnesses. I believe that is required by the statute, is it not?

Mr. DIXON. That is correct.

Mr. HOWZE. As to people who give you information, keeping that in confidence?

Mr. DIXON. That is confidential.

Mr. HOWZE. And what do you mean by "applicant"?

Mr. DIXON. The "applicant" is the complainant—an applicant who writes a letter of complaint to the Commission and recites a set of facts and says he is being injured by, in his opinion, a violation by some party and they would name them.

Mr. HOWZE. I want to clear that up, because we think of applicants in connection with other agencies as applicants for various things.

Mr. DIXON. I understand. We treat them as an applicant for relief in the matter.

Mr. HOWZE. That is all.

The CHAIRMAN. Thank you very much. We do appreciate your coming before us and your suggestions will be given every possible consideration.

Mr. DIXON. Thank you very much.

The CHAIRMAN. I would like to say now that I believe from what has taken place here and the testimony that has been developed here that when we conclude all of the testimony I am going to undertake to get, maybe, the chairman of the various agencies, or their various counsel, whom they might suggest, together so that we can consider in a block all of the suggestions which have been made by the various agencies, to see how many of them we can bring together.

Mr. DIXON. That is a very fine suggestion and I will be very happy to give you any help we can.

The CHAIRMAN. The committee will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the committee adjourned at 3:55 p.m., to reconvene at 10 a.m., Friday, June 9, 1961.)

INDEPENDENT REGULATORY AGENCIES ACT OF 1961

FRIDAY, JUNE 9, 1961

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 1334, New House Office Building, Hon. Oren Harris (chairman) presiding.

The CHAIRMAN. This morning we continue the hearings on H.R. 14. We are glad to have with us the Chairman and other members of the FCC.

Mr. Minow, we are very glad to have you testify at this time on behalf of the Commission. I would suggest probably you should introduce those with you here, in order that we can have the record show their appearance, too.

STATEMENT OF HON. NEWTON M. MINOW, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY COMMISSIONERS ROSEL H. HYDE, T. A. M. CRAVEN, AND FREDERICK W. FORD

Mr. MINOW. Thank you, Mr. Chairman. With me today is Commissioner Hyde, Commissioner Craven, and Commissioner Ford. Some of our other Commissioners could not be here today. Some are away on Commission business outside the city. And we also have members of the staff. Do you want me to identify them for the record?

The CHAIRMAN. I think it would be appropriate.

Mr. MINOW. Max D. Paglin, the General Counsel, is here. Mr. Geller the Associate General Counsel. Mr. James Sheridan of my office. Mr. Cahill, Assistant General Counsel. And Mr. Donald J. Berkemyer, the head of our opinions and review staff.

The CHAIRMAN. We are glad to have all of these gentlemen with us here today on this proposal.

I believe you have a statement.

Mr. MINOW. Yes.

I should like to begin by saying I am pleased to read a unanimous Commission statement today, Mr. Chairman.

The CHAIRMAN. The committee welcomes it.

Mr. MINOW. I appear here today to present the views of the Commission regarding H.R. 14, the proposed Independent Regulatory Agencies Act of 1961, which has for its purpose the strengthening of the independence and effectiveness of regulatory agencies and their efficient, fair, and independent operation.

This bill, which is identical to H.R. 12731, 86th Congress, as reported to the House July 1, 1960 (H. Rept. 2070), consist of 11 sections. The first 10 sections are of general applicability to the six Federal regulatory agencies mentioned in the title of the bill, including the Federal Communications Commission. The 11th section of H.R. 14 applies only to the Federal Communications Commission and would repeal certain provisions of the Communications Act of 1934, as amended.

I wish to emphasize first that we are in agreement with the objective of this bill to strengthen existing laws concerning agency proceedings and the manner in which agency decisions are arrived at. However, at the same time, we feel that great care must be taken to assure that the Commission is not unduly shackled by unworkable procedures which might inadvertently add to delay and the expense of this agency's proceedings. Otherwise, the benefits to be expected from this proposed legislation would not be accomplished. Thus, our main concern in the comments which follow has been to suggest revisions in H.R. 14 which, from our viewpoint, would strike a fair balance between assuring fairness of agency proceedings on the one hand, and in promoting the efficiency of Commission operations, on the other.

In this connection, in his message to the Congress on Standards of Ethical Behavior (H. Doc. 145, 87th Cong., Apr. 27, 1961), President Kennedy said of ex parte contacts with officials of independent agencies—

> This problem is one of the most complex in the entire field of government regulation. It involves the elimination of ex parte contacts when those contacts are unjust to other parties, while preserving the capacity of an agency to avail itself of information necessary to decision. Much of the difficulty stems from the broad range of agency activities—ranging from judicial type adjudication to wideranging regulation of entire industries. This is a problem which ties of each agency.

Now, to take the bill section by section.

SECTION 1

This section provides that this act may be cited as the "Independent Regulatory Agencies Act of 1961."

SECTION 2

Section 2 contains five subsections which define various terms used elsewhere in the proposed act. The first subsection, which defines "agency" to include the Commission, raises no problems. But some of the remaining subsections do. These subsections define the terms "agency employee involved in the decisional process," "on-the-record proceeding," "person," and communications which are to be regarded as "ex parte," for the purposes of this proposed legislation.

Section 2(3) defines the term "on-the-record proceeding" to mean any proceeding before an agency in the case of which agency action is "required by law" or agency rule to be based on the record of an agency hearing. The Administrative Procedure Act, however, speaks of rules that are "required by statute" to be made on the record after opportunity for an agency hearing. We are opposed to the

use of the phrase "required by law" and urge the substitution therefor in section 2(3) of the phrase "required by statute." Our opposition rests on the fact that as a result of the language in *Sangamon Valley Television Corp.* v. *United States* (269 F. 2d 221), the Commission cannot be certain that in a rulemaking proceeding not otherwise required to be based on a record, it can follow the heretofore traditional practice of consulting on complex problems in the industry with persons, industry committees, and technical groups, expert in their fields, in addition to reviewing and considering written comments filed in the rulemaking proceeding.

Section 2(4) defines "person" to include, inter alia, "any governmental body." Here, we would like to direct the committee's attention to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Bendix Aviation Corp.* v. *Federal Communications Commission* (272 F. 2d 533, cert. den. sub. nom. *Aeronautical Radio, Inc.*, v. *U.S.* 963), in which the court of appeal sustained the authority of the Commission, after consultation with the Office of Defense Mobilization, to allocate certain frequency bands for Government use because of vital national defense considerations. In our opinion, such intragovernmental communications should be exempted from the ban on ex parte presentation contained in the present bill. However, so that there will be no question on this point, I think the legislative history of H.R. 14 should clarify this matter explicitly.

SECTION 3

Section 3 of this bill presents no difficulties. This section is a declaration of policy by the Congress stating, in effect, that enactment of this legislation is vitally important in the public interest to strengthen the independence and effectiveness of the several agencies and to promote the efficient, fair, and independent operation thereof.

SECTION 4

This section is intended to carry out in part a recommendation made by the Special Subcommittee on Legislative Oversight, on January 3, 1959 (H. Rept. 2711, 85th Cong., p. 9) that there be enacted into law a code of ethics governing the conduct of Commissioners, Commission employees, practitioners, and others who appear before the various agencies. Such recommendation further provides for civil criminal sanctions and for continuous enforcement of such a code.

We support the provisions of this section, and note in passing that many of the objectives stated in this section are similar to those expressed by the President in his message of April 27, 1961, to the Congress on ethical conduct in Government, particularly that part dealing with independent agencies, and also with Executive Order 10939 of May 5, 1961.

SECTION 5

Section 5, which relates to statements to be included in hearing notices, presents no problems.

SECTION 6

This section gives agencies authority to treat certain proceedings as "on the record" prior to their being noticed for hearing, thus advancing the time when presentation on the record only must begin.

One problem here which bears mentioning is that because the Commission will have authority under section 6 to advance the time limit against ex parte presentation, it can be expected that, in certain instances, it will be argued that the Commission abused its discretion in not exercising its authority under this section. I have in mind here the highly controversial types of proceedings which are sometimes instituted before the Commission, such as the consideration of applications for pay television. While such problems would not, of course, be insurmountable, we think it would be well for the committee to emphasize in any legislative history made on H.R. 14 the discretionary nature of this section.

SECTION 7

This section deals with one of the most important objectives of this legislation—protecting the integrity of on-the-record proceedings by prohibiting off-the-record presentation in proceedings before the regulatory agencies to whom this bill would apply.

Since this section consists of six subsections which deal with one aspect or another of ex parte presentation, I will not undertake here to paraphrase the language of this section. Rather, I think it would be more fruitful if I were to limit myself to discussing those parts of section 7 which the Commission feels deserve further attention, as well as the relationship of this section to other sections of the bill which, by definition, interlock with section 7. At the same time, I think it would be helpful preliminarily to set out our understanding of this section, so that if we are laboring under any misconceptions regarding the precise situations to which section 7 would apply, such misunderstanding can be corrected at this point.

First, this section would apply to an on-the-record proceeding, which, as defined in section 2(3) of the bill, means any proceeding which an agency is required by law or agency rule to base on the record of an agency hearing. As to when the ban against off-the-record presentation would begin with reference to such proceedings, this subsection additionally provides that on-the-record proceedings go on the record only at the time the proceeding has been noticed for hearing, or at such earlier time as the Commission may designate under section 6.

In the case of on-the-record proceedings which have been noticed for hearing or otherwise place on an on-the-record basis, it would be illegal under section 7(a)(1) for any party to such a proceeding, or person acting on behalf of such party, except in circumstances authorized by law, to communicate ex parte with respect to such proceeding, directly or indirectly, with any agency member, hearing officer, or employee involved in the decisional process. Under section 7(a)(2), it would similarly be illegal, except as authorized by law, for any agency member, hearing officer, or employee involved in the decisional process to communicate ex parte with respect to such proceeding with any party or person acting on behalf of such party. It is apparent

that these paragraphs would apply to both oral and written communications.

While section 2(5) constitutes what, in effect, is a definition of the terms "ex parte communication" and "communicate ex parte," it is apparent from section 7 itself that not all off-the-record communications should be banned, even though an on-the-record proceeding is involved, since section 7 permits ex parte presentation in circumstances authorized by law. We approve this exemption.

One feature of this section which presents problems to the Commission is the requirement imposed on the Secretary of the Commission, by sections 7(b) and (c), to give notice of such ex parte communications to all parties to the proceeding. While this requirement might not be onerous in some situations, in others it would impose an almost impossible administrative burden. In some Commission rulemaking proceedings, we receive literally hundreds of communications concerning the merits of the proposal. If a cope of each communication subject to section 7 had to be served on all of such parties, the burden would be intolerable, especially because the bulk of such communications are unsolicited and come from members of the public whose interest in a proceeding is often remote.

It is the Commission's view that the placing of such communications in the public file of the agency is sufficient. Furthermore, since constructive notice is explicitly provided for by section 8, which governs communications with respect to the status of an on-the-record proceeding, it appears that there is no good reason why other written communications should not be treated the same.

SECTION 8

Section 8 requires the Secretary of the Commission to place in the public file all written inquiries regarding the status of an on-the-record proceeding (irrespective of whether the inquiry was originally directed to the Secretary or to some other person in the Commission), together with the Secretary's written reply thereto.

We have no objection to this section.

SECTION 9

This section provides that any member of an agency may be removed by the President for neglect of duty or malfeasance in office, but for no other reason.

We have no objection to enactment of this provision.

SECTION 10

We are opposed to section 10 of this bill. Enactment of this provision would work substantial changes in the present law which governs separation of functions, which, in our opinion, would unduly burden the administrative process and substantially increase our budgetary requirements. At the same time, it does not appear to us that any real benefits to the public interest would accrue from the changes proposed by this section.

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At the present time, section 5(c) of the Administrative Procedure Act, which governs separation of functions where there is a requirement that rules be adopted after a hearing on the record, specifically provides that the separation requirements of subsection 5(c)—

> * * * shall not apply in determining applications for initial licenses or to proceedings involving the validity or application or rates, facilities, or practices of public utilities or carriers, nor shall it be applicable in any manner to the agency or any member of the body comprising the agency.

Further, under section 2(c) of the Administrative Procedure Act the approval or prescription for the future of rates, facilities, classifications, etc., is defined as "rulemaking."

But section 10(a) of this bill, which would require that on-the-record proceedings be decided as though the last sentence of section 5(c) of the Administrative Procedure Act had not been enacted, would change all this.

Our concern with the provisions of section 10(a) may be summarized as follows:

Historically, the prescription and approval of rates, regulations, classifications, and practices of public utilities and common carriers have been regarded and treated as a legislative function and not as an adjudicatory function. Without going into the historical evolution and application of this concept, it is sufficient to note that this concept was incorporated into and preserved by the Administrative Procedure Act which classified proceedings involving the prescriptions and approval of rates for the future as rulemaking proceedings. Section 10(a) of the bill would substantially alter this concept of the rulemaking proceeding by requiring that the same administrative procedures be applied thereto as are applicable in an adjudicatory proceeding. It is our opinion that a change of this kind is unnecessary and will not serve the public interest in the establishment and maintenance of just, reasonable and nondiscriminatory rates, regulations, classifications and practices of common carriers.

Also, there must be considered the practical aspects of what is required for effective regulation of an industry having the size, growth characteristics and complexities of the common carrier communications industry.

It is neither practical nor possible for the members of the Commission itself, without the aid of staff analysis and recommendations, to make the complicated and difficult determinations that are involved in ratemaking proceedings solely on the basis of the evidentiary record and arguments advanced by the parties. While the record constitutes the exclusive basis for decision, it is nevertheless necessary to bring to bear upon that record expert and specialized knowledge of many background ramifications of the ratemaking problem. This requires an intimate knowledge of the industry's organization, structure, operations and policies, its facilities, operating practices, rate structures, technological developments, present and prospective, and other such information.

To facilitate this objective, the Commission maintains a staff of technical experts who, through continuous daily contact with all aspects of the industry, are available to consult with and advise the Commission with regard to all of its ratemaking functions. In formal ratemaking proceedings, it is also the responsibility of this same

staff to participate therein in order to insure that a full and complete record is made so that the ingredients essential to the prescription and approval of rates for the future are fully developed and that the contentions advanced by the parties are thoroughly examined.

To isolate the Commission from its staff of experts at the decisional level would tend to sterilize and hamper the ratemaking processes. The only alternative would, of course, lie in the Commission maintaining two separate staffs—one to advise and consult with, and the other to participate as a party to the proceeding—but both of whom would be required to be equally well informed and expert in the particular ratemaking field. This certainly would complicate and burden the organizational structure of the Commission. The existing problem of recruiting and training qualified personnel who are knowledgeable and skilled in the common carrier communications field is a difficult problem to meet under the existing regulatory scheme. To staff the apparatus of two such organizations in order to implement H.R. 14 would require substantial additions to our common carrier budget, inasmuch as it would be impossible to fractionalize the existing staff without crippling its effectiveness.

Moreover on the basis of our regulatory experience, it does not appear that any formal charge or complaint of a substantial nature has been made against the existing statutory scheme of ratemaking contained in the Communications Act of 1934. In view of the absence of any claim that the existing processes have been abused or not fairly applied, there would appear to be no valid reason for applying to legislative type matters, such as ratemaking, the rules of procedure applicable to adjudication.

For the foregoing reasons we are strongly opposed to the enactment of section 10(a) of this bill. The judicialization of procedures proposed by this section would not, as I see it, serve the public interest. On the contrary, enactment of section 10(a) of this bill could only serve to add to the length and expense of proceedings, without bringing about any demonstrable benefits.

SECTION 11

The final section of this bill, section 11, applies only to the Federal Communications Commission. This section would repeal section 5(c) of the Communications Act of 1934, which presently provides for a review staff, and would also repeal section 409(c)(2) of the Communications Act, which, in case of adjudication, prohibits the making of "additional presentations" by certain personnel of the Commission, except on notice and opportunity for all parties to participate.

The Commission approves enactment of section 11. It is our opinion that repeal of section 5(c) would materially assist the Commission in achieving a degree of flexibility in preparing decisions which is not now possible under the restrictive language of that subsection. However, if this subsection were repealed, the Commission would consider that it had authority to use the personnel of that section for purposes of preparing decisions, and that such personnel could, where appropriate, make recommendations to the Commission.

We also agree that section 409(c)(2), which has unduly separated the Commission from its professional staff, should be repealed. But in our opinion, the amendments to section 409 do not go far enough.

We feel that, at this juncture, it would be appropriate for the committee to consider the desirability of amending this bill so as to repeal that portion of section 409(c)(1) which now forbids examiners from consulting with each other on questions of law, unless such examiners participate together in the conduct of a hearing. In our opinion, this "special" separation, which goes far beyond the provision of section 5(c) of the Administrative Procedure Act, is unwarranted. We feel that full and free discussion among hearing examiners of legal problems and legal questions arising in their cases should result in an improvement in the quality of initial decisions and in expediting the issuance of such decisions.

Finally, we also think that an important step toward conforming the Commission's separation requirements substantially to those of other agencies could be achieved by returning essentially to the format of section 5(c) of the Administrative Procedure Act, and amending section 409(c)(3) of the Communication Act to provide as follows:

(3) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person or persons engaged in the performance of investigative or prosecuting functions for the Commission shall advise, consult, or participate in that or any factually related case, except as a witness or counsel in public proceedings.

We point out that this language would include initial license proceedings, now exempted by section 5(c) of the Administrative Procedure Act.

Thank you, Mr. Chairman.

We would be pleased to try to answer any questions.

The CHAIRMAN. Thank you, Mr. Minow, for your very fine statement on this important issue.

We are very glad to have your suggestions as to how this proposal could be improved, thereby strengthening the processes in which you labor from day to day.

Mr. Springer, any questions?

Mr. SPRINGER. Yes, just two, Mr. Chairman.

Mr. Minow, would you turn to page 3 of your statement.

About halfway down the page, you begin—

We are opposed to the use of the phrase "required by law" and urge the substitution therefor in section 2(5) of the phrase "required by statute." Our opposition rests on the fact that as a result of the language in the *Sangamon Valley Television Corporation* v. *the United States* the Commission cannot be certain that in a rulemaking proceeding not otherwise required to be based on a record, it can follow the heretofore traditional practice of consulting on completion problems in the industry with persons, industry committees, and technical groups, expert in their fields, in addition to reviewing and considering written comments filed in the rulemaking proceeding.

Would you just expand on that a little bit.

I am familiar with the *Sangamon Valley* case. I am trying to see how it applies here to this particular problem a little more extensively.

Mr. MINOW. Yes. As you know, the *Sangamon* case was decided before I got here. A have heard more about the principles of this case than anything else since I have been at the Commission, because some of the language in that decision is broad and far ranging.

As a result, my colleagues and I are constantly concerned as to whether a particular matter before us comes within the *Sangamon* rule—whether in effect the decision in *Sangamon* has converted what

we would normally regard as a rulemaking procedure into an adjudicatory procedure, and this is very hard to apply to a specific factual situation since in almost every matter with which we deal, valuable private rights are effected.

Take our recent rulemaking proceeding involving FM stereo standards. The issue and problem there affects the whole industry. Everybody's rights are involved in a matter like that. Or take the overall problem of UHF–VHF. There we seem to be agreed that the *Sangamon* case does not restrict us. But when we get down to cases of deintermixing a market and transferring one channel to another city, we do come within *Sangamon* when there are interested, contesting private parties.

I would like my colleagues who are here to expand on that, because I think they are more familiar with the problem. They could give you some specific examples, if that is agreeable.

Mr. SPRINGER. Perhaps in just a minute.

You are taking this phrase "required by law," and urge the substitution therefore the phrase "required by statute."

Mr. MINOW. Right.

Mr. SPRINGER. Now, what is the technical differentiation?

Mr. MINOW. Well, the Administrative Procedure Act uses the words "required by statute" and then prescribes certain kinds of cases which are adjudicatory and then certain kinds of matters that are rulemaking. If we use the word "law" rather than "statute," then we would be interpreting what *Sangamon* means ourselves.

Mr. SPRINGER. Then your objection is to the second portion.

Mr. MINOW. That is right.

Mr. SPRINGER. In other words, using the language you have suggested, you would only have to use in essence the Administrative Procedure Act, is that correct?

Mr. MINOW. That is correct, and our own statute.

Mr. SPRINGER. That is the technical problem.

Mr. MINOW. That is right, sir.

Would any of you like to elaborate on that?

Mr. FORD. The Administrative Procedure Act seems to make a distinction in section 5. In the first sentence of section 5 it says "in every case of adjudication required by statute" and then under the separation of functions in 5(c), "save to the extent required for the disposition of ex parte matters as authorized by law." And I assume the distinction being drawn there is if it is a specific statutory provision then the word "statute" is used, and when the general body of law, which includes that made by the courts, dealing with these matters of subpena, are properly matters that you can make an ex parte approach to the court on—to the Commission, then they use the term "law" as a much broader concept.

Mr. SPRINGER. Now, Mr. Ford, just in connection with that, though, I don't know what your legal counsel says—suppose you get back up to the Supreme Court with this language. Is the Supreme Court then closed from using the *Sangamon* language in consideration?

Mr. FORD. I don't quite understand.

Mr. SPRINGER. Suppose that you use that language suggested.

Mr. FORD. "Required by statute"?

Mr. SPRINGER. Yes. Then you get back up to the Supreme Court case. They say they are within the *Sangamon* case. I take it from what you said, or what your counsel said, that the Supreme Court would then be closed from using the language of the *Sangamon* case as a precedent.

Is that true?

Mr. FORD. Well, I don't believe that the Supreme Court would——

Mr. SPRINGER. What you are trying to do I think is to exclude from consideration of this——

Mr. FORD. With the history being made of this—if the Congress sees fit to change this language, I think it would give the Court pause. But they would then have to find some specific statutory language.

Now, as to whether or not it would be closed as a result of the *Sangamon* case, and this change in language, I don't know, because they may find some other provision of statute which would support their position, or support the position of the *Sangamon* case, or rule or something of that sort.

But I think it is pretty difficult to predict by the change in this language that the Court might not find some other suitable language in a statute which would support what they determined in the *Sangamon* case.

Mr. SPRINGER. I would just put that to your legal counsel. What do you think?

Mr. PAGLIN. I do not think, if I understand your question correctly, Congressman, that the Supreme Court would be precluded if this language were put in. The reason is that the *Sangamon* case, as we read it, did not go off on any proposition or any provision of a statute. The opinion in the *Sangamon* case was basically divided into two parts. One had to do with the principle of basic fairness, the Court declaring that in a situation, be it adjudication or rulemaking, where valuable rights and private interests were involved, and these interests were of an adversary nature, it would be unfair to permit private off-the-record contacts by an interested party in the proceeding. And the Court said in the presence of the materials before it, the private contacts by one of the parties served to vitiate the validity of the proceeding. That was the first half of the *Sangamon* decision.

The second half had to do with a particular provision of the Commission rules at the time, which were applicable, a rulemaking proceeding. The Commission's rules then provided that after comments and reply comments were submitted, the Commission would then permit no other presentations by the interested parties. And the Court said the second ground of our decision is that your own rules would not permit you, after reply comments are in, to consider any further materials from the parties. So they said in effect that the things that happened in this proceeding vitiated your action on both these grounds.

Now, the point that we are trying to make in this statement, if you will permit me to continue, is that legislatively it would be a great deal clearer, insofar as our purposes are concerned, if the statute were pegged to a hearing required by the statute, as against required by law. It would be more specific insofar as our particular application

of the statute would be concerned. Our reason is that the Communications Act now has specific provisions in it, specifically in title 2 and in section 303(f), which provide for hearings in rulemaking cases—and it has only those specific instances. Nowhere else in the act is the Commission required to have on the record hearings proceedings in rulemaking cases. And if you imposed this language, "required by law," it is our feeling that it would then render uncertain the nature of our proceedings in the context of the other provisions of the act.

Mr. SPRINGER. Just that last sentence. Do you mean it would make uncertain whether it is adjudicatory or a rulemaking proceeding?

Mr. PAGLIN. No, it wouldn't do that. It would make uncertain the question as to whether or not the particular proceeding was required to be "on the record," in the same way as an adjudicatory proceeding is or as the rulemaking proceedings I mentioned are presently required to be on the record after a hearing.

Mr. SPRINGER. I will come back to that in a moment.

Mr. Minow, with reference to 10(a), what did you say the effect of 10(a) would be? Would you expand on that a little bit.

Mr. MINOW. The problem in 10(a) is this.

Ratemaking has historically been considered by most regulatory agencies, including ours, as being a legislative rather than an adjudicatory function. We feel that it would be very crippling to us if there was a departure from that view, because we have only one common carrier staff and it of necessity must conduct rate cases. If 10(a) were adopted, as we understand it, it would require us now to have two—one staff to act as a party in a rate case and the other to act in advising us about it—similar to what we do in the broadcast field, in the adjudicatory field.

So that is why we feel that ratemaking separation of function provision should not be changed.

The present system is consistent with the Administrative Procedure Act. That is what we would like to keep.

Mr. SPRINGER. Well, now, at the present time on the ratemaking, does your staff consult with other people in the industry?

Mr. MINOW. With other people in the industry? Yes, sir.

Mr. SPRINGER. Is a ratemaking case in essence a contest?

Mr. MINOW. Well, it depends. I would say sometimes yes, sometimes no. We haven't had too many ratemaking cases on the record in recent years. But I would say in many instances they are contested, yes sir.

Commissioner Hyde, who is our telephone committee, can tell you about one we have now, and give you an example, if you would like.

Mr. SPRINGER. Well, let me ask you. Traditionally, do you regard it as a contested case?

Mr. MINOW. I would say no.

Mr. SPRINGER. Just as a contest between the staff and the public?

Mr. MINOW. No, I think not. The staff's role there is to represent the public, and the carrier is heard. But it has always been regarded, I would say, more as a legislative rather than an adjudicatory function, historically.

Now, sometimes we get several parties in them. That is the example I wanted to give you—where the parties themselves are contesting.

Mr. SPRINGER. Now, in that case should it become a judicial proceeding?

Mr. MINOW. I would think not, sir.

Mr. SPRINGER. Now, actually, section 10(a) would change you and make you in essence a judicial proceeding in those instances.

Mr. MINOW. That is right. This would be a rather radical departure from the ratmaking history that has gone on all these years.

The CHAIRMAN. Do you have some comment, Mr. Hyde?

Mr. HYDE. Mr. Chairman, members of the committee, I would just like to offer this comment on what has been said here. The question was asked if a ratemaking case could become a contested case. Well, in certain instances, as mentioned by the Chairman, there will be intervenors. There may be several carriers, and they have conflicting interests.

In that situation, no member of the Board, no member of the staff, would want to carry on ex parte discussions that would be unfair to any of these participants.

But I think the Commission, in its discretion, can prevent any abuses here without having a statute that would subject the whole proceeding to the limitations—I will call them limitations—the formalities of an adjudicatory proceeding.

I think you could give us the flexibility to—and the discretion and rely upon the agency to be certain it does not hear one party in the absence of others on a matter that is a subject of contest between them, because I think—I think this is necessary because in the broad ratemaking processes, we do need the flexibility, we do need the help that we can get from freedom to get information where it is available.

Mr. SPRINGER. At what point Mr. Hyde, do you consider ratemaking to be on the record? Is it at hearing, or before that?

Mr. HYDE. Well, we set up the docket in a ratemaking proceeding just the same as we would in what is normally recognized as adjudicatory process. In some instances this will simply be a matter of examining the carrier on the record, Commission staff carrying on the examination. There will be some few instances, however, when a group of consumers, perhaps an agency, such as GSA, will participate in it.

Now, answering your question as to what point does it become adjudicatory, I wouldn't want to classify it as adjudicatory at any time, but it could become a case in which there are elements in contest between parties, and I think in that situation the Commission would be wise not to let one contestant have an unfair advantage over another.

Mr. SPRINGER. This has developed an interesting point.

Do you at any point say this is adjudicatory?

Mr. HYDE. We do not, in ratemaking cases.

Mr. SPRINGER. That makes it possible then for you or your staff to consult with a lot of people off the record.

Mr. HYDE. It does. It makes it possible for the staff to seek information from consumers, to discuss the matter with experts. But all this looks toward introduction in the record of the elements that finally get into the decision.

Mr. MINOW. That is the point I want to make. Once it is decided to have a real estate case, then it is set down for hearing, and everything from that point is on the record.

Mr. SPRINGER. The point then I take it is when you set it down for hearing, is that correct?

Mr. HYDE. Yes. But we do not, at this point, classify it as an adjudicatory matter. But depending upon the characterization of the case, we would limit—we would be careful to make sure that any interested party is treated fairly.

Mr. SPRINGER. Would you agree with that, Mr. Ford?

Mr. FORD. I am in complete agreement with it. But I think perhaps it might be well to put the provisions of law in the record here so that it will be clear and in support of Commissioner Hyde's statement.

Rulemaking, as defined in the Administrative Procedure Act, includes rates. The definition of adjudication—an order of adjudication is an agency process in arriving at an order, formulation of an order. And I think perhaps if I just read section 2(d) into the record, it will be clearer. Defining order of adjudication:

Order means the whole or any part of the final disposition, whether affirmative, negative, injunctive or declaratory in form, of any agency in any matter other than rulemaking, but including licenses. Adjudication means agency processes for the formulation of an order.

So you see by definition the rulemaking proceeding is excluded from the term "adjudication."

Then when you turn over to 5(c), and section 5 says "in every case of adjudication," you get down to the separation of functions section, 5(c), it says—

this subsection does not apply in determining applications for initial licenses or to proceedings involving validity or application of rates, facilities or practices.

So the separation of functions with respect to the investigative staff does not apply. Therefore, when we designate—section 204 and 205 of our act require ratemaking proceedings to be on the record. So when we designate them and start in to take the testimony, the separation of functions provisions of 5(c) of the Administrative Procedure Act do not apply, because these are investigative people. However, when you get into a question of conflict, highly contested facts, the legislative history under the Administrative Procedure Act says even in that kind of a situation the separation should apply, and so traditionally the agency applies the separation of functions insofar as the agency and the contestants are concerned, but not with respect to our staff.

Now, in the *Sangamon* case we were very careful not to make that apply to our staff.

Mr. SPRINGER. All right. Now just this one last question Mr. Chairman.

I take it, then, that 10(a) in effect makes a rate case on the record from the beginning. Is that correct?

Mr. MINOW. I think that part of it is not a change from the past, as I interpret it.

Mr. SPRINGER. Now, what I understand from this, 10(a), as you interpret it is if there were enacted into law what in effect would be true would be this. That all of it, from the time that you decided to take it up, would be a judicial proceeding, in essence on the record. I am talking about investigation, everything having to do with it. Up to the point where you presently say that it is adjudicatory.

Mr. MINOW. That is right.

Mr. SPRINGER. That is in effect what this section 10(a) does.

Mr. MINOW. That is my understanding.

Mr. SPRINGER. Is that the way you interpret it Mr. Counsel?

Mr. PAGLIN. Yes. 10(a) would not only impose the on-the-record aspect of the administrative proceeding, which as the Chariman indicated is already provided for in our statute for ratemaking cases, but would in addition impose the separation of function aspect that applies now to adjudicatory cases to ratemaking cases, and to that the Commission objects.

Mr. SPRINGER. Mr. Chairman, that is all.

The CHAIRMAN. Mr. Dominick.

Mr. DOMINICK. No questions.

The CHAIRMAN. Mr. Howze.

Mr. HOWZE. No questions.

The CHAIRMAN. Mr. Chairman, pursuing the question of Mr. Springer, with reference to your statement on page 3, in which you state your opposition on the basis of the court decision in the *Sangamon Valley* case—the court, in that case, applied the prohibition against ex parte contacts to rulemaking proceedings on the theory that the parties to that proceeding had positions similar to positions held by parties in contested proceedings in an adjudicatory nature. Is that your understanding?

Mr. MINOW. That is right, sir.

The CHAIRMAN. Well, this phrase that you object to "required by law" was purposely used, and exactly for the purpose of making the prohibitions against ex parte communications applicable to such proceedings, like the *Sangamon Valley* case.

Mr. MINOW. I understand that, sir.

The CHAIRMAN. Well, now, that has caused us some concern, and we have given a great deal of thought to it over a period of time. As was indicated by Mr. Springer, when a case of rulemaking, precisely like that case, has reached the point of record proceedings, then don't you think it should be applicable as though it was an adjudicatory proceeding?

Mr. MINOW. I would say that we agree certainly with the principle, Mr. Chairman. Our problem is that when you don't have a precise definition, that the *Sangamon* case leaves us in sort of a twilight zone, where we are not sure where the line is between adjudicatory procedure and rulemaking procedure. This is our problem. If we knew for sure, it would simplify our lives enormously.

The CHAIRMAN. Well, let's see if we can arrive at some demarcation. I do not want to disturb the Commission's authority and effectiveness. My position throughout the entire consideration of these matters has been to assist the Commissions in their work and strengthen their proceedings, but yet give all parties the rights to which they are entitled. And in our discussion and consideration of the *Sangamon Valley* case, we arrived at a conclusion, when it reached that particular point, from there on out it was identical to any adjudicatory proceedings, and the court so held.

Mr. MINOW. Right.

The CHAIRMAN. Now it would seem to us, from the action of the committee in the past, and our reports, that there should be some

way to get to that type of proceeding without interferring with the Commission's activity and work.

In other words, we felt very strongly that when it reached a certain position, that it was just as important to the people who were involved on a final decision here as if the matter had been contested in adjudicatory proceedings from the start.

Mr. MINOW. Mr. Chairman, I can only say I agree with you completely. Our problem—again, to repeat—is drawing the line. What we do now, in an effort to solve this problem, is on matters as they come up, where we feel they will involve contested rights but in the context of rulemaking, the full Commission decides at the time rulemaking is announced, or at some later stage during rulemaking, that henceforth everything submitted by the interested parties will be on the record. This serves as a guide, then, to each of us, and also to anybody who is interested in the problem in the industry. And we have searched for a rule or a guideline which could be all embracing and haven't found one yet. Therefore we do it now on a case-by-case basis with the Commission deciding.

Now I would appreciate an opportunity for my colleagues to speak to that particular point, because they have more experience than I have.

The CHAIRMAN. Yes. We think there is a very close problem; I know that. And it has to be considered in a very narrow sense. But we do feel that in order to avoid some of the pitfalls of the past, that it should be approached in some logical way in the future.

Mr. FORD. I think perhaps the use of the term—the *Sangamon Valley* case right at this particular point may be a little bit misleading, and that is what our problem is in getting clearly before you the point we are trying to make.

If you look at the terms of the bill, in section 23, the term "on the record proceeding" means any proceeding before an agency in the case of which agency action is required by law or agency rule to be based on the record of an agency hearing. Now the *Sangamon Valley* case did not require a particular proceeding to be on the record or off the record or any other way. The point is that once you go on the record, then the principles of the *Sangamon Valley* case arise. And the thing that we are talking about is the determination of whether we go on the record or not.

Now, by law, it would include case law, as to when you go on the record and when you don't go on the record. Sections 204 and 205 indicate specifically by the statute when you go on the record and when you don't. But once you go on the record, pursuant to the statute, then the principles of the *Sangamon Valley* case apply, and the suggested change that we ask does not effect that case, or reverse it in any way, in my opinion. I think what we are really talking about is when a case should be on the record or not on the record. Should it be based on general case law or should it be by statute. This should be pinned down so that we know specifically when we are supposed to go on the record in our rulemaking proceedings. "By law" is too general. "By statute" would make it specific for us. And I don't think either phrase would have any bearing on the case law laid down in the *Sangamon Valley* case.

The CHAIRMAN. Commissioner Ford, have you considered the provision of section 5 in connection with this immediate problem? Section 5 of the bill.

Mr. MINOW. If I could just say a word about that, Mr. Chairman, that is in effect what we are doing now. That is the way we have tried to resolve it, by announcing in each matter in our notice how we are going to treat it.

The CHAIRMAN. Well, it seems to me that the language of section 5 gives the Commission an opportunity to decide whether it is an on-the-record proceeding. And the purpose of that would leave the Commission with the discretion to decide on a case-by-record method.

Mr. FORD. Mr. Chairman——

The CHAIRMAN. Maybe it doesn't reach what Commissioner Ford had in mind—I don't know. But that is the purpose of it.

Mr. FORD. Well, I think this particular section gives us an opportunity to give a notice of whether or not it is an on-the-record matter. But at this time, using "by law" isn't a complete answer, because we would have to take into consideration in issuing the notice under section 5, case law in addition to statute law.

The CHAIRMAN. Well, let me go back to Mr. Springer's question. You may have answered it fully and completely, but it doesn't seem to me that I got the full import of it.

If the words that you suggest were substituted would it then nullify the holding of the court held in the *Sangamon Valley* case?

Mr. FORD. I think the answer to that, sir, is "No."

Mr. HYDE. May I also offer help?

The CHAIRMAN. Is that your opinion, Mr. Hyde?

Mr. HYDE. Yes, sir. I think it is.

The CHAIRMAN. In other words, a case such as the *Sangamon Valley* case, even though rulemaking, as it was, reached that stage, would be treated on the same basis as it was an adjudicatory case.

Mr. HYDE. Yes, sir; I think so. May I answer it this way. If a case——

The CHAIRMAN. Let me put it this way, then. Would the same rule with reference to ex parte contacts apply——

Mr. HYDE. What I wanted to say it——

The CHAIRMAN. As though it were a case of adjudication?

Mr. HYDE. Yes, what I want to say is——

The CHAIRMAN. All right. I want to get each of your opinions on it.

Mr. HYDE. All right. If there should be another case arise, in circumstances similar to Sangamon, I think the principle of that case, namely that you must have essential fairness in rulemaking would certainly apply, irrespective of the change of the section.

The other point I wanted to make, and I hope I'm not out of order in this, is that section 5, as you have mentioned, Mr. Chairman, does give the Commission needed flexibility and discretion in determining what should be handled—what type of rulemaking—in what instance rulemaking should be handled in an on the record adjudicatory form and when not. That is highly desirable.

I think, however, that if you adopt this other provision, with the phrase "required by law," that you limit that discretion. And I think that that would be undesirable.

The CHAIRMAN. Well, I just want to be sure that we do not rule out the same application to rulemaking proceedings when they reach a certain stage, where the principle of the *Sangamon Valley* case applies.

Mr. HYDE. I don't think you would. But you would place upon the Commission the duty of making that judgment in its discretion when it issues the rulemaking notice as to whether it should be handled in the adjudicatory manner or the other.

The CHAIRMAN. I recognize that you have many many matters that you dispose of by rule making. On the other hand, I feel that there are many matters apparently required to be handled by rulemaking proceedings where more stringent safeguards ought to apply.

Mr. HYDE. Mr. Chairman, there certainly are cases that take on the characteristics of rulemaking and licensing, or a modification of licenses. In those instances, even though the general classification may be rulemaking, it still involves rights and license privileges similar to what you have in the usual adjudicatory case—the Commission must be careful to——

The CHAIRMAN. You agree the same rule should apply in that kind of situation?

Mr. HYDE. I do, sir.

Mr. CHAIRMAN. Is that your opinion, Mr. Ford?

Mr. FORD. Yes, I think this is entirely correct. If you look at the history of the Commission and its treatment of initial licensing, which is excepted from the separation of functions provision, and the Commission by rule brought it under that provision, because of the legislative history of that section which says in highly contested facts of either kind, rulemaking or initial licensing, the separation of functions provision should be applied by the agency voluntarily. And that is exactly what the Commission did.

The CHAIRMAN. Mr. Craven, is that your opinion of this?

Mr. CRAVEN. Mr. Chairman, I am not a lawyer, and I have complete faith in my colleagues who are lawyers. But I do agree.

Mr. MINOW. So do I, Mr. Chairman. I would only add we are very much aware of that. As I said earlier, every time we have a rulemaking now—Sangamon is very much on our minds. And I can assure you for the Commission that where cases might involve any doubt of fairness as to our procedures we treat them as being on the record with respect to interested parties.

The CHAIRMAN. Then the Commission does not recommend to the Congress—and I want to get this for the record—that it enact a law which would fall short of the equitable principle which evidently led the court in the Sangamon case to set aside the decision of the Commission.

Mr. MINOW. Oh, no, we are for the principle. Our problem is only with the draftsmanship and language in achieving it, sir.

The CHAIRMAN. I am hopeful we can work this out. I believe we can, and have a complete history and thorough understanding about it. Now, let me turn to section 10. As I have stated before, that is a problem that has disturbed me. I recognize from that information we developed here in the course of the hearing there is a condition that ought to be reached. And we have been struggling to try to get to it. As an example, before another commission there was a case—you probably read something about it in the papers—there was a

case involving licensing. Well, it did have consideration of a rate of return, too. But primarily it involved initial licensing. And it reached a point where the average person could understand why those that were deeply concerned felt that they should have a decision on it. A time limitation was involved, but nevertheless, they felt so concerned about it that this particular individual, a well known name, did make a personal call on the members of the Commission about it, as was acknowledged by members of the Commission and the individual himself. And when he was questioned about the propriety of it, he read to the committee this provision, "separation of functions". And that is the last sentence of section 5(c) of the Administrative Procedure Act. The latter part of the exemption reads: "nor should it be applicable in any manner to an agency or members of the body comprising the agency." And he felt that with that exemption, with the first part of the exemption, that it shouldd not apply to initial licenses, that he was within his rights under the law, and said he was within his rights, and he was going to depend on it thereafter.

Now, there has been some question as to the interpretation. Members of our staff at that time, after long and careful study, came to the conclusion that he was right, that he was within his prerogatives under the law. We did have some members, at least one member, I think, of this committee, who took issue with it. So that is still up in the air.

Now, what we are trying to do here is to get at that particular type of problem. There is no intention to go far beyond that and handicap or in any way hamstring the regulatory activities you have just mentioned.

I don't know how it can be reached without getting into these other involvements which you have raised here.

Yesterday Mr. Howze, the counsel for the special subcommittee, suggested that maybe the sections should apply only to the first part of the exemption. The Federal Trade Commission was here at that time, and they said if that were to be done it would meet their problem, and they would have no objection to it. They thought it would be all right. But as I understand from what you say here, it would complicate your situation.

Mr. MINOW. Well, to my knowledge we have never had a problem like that one. I know the one you are referring to.

The CHAIRMAN. Yes, I am sure you do. And we had no information developed in the course of our investigations that you have. You have had a lot of other problems.

Mr. MINOW. Fortunately this one we have missed. But I would say that once we have a rate case on the record, it is my understanding, subject to correction, that we treat it on the record. Aside from the separation of functions question, we would not then be entertaining any communciations that were not on the record. Let's say we have decided to have a rate case in the common carrier field. After that point, it is my understanding that none of the members of the Commission would then entertain any communication, except as part of the formal record in a proceeding.

So I don't think we have the same interpretation of the problem.

Our point is that we don't want to be cut off from talking to our own staff in such a situation. That is the real problem. Because we

only have one staff, one common carrier staff. We don't have——

The CHAIRMAN. If we left the exemption, the last part of it, would that then meet your problem?

Mr. MINOW. I want to be sure I understand. You mean we could continue to talk with our staff in a rate case.

The CHAIRMAN. Pardon?

Mr. MINOW. I want to be sure I understand. This suggestion would mean we could continue to talk freely to our staff in a rate case.

The CHAIRMAN. In the first place, this section referred to here, this separation of functions—that is applicable to adjudication matters. Now you said heretofore that ratemaking was not adjudication. So I can't see how this section, if that is true, would apply at all to ratemaking, if ratemaking is not adjudication.

Mr. MINOW. My counsel tells me if you drop the last sentence of 5(c), this would have the effect of making ratemaking into an adjudicatory case, insofar as separation of functions of our staff is concerned.

The CHAIRMAN. I don't mean dropping the last sentence. I mean continuing the exemption in the last part of that sentence. That is what Mr. Dixon of the FTC suggested.

Mr. MINOW. If you would continue it, I think we would have no problem.

The CHAIRMAN. But not continue the exemption in the first part of the sentence.

Mr. MINOW. In other words, if they dropped out initial licenses and left in the part about rates.

Mr. FORD. Mr. Chairman, I was going to suggest the way to get to it is by adding "the provisions of 5(c) shall apply to initial licensing."

The CHAIRMAN. Well, that is what we are talking about, yes.

Mr. MINOW. We follow on this any way.

The CHAIRMAN. Shall not apply——

Mr. FORD. To initial licenses.

The CHAIRMAN. That is what it says now.

Mr. FORD. The provisions of 5(c) shall apply to initial licensing.

The CHAIRMAN. You would have no objection to that.

Mr. FORD. That is right. If you struck out the words "initial licenses." But that does not get to the rulemaking at all—just initial licensing.

Mr. MINOW. To be very precise, if you dropped the words at the bottom line, the three words "for initial licenses" or, we would have no problem. That is the practice we follow now. And we have no disposition to change it.

The CHAIRMAN. Well, if we could reach it in some way, it would not leave an agency wide open to another instance such as the one which created such a good deal of concern throughout the Nation, it would seem to me an advisable thing to do. I know the members of that Commission evidently must have had some great concern about it, because after the contacts had been made, they voluntarily came up and reported it.

Mr. MINOW. Well, Mr. Chairman, I would be happy to volunteer that we would undertake to study this specific suggestion and file a letter for the record with the Commission's views on it.

The CHAIRMAN. We would be very glad to have it. It does bother me. It has all along. I don't want to go too far, but I still think

a matter of that kind, as in these Sangamon Valley type proceedings—I think even though they are technical and have to be approached on very narrow terms, I do think they are awfully important.

Now, another question or two. I don't want to trespass on any prerogatives here, or embarrass anybody, particularly you who must assume these responsibilities as Commissioners. But does the Commission at the present time have disciplinary powers over the attorneys or other persons permitted to practice before the Commission?

Mr. MINOW. There is a provision in section 1.23 of our rules, Mr. Chairman.

The CHAIRMAN. Is that a lengthy instrument? Could you provide a copy of it for the record?

Mr. MINOW. Yes, sir. It is very brief. We will supply a copy for the record.

The CHAIRMAN. Thank you. Now, in some of the cases in which Judge Stern heard, as a special hearing examiner, he made some specific findings as to activities of attorneys in bringing about or participating in bringing about off the record presentations to influence the Commission. In some of these cases Judge Stern recommended that the license be voided, that a new hearing be conducted by the Commission. Has the Commission given consideration to the findings made by the judge with regard to activities engaged by some of the attorneys in such cases?

Or is that a question you would not care to answer at this time, in view of pending matters?

Mr. MINOW. I think these were prior to my arrival. I want to find out.

Mr. Chairman ——

The CHAIRMAN. I might say, Mr. Chairman, I am a lawyer myself, and I am not for arbitrarily penalizing lawyers.

Mr. MINOW. All of these cases are still sub judica, under consideration. The Commission has felt, Mr. Chairman, that it would not take any action until the cases were determined.

The CHAIRMAN. All right.

Mr. MINOW. I might call your attention, Mr. Chairman, to the fact that I am told that the Federal Communications Bar Association has its own special canon of ethics with respect to its member lawyers having to do with disciplinary problems.

The Chairman. Does any other member of the committee have any questions now?

Mr. Howze, do you have anything?

Mr. HOWZE. No, sir.

The CHAIRMAN. Your appearance here concludes the hearings on all six of the major regulatory agencies. We had a full and complete hearing on this matter in the last Congress. I would like for the record to show at this point that the hearings which resulted in H.R. 12731, reported in the 86th Congress, will become a part of this record by reference.

Each of the Commissions who have appeared have stated emphatically that they were supporting this type legislation. And they were strongly in favor of the objectives of this kind of legislation. And each of the Commissions has been exceedingly helpful in making certain changes and suggestions that would improve the bill,

as applicable to that particular agency. We want to express our thanks, as well as our commendation, to each of these agencies who have commented here with that attitude.

It is with such feeling that I think we can more properly come to a final decision of what is best in the long run.

Now, there have been suggestions made by each of the agencies, and I suggested to Mr. Dixon, Chairman of the FTC yesterday, in view of these suggestions by each of the agencies, that I thought it might be helpful to arrange a meeting sometime with the chairman or general counsel of each of the commissions, and go over these changes suggested by each of them to see how they might all be brought together, or if there were some suggestions made by some that would have an adverse effect upon another. And I believe that such a meeting would be helpful as we would consider whatever changes, if any, we might make if the bill is reported.

Mr. MINOW. Mr. Chairman, we would be very pleased to participate in such a meeting.

The CHAIRMAN. Thank you. I am sure you would. I want to give you some idea of what I thought would be a further approach to this, because today will conclude the hearings on this legislation.

We had a good many witnesses appear from various groups—practitioners, organizations, industry and so forth, in the last Congress. I don't know whether it indicates their satisfaction this time or not, but we have not had any request from members of industry to appear again this time, in view of what the committee had done in the past. We do have some letters. We had a letter from the American Bar Association, which will be included in the record. And I think there are several other letters expressing some interest. But they are brief. And I think those should be included in the record. And without objection they will be inserted.

(The letter from the American Bar Association and other material submitted for the record follow:)

AMERICAN BAR ASSOCIATION,
SPECIAL COMMITTEE ON LEGAL SERVICES AND PROCEDURE,
June 5, 1961.

HON. OREN HARRIS,
Chairman, Interstate and Foreign Commerce Committee,
House of Representatives, Washington, D.C.

DEAR CHAIRMAN HARRIS: The enclosed article from the May issue of the American Bar Association's Journal discusses ex parte contacts in administrative agencies, the subject of your bill, H.R. 14.

The American Bar Association has sponsored legislation on this subject which has been introduced in the 87th Congress as H.R. 351.

I hope you will find Mr. Ablard's article to be of interest and help in the work of your committee.

Sincerely yours,

SMITH W. BROOKHART.

[Reprinted from American Bar Association Journal, May 1961]

Ex Parte Contacts With Federal Administrative Agencies

Mr. Ablard reports on the status of legislation proposed by the association dealing with the problem of ex parte communications in administrative adjudicatory proceedings. He urges support for this needed reform.

(By Charles D. Ablard of the District of Columbia Bar)

One of the most difficult and troublesome problems in the field of administrative law is that of ex parte contacts in administrative adjudicatory proceedings. In 1955, the task force report on legal services and procedure of the Commission on Organization of the Executive Branch of the Government (the Hoover Commission) recited findings made by the Congress on the problem of ex parte contacts and commented as follows:

"Example of improper and undue influence have been revealed, however, by at least 10 congressional committees, which conducted hearings on the subject, since 1948. One method consists of presenting arguments to the agency, which would not be presented in open hearing, in private and behind the backs of other parties to the proceeding in an effort to obtain special consideration and unfair advantage." [1]

The task force recommended that minimum standards of conduct be prescribed by statute to prohibit "communication privately with any agency or any representative thereof with respect to the merits of any pending case, action, or proceeding, without notice to his adversary." [2] The report of the Special Committee on Legal Services and Procedure of the American Bar Association to the house of delegates in 1956 mentioned their recommendation.[3] In 1958, realizing the need for legislation, the house of delegates authorized the special committee to proceed to draft legislation to implement its recommendation.[4]

RECENT DEVELOPMENTS

During the 86th Congress, much interest in this legislation was generated by several decisions of the courts and some well-publicized testimony before committees of the Congress. The opinions of the courts during the past few years have affected the thinking of Congress and the public. In *Sangamon Valley Television Corporation* v. *FCC*,[5] the Supreme Court remanded the proceeding to the Federal Communications Commission after the brief of the Solicitor General before the Supreme Court revealed that certain relevant evidence had been elicited by the Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of Representatives. The testimony before that committee indicated that ex parte communications which were not a part of the official record of the proceeding had been made to members of the Commission. Although it was in form a rulemaking proceeding, the rule concerned the location of a television channel, and there were several competing applicants in different cities. After remand and a second decision by the Commission, an appeal was made to the Court of Appeals of the District of Columbia Circuit. The court remanded to the Commission again after finding certain ex parte communications had been made to the Commission in violation of an order of the Commission. The court said:

"Interested attempts to influence any member of the Commission * * * except by the recognized and public processes go to the 'very core of the Commission's quasijudical powers * * *' *Massachusetts Bay Telecaster, Inc.* v. *Federal Communications Commission*, 104 U.S. App. D.C. 226, 261 F. 2d 55, 67. That case involved licensing, not rulemaking. Ordinarily allocation of TV channels among communities is a matter of rulemaking, governed by section 4 of the Administrative Procedure Act, 5 U.S.C.A. 1003, rather than adjudication governed by section 5, 5 U.S.C.A. 1004. The Commission and the intervenor contend that because the proceeding now on review was 'rulemaking,' ex parte attempts to influence the Commissioners did not invalidate it. The Department of Justice disagrees. On behalf of the United States the Department urges that whatever

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[1] Legal services and procedure task force report, p. 298.
[2] Id., p. 301
[3] 81 A.B.A. Rep. 340.
[4] 83 A.B.A. Rep. 611.
[5] 358 U.S. 49 (1958), reversing 255 F. 2d 191 (D.C. Cir. 1958).

the proceeding may be called, it involved not only allocation of TV channels among communities, but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. We agree with the Department of Justice.

"Accordingly, the private approaches to the members of the Commission vitiated its action and the proceeding must be reopened." [6]

While in *Sangamon*, supra, one of the litigants had violated an express order of the Commission inviting comments but restricting them to a certain time period, the language of the Court seems sufficiently broad to indicate that any attempted ex parte influence is sufficient to vitiate a proceeding.

On May 19, 1960, the Court of Appeals of the District of Columbia Circuit in *United Airlines and Trans-World Airline* v. *CAB* remanded the proceeding to the CAB under the doctrine of *Sangamon*.[7] That proceeding, like *Sangamon*, involved competing carriers. The issue was whether the initial certificate to American Airlines should be amended to remove a restrictive clause requiring at least one stop on all coast-to-coast flights. The Board granted the removal, and the two intervening airlines appealed the decision. The court, at the urging of the Department of Justice, remanded to the Board for consideration of the effect of alleged ex parte approaches by American and other interested parties.

A recent Harvard Law Review note attempts to differentiate *Sangamon*, *United Airlines* and *Massachusetts Bay Telecasters* from the factual situation which arises when there are no competing applicants for the favors of the Commission.[8]

This situation was exemplified by the testimony of Thomas Corcoran, a well-known lawyer in the Roosevelt (FDR) administration, before the Legislative Oversight Subcommittee on May 18 and 19, 1960. Mr. Corcoran testified that he had approached three of the five members of the Federal Power Commission in an initial licensing proceeding for his client, Midwestern Gas Transmission Corp. Midwestern was the only applicant for a certificate of the Commission which authorized the construction of a pipeline in the northern central part of the United States. His only "opponents" in the proceeding were the staff members of the Commission. Since the matter was initial licensing, it was treated as though not subject to the separation of functions provision of the Administrative Procedure Act.[9] That section prohibits one engaged in the prosecuting functions of a case from advising or participating in the decision of the agency, but this provision does not apply in determining applications for initial licenses or at the agency level since the Administrative Procedure Act exempts agency members from the restriction. Corcoran contended that since the separation-of-functions provision did not apply the staff was free to "sit in the lap" of the Commission during the decisionmaking phase of the proceeding. Knowing this, Corcoran felt that it was his duty to his client to get the "ear" of the Commissioners to reemphasize certain aspects of his case.

The proposed Code of Administrative Procedure,[10] also sponsored by the American Bar Association through the Special Committee on Legal Services and Procedure, would remove the exception for initial licensing proceedings and would require a complete separation of functions, even at the agency level. This proposed change, if adopted, would eliminate the cause for concern which Mr. Corcoran expressed. There is certainly no justification for ex parte communications by agency nonadjudicatory staff members to the decisionmaking personnel after the record is closed. All ex parte communications should be and must be prohibited in adversary adjudicatory proceedings.[11]

The report of James M. Landis, former dean of the Harvard Law School, which was issued in December 1960, to then President-elect Kennedy on the administrative process mentioned the need for action on ex parte contacts.[12] Although recognizing its limitations, he recommended action by Executive order to set standards of conduct. He also recognized that legislation might be needed.

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[6] 269 F. 2d 221 (D.C. Cir. 1959).
[7] Nos. 15, 414–415, unreported.
[8] 73 Harv. L. Rev. 1178 (April 1960).
[9] Sec. 5(c), 5 U.S.C. 1004(c).
[10] S. 1070, 86th Cong.
[11] Sec. 101(a) of H.R. 12731 (86th Cong.); H.R. 14 (87th Cong.), the reported bill of the Interstate and Foreign Commerce Committee, removes the initial licensing exception when decisions are required to be based on the record.
[12] Landis, "Report on Regulatory Agencies to the President-Elect," committee print, Senate Committee on the Judiciary, 86th Cong., 2d sess., December 1960.

PRINCIPLE OF LEGISLATION

The basic principle behind the legislation proposed by the American Bar Association is fundamental to most practicing attorneys. It is the principle that a case be decided on the record made by the parties, and not upon the basis of information that was not placed in that record by the litigants. Canon 3 of the Canons of Professional Ethics provides that "a lawyer should not communicate or argue privately with the judge as to the merits of a pending cause * * *" [13]

While an administrative agency is not a court and a commissioner is not a judge by the strict definition of those terms, in proceedings where there are competing litigants contending for the valuable rights and privileges dispensed by the agency, the fundamental principle expressed in the canons should be applicable.[14] Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 1006(d), specifies what shall constitute the "exclusive record" for review in an administrative proceeding. This provision should be a sufficient statutory mandate to insure that no improper approaches are made outside that record, but there is no statutory language comparable to Canon 3.[15]

Legislation prohibiting an ex parte communication with decisional personnel will protect the integrity of adjudicatory proceedings by requiring those persons to decide cases only on the merits based on the record made by the parties.

In their testimony before the various committees of Congress, the administrative agencies have attempted to point out the difficulties of legislating in this area. They urge that Congress refrain from action and leave this problem to the individual agencies as their needs require.[16] If past performance is any criterion, this argument is not sound. While some agencies have attempted to cope with the problem through rules, none have arrived at an effective solution because the rules are binding on neither the agency personnel nor the agency members. The most effective provisions are the rules of the Securities and Exchange Commission [17] and the canons of ethics of the Interstate Commerce Practitioners,[18] but even these are not adequate because they do not prohibit ex parte communications with the staff of the Commission. Such practices result in the institutional decision where the litigant not only does not know who wrote the decision, but frequently is not even aware of the reasons for it.[19]

How does the legislation proposed by the American Bar Association approach the problem, and what consideration does it give to the inherent problems in this field? Consider the latter point first. The legislation acknowledges the dual nature of regulatory commissions and the regulatory functions of executive departments. Part of their work is legislative in nature, and it is these legislative functions which require and justify ex parte contacts to obtain the expert advice of members of the staffs and the views of the industries which are regulated. In the performance of their legislative functions, it would be a mistake to exclude the agencies from these views. Congress cannot legislate in a vacuum and the agencies certainly cannot be expected to do so. It is no easy task in these multifunction agencies to define the line between the legislative and the judicial functions, but this minor problem should not be exaggerated to the point of obscuring the main purpose.

The first legislation on this subject sponsored by the American Bar Association was title IV of the proposed Federal Administrative Practice Act, S. 600 (86th Cong.) and H.R. 349 (87th Cong.). It provides that:

"It shall be improper conduct for any representative to communicate or have any discussion with any agency, or with any employee, or representative, or official, or presiding officer of any agency, concerning the merits or disposition of any contested adjudicatory proceedings before that agency in the absence of or without reasonable notice to his adversary."

More comprehensive legislation was introduced in the Senate at the request of the American Bar Association by Senator Carroll as S. 2374 (86th Congress)

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[13] Canon 3, American Bar Association Canons of Professional Ethics.
[14] See also canon 23 and canon 17.
[15] See vom Baur, F. Trowbridge, "Whether in Case of Adjudication Proceedings Before Agency Tribunals, Canons of Professional and Judicial Ethics Should Be Applicable," 21 J.B.A.D.C. 99 (1954).
[16] Hearings before Subcommittee on Administative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, on Administrative Procedure Legislation, 86th Cong., 1st sess., p. 401 (1959).
[17] Rules of Practice of the SEC, 17 C.F.R. 203.10(9).
[18] Canon 8, Code of Ethics, Association of Interstate Commerce Commission Practitioners.
[19] See Beelar, "The Dark Phase of Agency Litigation," address before the Administrative Law Section of the American Bar Association, 82d annual meeting, 1959.

and in the House by Congressman Fascell as H.R. 10657 (86th Cong.) H.R. 351 (87th Cong.), and by Congressman Harris as H.R. 6774 (86th Cong.). The purpose of all these bills is to protect agency litigation from back door influence and pressure while at the same time preserving free access to information and flexibility of agency operation. The legislation has been considered by the three committees of the Congress to which the bills were referred and hearings have been held by each of them.[20] Representatives of the American Bar Association's Special Committee on Legal Services and Procedure have testified before all of the committees in support of the association-sponsored bills.

Both S. 2374 and H.R. 10657 which were referred to the Committees on the Judiciary of the Senate and House applied to all agencies. H.R. 6774 which was referred to the House Committee on Interstate and Foreign Commerce applied to only the six major regulatory agencies since these agencies constitute the extent of the oversight jurisdiction of that committee. That committee also had pending before it another bill, H.R. 4800 (86th Cong.), which represented the views of the staff of the committee. It also dealt with other matters, including conflicts of interest.

On June 23, 1960, the Committee on Interstate and Foreign Commerce unanimously reported H.R. 12731 to the 86th Congress. It was a revised version of H.R. 6774 and H.R. 10657. This bill also applies to only the six major regulatory agencies. The bill has been reintroduced in the 87th Congress as H.R. 14.

WHAT THE REPORTED BILL DOES

In the reported bill, the line of coverage is drawn at agency proceedings where the decision must be based on the record of hearing. This requirement is either by rule, statute or judicial interpretation of the due process clause of the Constitution. These proceedings are usually tried before a hearing examiner or a board which performs only judicial functions. With few exceptions, these proceedings are now identified as adjudications. If there is any ambiguity, it may be overcome by the simple device provided in the bill requiring that the notice of hearing or other pleading which initiates a proceeding specify whether that proceeding is subject to the standards of conduct prescribed by the proposed legislation. By this device, all persons will obtain knowledge of the status and character of the particular proceeding and of the applicability of the standards of conduct legislation. This procedure also permits a certain flexibility by the agency in bringing an otherwise exempt proceeding under the act when that proceeding is clearly adversary in character determining conflicting rights or claims. Moreover, it would permit a party to request that the proceeding be made subject to the standards of conduct legislation if the agency had not done so in its notice of hearing.

As mentioned previously, the decisionmaking personnel are the only persons to whom the legislation would apply. These include agency members, hearing officials and those persons under their immediate supervision. The nonjudicial business of the agency will not be affected and those persons who perform these functions will not be covered by the act. In the past efforts have been made to draw the line between the "proper" and "improper" communication. The distinction was usually on the basis of whether the communication concerned the merits of a proceeding. The reported bill deals with the problem by prohibiting all secret communications about a pending proceeding. Propriety can be determined only by disclosure. If the content of a communication is improper, it should not remain secret; if it is proper, its disclosure will not offend. It is impossible to limit the prohibition to any class of ex parte communications; to attempt such a restriction would compromise the objective of fair play. The bill requires disclosure of all written communications by placing them in a public file with notice to all parties.

This theory received support in the decision of Judge Horace Stern, who was appointed as special hearing examiner by the Federal Communications Commission in the *Miami Channel 10* case and the *Boston Channel 5* case. In the former, a licensing proceeding, ex parte contacts were made to a commissioner of the Federal Communications Commission by friends, creditors, and Senators. Judge Stern held this activity improper saying: "Communications to a judge designed to influence his judicial action are forbidden in pending pro-

[20] Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate; Committee on the Judiciary, House of Representatives, and Committee on Interstate and Foreign Commerce, House of Representatives.

ceedings, whether such communications be written or oral, except on notice to all other interested parties * * *."

This language is sufficiently broad to cover the procedural aspects of the case as well as the merits. In reaching his decision, Judge Stern used the "intent to influence" standard which was a part of several proposals before the Congress. The reported bill, H.R. 12731 (86th Con.), does not use this test but prohibits all ex parte communications in proceedings covered by the bill and relies on the disclosure provisions for enforcement. The effect of such disclosure on public opinion should be a powerful deterrent to back door approaches.

Although the reported bill has many good provisions, it does have two notable shortcomings. The first relates to oral communications. All of the American Bar Association's proposed bills provide that if the communication is oral, a true summary accompanied by a statement of circumstances must be written by the person to whom the communication was directed. This summary would be placed in the public file with notice to the parties. This provision is omitted in the reported bill. Unfortunately, the committee yielded to the agencies and deleted the "true summary" provision. However, the bill by its definition and mandate, declares unlawful the oral ex parte communication. It is only the failure to make the required disclosure of written communications which would bring about the imposition of sanctions. A willful violation would subject the violator to a fine of not more than $10,000 or imprisonment for not more than 1 year, or both. The personnel of the agency are not under any sanction unless, by their own misconduct, they fail to make the disclosure required by the bill. If they fail to make the disclosure, they are deliberately withholding information which by right should be available to the parties.

The second shortcoming is the provision in the bill which states that a "status inquiry" is not an ex parte communication. The bill does provide that such an inquiry shall be made a part of the file if in writing. The status inquiry has long been known to be of much more significance than its name implies. Any inquiry to any agency member by a powerful Member of Congress, before whom he must appear for appropriations or for confirmation on reappointment, is likely to create a strong impression on that agency member as to the disposition of the case desired by the Congressman. Admittedly, Congress should not be cut off from the agencies since they are arms of Congress and in some proceedings such as those of the Food and Drug Administration, the Federal Trade Commission and the Post Office Department, where it is often "big government versus the little guy," a congressional inquiry may be desirable.

One possible solution to the mischievous practice of status inquiries would be to provide that status inquiries be processed by some one other than an agency member who must decide the case. If the status inquiry is to be in fact what its name implies, there is no reason why any attorney in the agency or possibly the secretary to the agency cannot advise the Congressman as to the status of the proceeding, without going to the top man for the "red carpet" treatment.

The two most important constructive provisions in the bill are: first, the requirement that the notice of hearing in each proceeding state whether it is subject to the legislation so all will know from the commencement of a proceeding which rules are to apply; second, the requirement for disclosure of written ex parte communications in a public file. A statutory prohibition against secret communications about pending proceedings, reenforced by requirement for public disclosure, should prove effective in eliminating the pernicious effects of ex parte communications and influence from agency litigation. One can only speculate whether the mandate will be sufficient to prohibit the oral ex parte contact without the written true summary provision. It is hoped that Congress will restore this provision in any legislation which is enacted into law.

Only by the enactment of legislation can we bring about an environment in which litigants before agencies can be assured that their cases will be decided solely on the merits and the evidence contained in the public record of the proceeding.

An aroused bar can bring about the passage of this much-needed legislation.

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WHAT THE REPORTED BILL DOES

In the reported bill, the line of coverage is drawn at agency proceedings where the decision must be based on the record of hearing. This requirement is either by rule, statute or judicial interpretation of the due process clause of the Constitution. These proceedings are usually tried before a hearing examiner or a board which performs only judicial functions. With few exceptions, these proceedings are now identified as adjudications. If there is any ambiguity, it may be overcome by the simple device provided in the bill requiring that the notice of hearing or other pleading which initiates a proceeding specify whether that proceeding is subject to the standards of conduct prescribed by the proposed legislation. By this device, all persons will obtain knowledge of the status and character of the particular proceeding and of the applicability of the standards of conduct legislation. This procedure also permits a certain flexibility by the agency in bringing an otherwise exempt proceeding under the act when that proceeding is clearly adversary in character determining conflicting rights or claims. Moreover, it would permit a party to request that the proceeding be made subject to the standards of conduct legislation if the agency had not done so in its notice of hearing.

As mentioned previously, the decisionmaking personnel are the only persons to whom the legislation would apply. These include agency members, hearing officials and those persons under their immediate supervision. The nonjudicial business of the agency will not be affected and those persons who perform these functions will not be covered by the act. In the past efforts have been made to draw the line between the "proper" and "improper" communication. The distinction was usually on the basis of whether the communication concerned the merits of a proceeding. The reported bill deals with the problem by prohibiting all secret communications about a pending proceeding. Propriety can be determined only by disclosure. If the content of a communication is improper, it should not remain secret; if it is proper, its disclosure will not offend. It is impossible to limit the prohibition to any class of ex parte communications; to attempt such a restriction would compromise the objective of fair play. The bill requires disclosure of all written communications by placing them in a public file with notice to all parties.

This theory received support in the decision of Judge Horace Stern, who was appointed as special hearing examiner by the Federal Communications Commission in the *Miami Channel 10* case and the *Boston Channel 5* case. In the former, a licensing proceeding, ex parte contacts were made to a commissioner of the Federal Communications Commission by friends, creditors, and Senators. Judge Stern held this activity improper saying: "Communications to a judge designed to influence his judicial action are forbidden in pending pro-

[20] Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate; Committee on the Judiciary, House of Representatives, and Committee on Interstate and Foreign Commerce, House of Representatives.

no carrier membership. Membership comes from all parts of the United States and from every line of industrial and commercial activity. The company by which I am employed is a member.

The league has a vital concern for high standards of agency conduct. Standing league policy favors legislation which will authorize and direct each transportation regulatory agency to adopt and enforce a code of ethics specifically applicable to proceedings before it.

In the 86th Congress this committee held hearings on H.R. 4800 and H.R. 6774 to establish standards of conduct for agency proceedings. The league did not favor those bills generally as opposed to its policy for action by the agencies themselves; moreover, it objected to several specific faults or excesses in the particular provisions of the bills. The bills did not pass.

The particular provisions of H.R. 14 substantially meet many of the objections which the league presented to the earlier bills. Nevertheless, this bill would establish standards of conduct for proceedings of record in six agencies, including the Interstate Commerce Commission; it defines and forbids ex parte communications, provides for making written communications a matter of record, and imposes severe penalties by way of fines or imprisonment for violation.

The league is in sympathy with the purposes of the bill but believes it to be unnecessary and inappropriate to the Interstate Commerce Commission; the matter can and should be adequately treated in the agency's own rules and codes of ethics.

The Interstate Commerce Commission already has such a code and the code deals broadly with the subject of improper ex parte communications. Appendix A to the General Rules of the Interstate Commerce Commission, entitled "Canons of Ethics," provides as follows:

"8. *Private communications with the Commission.* In the disposition of contested proceedings brought under the Interstate Commerce Act the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission."

The quoted provisions are not without important and binding effect. The Commission exercises the power of discipling members of its bar, who are subject to censure, suspension, or disbarment for failure to observe the code of ethics. Moreover, it requires all persons, whether or not they are practitioners, to conform. Rule 13 of the General Rules of Practice deals with disciplinary action and specifically requires that—

"All persons, whether or not admitted to practice under paragraph 9, must, in their representations before the Commission, conform to the code of ethics published by the Association of Interstate Commerce Commission Practitioners as of April 1, 1955, which code is reprinted in appendix A to this part."

The league does not favor H.R. 14 because it believes that the subject of ex parte communications is and should be best controlled by a code of ethics to be administered by the agency, as is done in the case of the Interstate Commerce Commission.

The bill partially recognizes league policy in section 4(c) wherein each agency is directed to implement by regulation the standards set up in section 4(a) and 4(b). This has already been done by the Interstate Commerce Commission. For example, the proposed section 4(a) recognizes that it is improper for any person to attempt to influence the vote of the Commission or any member or employee by improper means. The canons of ethics before the Interstate Commerce Commission provide as follows and apply by rule to all persons:

"4. *Attempts to exert political influence on the Commission.* It is unethical for a practitioner to attempt to sway the judgment of the Commission by propaganda, or by enlisting the influence or intercession of Members of the Congress or other public officers, or by threats of political or personal reprisal.

"5. *Attempts to exert personal influence on the Commission.* Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners."

Proposed section 4(b) condemns Commission members or employees from engaging in any other business for profit although this matter is already covered in the provisions of section 11, 17(3), and 205(i) of the Interstate Commerce Act. We are not aware of any supposed inadequacy in those provisions, or need for more detailed restrictions or statutory requirements.

In conclusion, the league suggests that the matter of ex parte communications should be dealt with by agency regulation. So far as the Interstate Commerce Commission is concerned there is ample statutory authority in the provisions of section 17(3) of the Interstate Commerce Act: "The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it."

The league does not favor the bill, H.R. 14.

COLUMBIA GAS SYSTEM SERVICE CORP.,
New York, N.Y., June 8, 1961.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
U.S. House of Representatives,
Washington, D.C.

GENTLEMEN: Nine subsidiaries of the Columbia Gas System, Inc., are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act.

As a result of our experience before the Commission, we think that for agency proceedings of record to be fair and just, H.R. 14 or a similar measure must be enacted into law.

We have long been concerned with the exception to section 5(c) of the Administrative Procedure Act that allows staff counsel or other staff personnel who acted as advocates to maxe ex parte contacts in certificate and rate cases. There should be the same separation of function for rate and certificate matters as for other issues tried before administrative agencies.

After trying a case at great expense and persuading the hearing examiner as to the merits of our position, we have nevertheless lost the case on the staff appeal to the Commission. We subsequently learned that the staff counsel, who tried the case and who appealed the examiner's decision, also wrote the Commission's opinion overruling the examiner's decision. Obviously, the present law is not conducive to fair hearing and just results.

We are therefore pleased to see that H.R. 14 would correct this situation by providing:

"SEC. 10. (a) In the case of any 'on-the-record proceeding' before an agency (as defined in sec. 2 of this act), subsection (c) of section 5 of the Administrative Procedure Act (5 U.S.C. 1004(c)) and the provisions of this act shall apply as though the last sentence of such subsection (c) had not been enacted."

Although we favor elimination of contact with decisionmaking officers, contact with the executive director and/or staff personnel of an agency who direct bureaus or have the function of directing advocates should be permitted insofar as they relate to procedural or administrative problems. Contacts of this type are often necessary while proceedings are in progress, and forbidding them may well impede the smooth flow of matters through an agency. It appears that H.R. 14 would prevent this kind of contact and, if it does, we recommend that the bill be amended to permit them.

This is the only reservation we have about H.R. 14, and considering the bill in toto, we endorse it and recommend that it be enacted into law.

We respectfully request that this letter be made a part of the record of the hearing before your committee on H.R. 14.

Very truly yours,

RICHARD A. ROSAN.

The CHAIRMAN. Let me thank you, Mr. Chairman and members of the Commission, for your appearance here and your valuable assistance in this problem.

Mr. MINOW. Mr. Chairman, on behalf of the Commission we thank you and members of the committee. We regard this as most helpful to us, and we are glad to cooperate, and we appreciate your concern for our problems.

The CHAIRMAN. Thank you very much. I am very pleased at the coooperative attitude that we are having by these commissions and people in Government. And I think it is going to be helpful in the long run.

Mr. MINOW. Mr. Chairman, might I add a sentence to my earlier answer having to do with the disciplinary problem. I would add there that the Commission has not prejudged this in any way, and will take it up in due course.

The CHAIRMAN. I understand that. And I wouldn't want to press you for any further comment at all at this time in view of the status of the matter before you. Thank you very much. You may be excused.

(Whereupon, at 11:45 p.m., the committee adjourned.)

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