SUMMARY JUDGMENT IN ADMINISTRATIVE ADJUDICATION †

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Needless delay is a conspicuous but not easily alleviated malady of the administrative process. Relying on the federal courts' experience with summary judgment, existing agency summary procedures, and the reactions of agencies and practitioners to a draft summary decision rule, the authors recommend applying summary judgment techniques to formal administrative adjudications and other trial-like proceedings in order to reduce delay.

DELAY is widely acknowledged as a major inadequacy of the administrative process. Administrative tardiness in deciding adjudicatory matters is no exception.[1] Despite long recognition of this frustrating problem in agency litigation, neither administrative law literature nor agency reports discuss summary judgment as a device to reduce delay. For example, Professor Davis' sole comment is: "Some agencies might well take a leaf from the federal rules of civil procedure and permit summary judgment without evidence when no issue of fact is presented." [2] This Article explores the merit of this suggestion in the realm of administrative adjudication.

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[1] The late Dean Landis summarized the magnitude of the problem a decade ago: "Inordinate delay characterizes the disposition of adjudicatory proceedings before substantially all of our regulatory agencies." J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 5 (submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary), 86th Cong., 2d Sess. (Comm. Print 1960). Nor has there been any startling improvement in the intervening years. *See, e.g.*, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 28–32, 34 (1969). *See generally* Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969); Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968). *But cf.* G. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 523–24 (1970).

[2] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.13, at 578 (1958). The paucity of administrative commentary and the scarcity of summary judgment in administrative proceedings seem surprising in light of the extensive application and commentary on summary judgment procedures in state and federal courts.

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I. The Civil Trial Analogue — Summary Judgment in the Federal Courts [3]

The motion for summary judgment triggers a pretrial procedure designed to eliminate unjustified delay by limiting the use of cumbersome trial machinery to the resolution of disputed factual questions. As incorporated in Rule 56 of the Federal Rules of Civil Procedure, summary judgment makes possible the prompt disposition of a case on its merits without a formal trial if there is "no genuine issue as to any material fact." Summary judgment is effective because it permits a party to pierce the allegations in his opponent's pleadings by presenting through affidavits material evidence which establishes that no factual dispute exists.

A district court will generally grant summary judgment if the pleadings and papers filed by the parties establish, without substantial dispute, facts that entitle the movant to judgment as a matter of law. Thus, before the court may decide legal contentions under Rule 56, there must be no dispute as to any material question of fact. The moving party has the burden of establishing that there is no dispute, so that "the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists." [4] Whether a fact is "material" is, of course, determined by the legal theory to be applied to the case. Since summary judgment may not be used by the judge to invade the province of the jury,[5] characterization of a disputed material question as one of "fact" or "law" involves a decision concerning whether the judge or jury should decide or traditionally has decided the question. Thus, if the parties have requested a jury trial, the judge should be reluctant to resolve disputed inferences of fact, even though there is no dispute as to the evidentiary facts.[6] On the other hand, where

[3] No attempt is made here to outline in detail federal precedent and practice in summary judgment. Others have reviewed summary judgment procedures with care and length. *See, e.g.*, 3 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 1231–47 (Wright ed. 1958); F. James, Civil Procedure § 6.18 (1965); 6 J. Moore, Federal Practice, ch. 56 (2d ed. 1966).

[4] C. Wright, Federal Courts 443 (2d ed. 1970).

[5] *See* note 24 *infra*. For a discussion of the division of function between judge and jury, see H.M. Hart & A. Sacks, The Legal Process 369–83 (tent. ed. 1958).

[6] *See, e.g.*, Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959); Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 365 (5th Cir. 1951). *But cf.* Fox v. Johnson & Wimsatt, Inc., 127 F.2d 729 (D.C. Cir. 1942); United States v. 2000 Plastic Tubular Cases, 231 F. Supp. 236 (M.D. Pa. 1964), *aff'd per curiam*, 352 F.2d 344 (3d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

For instance, it is frequently noted that negligence cases are not usually adjudicable by summary judgment, because application of the reasonable man test

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there would be no jury at trial, it may be a sufficient predicate to summary judgment that there is no dispute as to evidentiary facts.[7]

Even if the case comes within the literal terms of Rule 56, a district court may in its discretion deny a motion for summary judgment in recognition of the limitations on its effective and fair use under certain circumstances.[8] For example, where material facts are largely within the moving party's domain, as when his state of mind is in issue, a motion for summary judgment is usually denied as a transparent device to avoid evidentiary tests of confrontation and cross-examination.[9] Furthermore, courts seldom rely on summary judgment to decide cases involving complicated or voluminous evidence, especially when the legal question is novel or significant.[10] As a result, it has been recognized that although Rule 56 is available in all types of litigation, there are certain types of cases that by the nature of the issues involved do not lend themselves to summary adjudication.[11] For instance, the Supreme Court has asserted that antitrust cases frequently are not susceptible to disposition by summary judgment.[12] In the final analysis, discretion is guided by the prospective utility of a full evidentiary hearing.[13] As Professor Moore has advocated, "[T]he basic principles governing the summary judgment procedure [should] be accommodated in a common sense manner to the realities of the litigation at hand." [14]

As with any procedural rule, Rule 56 has occasionally been abused with the effect of adding to, rather than eliminating, delay. Yet in the majority of cases it involves little additional burden, is economical, and saves time for both the parties involved and the court.[15] Even when denied, it may serve to limit the issues

calls for invocation of community standards through use of the jury. *Cf.* 3 W. Barron & A. Holtzoff, *supra* note 3, at § 1232.1.

[7] Otis & Co. v. Pennsylvania R.R., 61 F. Supp. 905, 907 (E.D. Pa. 1945), *aff'd per curiam*, 155 F.2d 522 (3d Cir. 1946).

[8] *See* 6 J. Moore, *supra* note 3, at ¶ 56.15[6].

[9] *See, e.g.*, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944). The most celebrated application of this limitation on summary judgment motions is "in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

[10] *See* Kennedy v. Silas Mason Co., 334 U.S. 249, 256–57 (1948); *cf.* Eccles v. Peoples Bank, 333 U.S. 426, 434 (1948) (declaratory judgment).

[11] *See* C. Wright, *supra* note 4, at 442.

[12] *See* Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). *See also* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 506 (1969).

[13] F. James, *supra* note 3, at 236.

[14] 6 J. Moore, *supra* note 3, at 2453.

[15] Unfortunately, there is a dearth of empirical studies on the effectiveness of

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for trial.[16] Professor Moore aptly summarizes the general view that summary judgment has "operated successfully in all the jurisdictions in which it ha[s] been adopted and the tendency ha[s] been to enlarge the scope of its operation." [17]

II. Application of Summary Judgment to Administrative Agencies

The successful experience with summary judgment in civil litigation suggests the use of a similar device in administrative adjudication. Many types of agency proceedings resemble court proceedings, with no variations that would portend a loss of usefulness in the transfer of summary judgment to an administrative setting.[18] Nevertheless, the multiformity of agency adjudication [19] necessarily circumscribes the court-agency analogy. Adjudicatory hearings range from informal conferences between an examiner and the parties to long and complex formal trials comparable to civil antitrust suits. In some classes of adjudicatory proceeding, use of summary judgment would be inappropriate because the procedural framework is too dissimilar from that of the courts,[20] or because the subject matter involved is not normally amenable to proof without a hearing.[21] Therefore, each agency must determine whether it should adopt summary judgment for any of its proceedings. Even when an agency has decided to utilize such procedures, it may be necessary to mold them to fit the peculiar structure of that agency's litigation. Consequently, any recommendation must be limited to a model rule that an agency may adapt to its own practices.

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summary judgment in reducing delay. For a study of a decade of summary judgment in New York, see Saxe, *Summary Judgments in New York: A Statistical Study*, 19 Cornell L.Q. 237 (1934).

[16] Rule 56(d) provides for partial summary judgment to narrow the case to disputed issues.

[17] 6 J. Moore, *supra* note 3, at 2072–73.

[18] Administrative hearings are often indistinguishable from civil trials. In some civil cases, particularly antitrust prosecutions, even the distinctions of "administrative expertise" and the less restrictive evidentiary rules have disappeared. *Cf.* United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 355–56 (D. Mass. 1950). In fact, it has been suggested that Federal Trade Commission antitrust hearings impose even more rigid evidentiary requirements than are commonly applied in comparable civil cases. *See* Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 52–53 & n.23 (1969). However, summary judgment is often unavailable in antitrust litigation where court and agency trials are most alike. *See* note 12 *supra*.

[19] *See* 1 K. Davis, *supra* note 2, at § 8.02.

[20] *See, e.g.*, p. 617 *infra* (proceedings without counsel).

[21] *See, e.g.*, p. 618 *infra* (demeanor evidence in NLRB unfair labor practice cases).

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With these considerations in mind, we prepared a draft rule authorizing summary decision procedures in agency adjudication.[22] It deviated from Rule 56 in that it included only the essential elements of a summary judgment rule: when the motion may be filed; the methods available for presentation of evidence; and the standard for grant of the motion. This draft rule was then submitted to over twenty agencies and departments which conduct adjudicatory hearings and to knowledgeable private practitioners. These agencies were asked to describe the operation and effectiveness of current rules concerning summary disposition and to criticize the draft rule. Some of the objections to the rule, which are discussed below, point out that the effectiveness and fairness of a summary decision rule vary according to the type of proceeding and the nature of the issues involved. Experience with Rule 56 demonstrates, however, that limitations on the applicability of summary judgment in certain situations are no justification for across-the-board rejection of a device that will reduce delay in a broad range of agency proceedings.

A. Objections to the Use of Summary Judgment in Administrative Adjudication

1. Abridgement of Right to Administrative Hearing. — The contention that use of a summary decision rule would render the right to an administrative hearing meaningless is, in essence, an attack upon the theory of summary judgment. Why, it is asked, should a hearing be permitted on the one hand and cut short on the other? A right to be heard means, at the least, the right of a party to present evidence and to test that offered by his adversary. Summary judgment rules, it is argued, abridge that opportunity.

The short yet complete answer to these protests is that summary judgment is granted only when the papers filed with the motion clearly reveal that an evidentiary hearing would serve no useful purpose. Summary judgment honors the right to be heard by allowing the party opposing the motion to show the necessity for a trial and by placing the burden on the party seeking summary disposition.[23] It protects fairness by relieving the parties of the burdens of a trial in those instances where it is reasonably clear that the ultimate decision will be based on evidence which can be presented without testimony. Just as summary judgment is not in conflict with the right to trial by jury because it is avail-

[22] See pp. 628–29 *infra* for text to final recommended rule, which is almost identical to the original proposed rule.

[23] *See generally* Davis, *The Requirement of Opportunity To Be Heard in the Administrative Process*, 51 YALE L.J. 1093 (1942).

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able only when there is nothing for the jury to decide,[24] a rule allowing summary decision in administrative adjudications would not improperly deny the right to a hearing since it would allow the hearing examiner or agency to dispense with an evidentiary hearing only if the absence of a hearing could not affect the decision.

2. Informal Proceedings Without Counsel. — Opposition to a summary decision rule based upon the absence of counsel in some administrative adjudications stems from a misconception regarding the rule's potential application. Hearings in some agencies are informal and parties may either try their own cases [25] or appear without counsel.[26] In such instances, summary disposition by motion could take unfair advantage of a party's lack of legal training. Moreover, the rule is not needed in these cases since such hearings generally consume little time. A summary judgment procedure is, however, appropriate where parties rely on counsel and the proceedings become, as a practice, protracted. The summary decision rule is designed solely for formal "on-the-record" hearings.

3. Availability of Effective Discovery Procedures. — A serious potential problem arises from borrowing summary judgment procedures from district courts without including the full panoply of discovery currently available in federal courts but not in most agencies.[27] Without adequate discovery, the party opposing the motion may not be able to present sufficient evidence to establish that the case should go to trial. Yet the current federal discovery rules are not the measure of the necessary minimum opportunity for access to an opponent's proof. The question is whether an agency's rules allow a party opposing a summary decision motion sufficient opportunity to obtain defensive facts.[28]

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[24] "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." *Ex parte* Peterson, 253 U.S. 300, 310 (1920) (Brandeis, J.).

[25] *See, e.g.*, 10 C.F.R. § 3.14 (1970) (AEC contract disputes).

[26] *See, e.g.*, 25 C.F.R. § 15.7 (1970) (Indian probate proceedings).

[27] The Second Interim Administrative Conference urged agencies to improve and extend their discovery procedures. S. Doc. No. 24, 88th Cong., 1st Sess. 63 (1963). An extensive proposal to implement and enlarge this suggestion was adopted during the fourth plenary session of the Administrative Conference on June 2–3, 1970. *See Recommendation No. 21: Discovery in Agency Adjudication. See* Tomlinson, *Discovery in Agency Adjudication*, Consultant's Report to the Committee on Compliance and Enforcement Proceedings, Administrative Conference of the United States (March 1970).

[28] Several agencies, such as the Federal Communications Commission and the Federal Maritime Commission, have adopted discovery rules modeled closely after the federal rules. *See* 47 C.F.R. §§ 1.311–.325 (FCC 1970); 46 C.F.R. §§ 502.201–.211 (FMC 1970). The FTC also authorizes broad discovery in adjudi-

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In any event, this objection is met by the conceded inapplicability of the summary decision rule in proceedings lacking or restricting discovery procedures.[29] The proposed rule specifically precludes, as does Rule 56(f), summary decision where the "party opposing the motion [establishes] that he cannot for reasons stated present . . . facts essential to justify his opposition . . . ."[30]

4. Nature and Complexity of Issues and Procedures. — Some agencies object to the proposed rule because many of their adjudicatory hearings involve disputes that are normally decided by demeanor evidence,[31] or depend on economic policy judgments.[32] Still others object to the application of the rule where a large number of parties are involved or where the proceedings are exceedingly complex.[33] Again these objections are based on erroneous conceptions of the principles and function of summary judgment. The proposed rule, like Rule 56, would not displace full hearings where basic facts are in dispute or where their resolution involves a question of witness credibility. There are well-recognized limitations on the application of summary judgment where the litigation is complex or where the disputed issue involves policy questions of first impression or public importance.[34] Consequently, unless almost every adjudication could be so characterized, a rule permitting summary judgment would be desirable.

5. Agency Determination That Proceeding Is in the Public Interest and Probable Cause Exists. — Although advanced by only the FCC, many agencies could maintain that a motion for summary judgment is inappropriate where the agency has initi-

catory proceedings, *see* 16 C.F.R. §§ 3.31-.37 (FTC 1970), and the Interstate Commerce Commission may shortly join this group. *See* Tomlinson, *supra* note 27, at 2. *See also* Frankhauser & Belman, *The Right to Information in the Administrative Process: A Look at the Securities and Exchange Commission*, 18 AD. L. REV. 101 (1966); Manoli & Joseph, *The National Labor Relations Board and Discovery Procedures*, 18 AD. L. REV. 9 (1966); Maurer, *Use of Discovery Procedures Before the C.A.B.*, 18 AD. L. REV. 157 (1966); Rill & Scott, *Discovery under Title VII of the Civil Rights Act of 1964—New Concept, Agency and Challenge*, 18 AD. L. REV. 75 (1966); Ross, *Discovery and the Federal Power Commission*, 18 AD. L. REV. 177 (1966).

[29] In the federal courts summary judgment has long been denied where the party opposing the motion is barred from access to rebuttal information. *See* p. 614 & note 9 *supra*.

[30] *See* § 4 of the recommended rule, p. 629 *infra*.

[31] *E.g.*, unfair labor practice charge proceedings in the NLRB. *See* Letter, note 55 *infra*.

[32] *E.g.*, electric and gas utility and pipeline decisions by the FPC.

[33] *E.g.*, airline route allocation proceedings in the CAB. *See* Letter, note 75 *infra*.

[34] *See* p. 614 *supra*.

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ated the proceeding on a finding that "probable cause" exists and that an adjudication is in the "public interest." [35] Acting under this theory, the Federal Trade Commission has long denied its examiners authority to dismiss complaints without a hearing for lack of probable cause or absence of public interest, because it has determined that there is prima facie evidence that prosecution is warranted.[36] This ruling does not, however, deprive an examiner of the power to decide a motion for summary judgment. The summary decision procedure is a substitute for a triallike hearing when the moving party demonstrates that an evidentiary hearing is clearly unnecessary. An agency finding that the proceeding is in the public interest, or that probable cause exists, does not make an evidentiary hearing compulsory when an alternative method for adjudicating the complaint on the merits — summary decision — exists. The agency makes its determination of probable cause and public interest after reviewing only the evidence presented by its staff. The absence of any violation may become clear from a review of the counterevidence, although presented only in affidavit form. When it is realized that, despite this preliminary Commission finding, about one-third of the appeals decided by the FTC in 1964 resulted in dismissals of the complaint,[37] the potential value of summary judgment as a device to avoid delay becomes obvious. The power of summary decision, moreover, is double-edged; it can be applied affirmatively by the agency against the respondent, thereby effectively limiting delaying tactics, which have become the despair of commissioners and critics alike.

6. Hearings Made Mandatory by Statute. — The interpretation of statutory provisions as making certain agencies' hearings mandatory would make adoption of a summary decision rule by those agencies impossible. Among the statutes presenting this issue are the Atomic Energy Act,[38] requiring the AEC to hold hearings on applications for permission to construct nuclear power reactors, and the Civil Service Commission Acts,[39] providing that in employee appeals or in political activity cases the employee is

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[35] *See generally* French, *The Federal Trade Commission and the Public Interest*, 49 MINN. L. REV. 539 (1965).

[36] *See, e.g.*, Florida Citrus Mutual, 50 F.T.C. 959, 961–62 (1954). Adoption of a summary decision rule would not necessarily authorize a trial examiner to dismiss because of lack of "public interest," as the examiner sought to do in *Florida Citrus*; this would still be a question of discretion for the agency and not its examiners. *See* p. 627 *infra*.

[37] Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653 (1965).

[38] 42 U.S.C. § 2239(a) (1964).

[39] 5 U.S.C. §§ 1505, 7501 (Supp. V, 1970).

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"entitled to appear personally or through a representative" and that a decision be rendered "after this hearing." [40] In addition, the Armed Services Board of Contract Appeals contends [41] that introduction of a summary decision rule would require amendment of the long-standing disputes clause, which grants a contractor the right "to be heard and to offer evidence in support of his appeal."

Closer examination of each of these provisions reveals that with the exception of the Atomic Energy Act they do not pose real barriers to the suggested rule.[42] The statutory language, by itself or through judicial interpretation, does not make an evidentiary hearing mandatory where there is no factual dispute. On the contrary, this argument erroneously repeats the "right to jury trial" contention which has been rejected when posed as an obstacle to summary judgment in civil cases.[43] There may, of course, be other good reasons for not adopting the summary decision approach in these administrative hearings. For instance, a hearing may be viewed as serving purposes additional to mere factfinding; the symbolic value of making available to consumers the opportunity to participate in hearings, such as those relating to the location of hydroelectric plants, may override considerations of economy embodied in the summary decision technique.[44] Nevertheless, statutory or contractual rights to a hearing should not be interpreted as prohibiting the use of summary judgment by an agency to eliminate futile evidentiary hearings.

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[40] *See also* Immigration and Nationality Act, 8 U.S.C. §§ 1226, 1252(b) (1964); Federal Communications Act, 47 U.S.C. §§ 201(a), 204, 205(a), 209, 213(a), 214(b) & (d), 221(a) & (c), 222(e)(1), 303(f) & (m)(2), 309(e), 312(c) (1964); Federal Power Act, 16 U.S.C. §§ 797(e), 803(a) (1964); Natural Gas Act, 15 U.S.C. §§ 717(e) & (f) (1964).

[41] Letter from Acting General Counsel L. Niederlehner, Department of Defense, to Chairman Jerre S. Williams, Administrative Conference of the United States, Oct. 14, 1969.

[42] Although the language of the Atomic Energy Act arguably allows summary decisions, the legislative history and common understanding make clear that hearings are mandatory at the construction permit stage. *See* Cavers, *Administrative Decisionmaking in Nuclear Facilities Licensing*, 110 U. PA. L. REV. 330 (1962); Davis, *Nuclear Facilities Licensing: Another View*, 110 U. PA. L. REV. 371 (1962); Cavers, *Nuclear Facilities Licensing: A Word More*, 110 U. PA. L. REV. 389 (1962); Murphy, *Atomic Safety and Licensing Boards: An Experiment in Administrative Decision Making on Safety Questions*, 33 LAW & CONTEMP. PROB. 566, 574–77 (1968).

[43] *See* pp. 616–17 *supra*. *See also* Upjohn Co. v. Finch, 422 F.2d 944 (6th Cir. 1970); FDA Regulations §§ 130.12 & .14, 146.1, 35 Fed. Reg. 7250–53 (May 8, 1970); G. Robinson, *supra* note 1, at 485, 524–25 & n.154.

[44] *But see* Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969) (approving summary dismissal of complaints of citizens to merger of electric utilities), *noted in* Note, *Federal Administrative Law Developments-1969*, 1970 DUKE L.J. 67, 129–33.

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7. *Duplication of Existing Procedures.* — A number of agencies contend that the proposed summary decision rule duplicates their present rules of practice. Initially, we found this heartening, since one reason for canvassing the agencies was to determine whether they had developed alternatives to the summary decision approach. Many of the supposed alternatives, however, are disappointing. Several agencies note that their procedures provide for motions to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.[45] To the extent that summary judgment is based solely on the pleadings, these agency rules accomplish the ends sought by the proposed rule. However, the summary decision rule, like Rule 56, goes further. Not only would it allow the claimant to seek an *affirmative* summary decision, which cannot be achieved by a motion to dismiss, but it would also permit the parties to present, and the examiner to consider, matters outside the pleadings in deciding the motion.[46] Although the success of these agencies' motion practice does not obviate the need for a summary judgment rule, it does support the adaptability of the rule to the procedures of administrative agencies. Other agencies contend that their prehearing conference rules and methods for stipulating facts [47] accomplish the purposes of a summary decision rule. But these rules serve only to complement summary judgment motions. Prehearing conference rules, for example, do not authorize the hearing examiner to render summary decisions. More significantly, the use of prehearing conferences is often discretionary with the trial examiner. The right to invoke the proposed rule, on the other hand, is vested in the parties. Stipulations depend upon the willingness of the parties to agree. But summary judgment is dependent upon what a party can prove or disprove.[48]

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[45] Most commonly, such motions are available where the proceeding is initiated by a private party, *e.g.*, government contract disputes, rather than by an agency.

[46] This distinction is particularly significant in administrative proceedings because "[t]he most important characteristic of pleadings in the administrative process is their unimportance." 1 K. DAVIS, *supra* note 2, at § 8.04 (1958).

[47] *Cf.* FED. R. CIV. P. 16, 36 (parallel rules for the federal courts).

[48] Several practitioners recommended, as an alternative device, that hearing examiners and agencies be required to meet specified time deadlines. Some agencies have moved in this direction through ordering hearing examiners to conduct trials expeditiously, at one place, and without interruption. *See, e.g.*, 16 C.F.R. § 3.41(b) (FTC 1970). In addition, their decisions are required to be filed within ninety days after the closing of the trial record. *Id.* at § 3.51(a). Although one cannot quarrel with any effective method of expediting administrative adjudications, it seems doubtful that the application of rigid time deadlines could do more than alleviate certain sore spots of delay. They do not eliminate unnecessary trials and consequently only complement the summary decision rule. *See* p. 632 *infra.*

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There are, however, some agencies — including about one quarter of the agencies surveyed — that already have some kind of summary judgment rule in effect, although they are sometimes unaware of the fact. Exploration of the experience of these agencies with their procedures provides a basis for evaluation of the potential of summary judgment in disparate administrative settings.

B. *Existing Agency Summary Judgment Methods*

1. Maritime Administration. — Agencies have traveled different routes in opening their rules of practice to summary judgment procedures. The most striking course is that followed by the Maritime Administration of the Department of Commerce. Its rule, developed primarily at the suggestion of Judge Prettyman when he was chairman of the Second Interim Administrative Conference, was drafted along the lines of Rule 56.[49] It authorizes the presiding officer to rely upon matters of official notice as well as the pleadings and discovery in determining whether there exist any material facts in issue. It also permits interlocutory appeal as a matter of course from a denial as well as from a grant of the motion. Those familiar with Maritime Administration adjudication agree that the procedure is desirable.[50] It has been used sparingly, however, because that agency's decisions have frequently revolved about detailed factual information such as international cargo movements, ship construction and vessel operating costs, and competitive impact. But even when denied, the motion can have the salutary effect of winnowing out irrelevant issues.[51]

2. National Labor Relations Board. — Another method, used by the NLRB, is to allow unlimited motion practice[52] and to

[49] 46 C.F.R. §§ 201.91–.93 (Maritime Admin. 1970). The Department of Transportation also suggested that the draft rule be expanded to include matters officially noticed. Letter from Assistant General Counsel (Regulation) James B. Minor, Dept. of Transportation, to Chairman Jerre S. Williams, Administrative Conference of the United States, Oct. 2, 1969.

[50] Letter from Chairman Nathan Ostroff, Department of Commerce Appeals Board, to Chairman Jerre S. Williams, Administrative Conference of the United States, Sept. 30, 1969 (memorandum of Paul N. Pfeiffer, Chief Hearing Examiner, Maritime Admin.).

[51] *See* American President Lines, Ltd. (U.S. Mainland/Hawaii Service), Maritime Admin. Dkt. S–191 (Hearing Examiner Order, Sept. 30, 1966).

Federal Maritime Commission practice, which is not dissimilar to Maritime Administration procedure, relies upon a "show cause" proceeding to obtain speedy disposition of cases not subject to substantial dispute of fact. This procedure, however, is more restricted than summary judgment, because summary disposition is available only at the agency's option. *See* 46 C.F.R. § 502.66 (FMC 1970).

[52] *See* 29 C.F.R. §§ 102.24–.28 (NLRB 1970).

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grant trial examiners broad powers in ruling on such motions.[53] Perhaps because the NLRB's rules fail to specify that summary judgment is available, it appears that respondents have submitted only motions for judgment on the pleadings. The NLRB's General Counsel, on the other hand, has avoided relitigation of representation questions in unfair labor practice hearings by seeking the equivalent of a summary judgment motion.[54] While reaffirming the advantages of this practice, the NLRB opposes the proposed summary decision rule on several grounds.[55] The Board argues that interjecting a "broad summary judgment procedure would necessitate a . . . postponement of the hearing while responsive motions are filed and [an] opportunity is provided to supplement the motions and to engage in the other time-consuming activities . . . inherent in summary judgment procedures." [56] Why it argues that summary judgment motions would "create havoc in the hearing calendar," [57] while maintaining that other motions available under the NLRB's unlimited motion practice do not, is far from clear. Equally fanciful is the Board's rationalization that the proposed rule would require pretrial disclosure of witnesses' names and statements and therefore subject employee witnesses to potential intimidation. If witness intimidation poses a substantial threat, the proposed rule provides [58] for denial of the motion when the party opposing it establishes that he cannot support his opposition by affidavit.[59] Moreover, this same argument was advanced time and again only to be rejected when courts and agencies first considered whether to open their doors to discovery.[60]

3. Boards of Contract Appeals. — The several Boards of Con-

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[53] *See id.* §§ 102.35(g), (h), (k), (l).

[54] Before ruling upon the General Counsel's motion, an order to show cause is served upon respondent to provide him with an opportunity to establish the existence of a litigable issue. *See, e.g.*, Pepsi-Cola Bottlers of Miami, Inc., 153 N.L.R.B. 1342, 1343 (1965) (explicitly labeled "motion for summary judgment"), *aff'd per curiam*, 373 F.2d 31 (5th Cir. 1967). *But see* Pepsi-Cola Buffalo Bottling Co. v. NLRB, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969).

[55] Letter from Chairman Frank W. McCulloch, NLRB, to Chairman Jerre S. Williams, Administrative Conference of the United States, Oct. 1, 1969.

[56] *Id.* Perhaps the Board is concerned that an explicit rule will call the device to practitioners' attention, and the General Counsel's current advantage would thereby be lost.

[57] *Id.*

[58] *See* § 4 of the recommended rule, p. 629 *infra.*

[59] It seems unrealistic to assume that such a threat exists in many cases, the presumption being to the contrary, with the parties having the opportunity to show that it exists.

[60] *See* Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay? — A Judge's View*, 12 AD. L. REV. 103, 115–16 (1959–60).

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tract Appeals have by decision expanded motions for judgment based upon the admission of essential facts and have treated these motions as "the equivalent of a motion for summary judgment." [61] Their justification is familiar: [62]

> The purpose of this Board is to afford a just, inexpensive, and, to the extent permitted by circumstances, quick determination of unresolved disputes between contractors and contracting officers, without unnecessary technicalities. We are charged to construe all pleadings so as to do substantial justice.

Once again, however, no express rule provision sets forth the availability of summary judgment. Perhaps this explains the lack of awareness of the Armed Services Board of Contract Appeals that it accords de facto recognition to a rule that it opposes.[63]

4. Interstate Commerce Commission. — The ICC has had extensive experience with rules adapting the salient features of summary decision procedures to its practice. Early in the 1920's, the ICC abbreviated its usual method of holding hearings before a commissioner or an examiner through the use of "shortened" and "modified" procedures. The "shortened" procedure dispensed with oral testimony upon the consent of the parties and a decision was rendered upon their stipulated sworn statements of fact.[64] Under the "modified" procedure, in contrast, each party submitted his case in writing in an attempt to obtain agreement upon as many facts as possible; the parties then confined their oral testimony to the remaining points in dispute.[65] Neither procedure proved successful. The parties could avoid the "shortened" procedure at any time by requesting a formal hearing. The "modified" procedure did not eliminate a formal hearing if the parties did not agree as to the facts.

The drastic increase in the number of applications for operating rights filed by motor carriers prodded the Commission into revising its techniques for eliminating evidentiary hearings when the material facts of the case were not in dispute. What developed in time are known as the "modified procedure rules" whose objectives and operation are similar to our summary decision

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[61] *E.g.*, Liberty Coat Co., 57-2 CCH Bd. Const. App. Dec. ¶ 1576 (1957) (Army Appeals).

[62] *Id.* at 5,670.

[63] *See* p. 620 *supra.*

[64] *See, e.g.*, Mason v. Missouri, K. & T. Ry., 77 I.C.C. 633 (1923).

[65] *See, e.g.*, McCormick Warehouse Co. v. Pennsylvania R.R., 95 I.C.C. 301 (1925), *rev'd on other grounds*, 148 I.C.C. 299 (1928). For a further discussion of the evolution of these procedures by the ICC, see Woll, *The Development of Shortened Procedure in American Administrative Law*, 45 CORNELL L.Q. 56, 62-66 (1959).

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proposal. Rule 45 of the ICC's Rules of Practice and Procedure provides that any party, upon a motion to the Commission, may request the modified procedure.[66] In so doing the complainant, respondent, or applicant files a verified statement setting forth the facts, arguments, and exhibits upon which he relies. The opposing party must either admit or deny in detail each material allegation and explain each exception he takes to the facts and arguments of his adversary.[67] If a party can explain why he cannot properly present his case by affidavits, he is permitted to have an oral hearing to adjudicate those matters still in dispute.[68] If there are no material facts in dispute, summary judgment will be issued.[69]

The ICC's modified procedure goes beyond the proposed rule in its provision for compulsory summary judgment in certain cases. Rule 45 empowers the Commission to order the parties to submit their evidence in the form of verified statements. The burden is then on the parties to prove an oral hearing is necessary in order to ensure fair and equal treatment to all concerned.[70] The Commission has concluded that this compulsory summary judgment proceeding provides a useful tool in the expeditious processing of its caseload.[71] Such procedures are well adapted to the ICC's task but cannot yet be recommended for general agency application. Requiring the submission of all facts and arguments in written form when the case is complicated and the evidence is voluminous would probably only introduce further delay into many agency procedures. In such cases the parties are best able to judge whether or not a motion for summary judgment is likely to be productive. If voluntary summary procedures are underutilized, however, an agency might justifiably experiment with the ICC approach.

5. Civil Aeronautics Board. — The CAB provides for motions to dismiss, declaratory orders and disclaimers of jurisdiction (a

[66] 49 C.F.R. § 1100.45 (ICC 1970).

[67] *Id.* § 1100.49.–.50.

[68] *Id.* § 1100.53.

[69] *Id.* However, the ICC has no specific rule providing for interlocutory review of decisions made pursuant to the modified procedure. For a case illustrating the use of the ICC's procedure, see United Towing Service, No. MC–133114 (Sub. No. 2) (ICC, Aug. 19, 1969).

[70] *See* General Policy Statement Concerning Motor Carrier Licensing Procedures, No. 55 (ICC May 3, 1966), *applied in* John Novak, No. MC–94201 (Sub. No. 55) (ICC, May 5, 1966).

The application of these procedures has been upheld against claims that they transgress the due process clause or the Administrative Procedure Act. *See, e.g.*, Allied Van Lines Co. v. United States, 25 Ad. L.2d 938 (C.D. Cal. 1969).

[71] Letter from Chairman Virginia Mae Brown, ICC, to Chairman Jerre S. Williams, Administrative Conference of the United States, Dec. 9, 1969.

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specialized variety of declaratory order) when there is no factual disagreement between the parties.[72] These procedures, which parallel the proposed summary decision rule, have been applied to economic policy as well as legal disputes.[73] The CAB's rules also provide for supplementing pleadings by affidavit in order to limit conflict as to factual matters.[74] As the Board correctly points out, however, these procedures

> are not so much "summary judgment" procedures for the determination of non-factual disputes as they are abbreviated written procedures for the determination of policy issues on the basis of facts, the ascertainment of which, although perhaps in dispute, will not be enhanced by hearing procedures.[75]

6. Federal Trade Commission. — Six months after the draft rule was proposed to it, the FTC adopted a summary decision rule closely paralleling the original proposal.[76] However, as a result of the Commission's unwillingness to communicate during its rule revision deliberations,[77] the FTC's new rule does not reflect improvements in the draft rule suggested by the experience of other agencies, such as provision for basing summary decision on matters officially noticed. In addition, the FTC rule does not explicitly face the question of interlocutory appeals from denials of summary decision motions. If the motion for

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[72] *See, e.g.*, 14 C.F.R. § 302.18 (CAB 1970) (motions to expedite route applications).

[73] *See, e.g.*, United Airlines, Inc., 2 Av. L. REP. ¶ 21,855 (CAB 1969) (jurisdiction disclaimed).

[74] *See, e.g.*, 14 C.F.R. §§ 222.3 302.400, 302.1020 (CAB 1970).

[75] Letter from Acting Chairman, Whitney Gillilland, CAB, to Chairman Jerre S. Williams, Administrative Conference of the United States, Oct. 6, 1969.

[76] FTC Rules of Practice for Adjudicative Proceedings § 3.24, 35 Fed. Reg. 5007–08 (March 24, 1970).

[77] The Chairman of the FTC asserted that comment on the draft rule would be "premature" at that time. Letter from Chairman Paul Rand Dixon, FTC, to Chairman Jerre S. Williams, Administrative Conference of the United States, Oct. 10, 1969. Why FTC comment during the drafting stage would be premature was not — and, for that matter, cannot be — rationally explained. The Commission's fetish for secrecy in adjudicatory and other proceedings has been exposed at great length. *See, e.g.*, E. COX, R. FELLMETH & J. SCHULTZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PA. L. REV. 401 (1968); Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968). It is precisely during the drafting stage that an "open door" policy should be followed so that procedural rules can be tested by criticism before they snarl practices. *See id.* at 184. A step in this direction was recently taken by the FTC in the formation of an Advisory Rules Council composed of practitioners and law professors. *See* FTC News Release, 5 CCH TRADE REG. REP. ¶ 50,280 (May 27, 1970).

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summary decision is to become a forward step, the Commission must develop a response to this problem, since its current practice of automatically reviewing almost all interlocutory decisions appealed by disappointed parties,[78] despite restrictive rule language,[79] may ensure that summary decision motions will become the latest sport of attorneys seeking delay.[80]

In the six months following promulgation of the FTC's new rule, summary decision was sought in three cases before the Commission's hearing examiners.[81] In *Standard Educators, Inc.*,[82] the respondent attempted unsuccessfully to use summary decision to elicit a ruling from the hearing examiner that the proceeding was not in the "public interest." The rejection of the use of summary decision for this purpose should be followed.[83] In contrast, the deceptive advertising case of *Union Carbide Corp.*,[84] in which both complaint counsel and respondent sought summary decision, was well adapted to the Commission's new rule. The facts surrounding respondent's challenged "Acid-Test" antifreeze commercial were not subject to debate, as indicated by the parties' extensive stipulations, and the chief issue was whether the commercial could be interpreted as representing that the "Acid-Test" was actual proof of the antifreeze's superiority. The examiner's flaccid denial of the motions for summary decision, however, suggests that, as in the case of previous procedural changes at the FTC, progress comes only when the Commission exercises a strong followup leadership role. Lastly, respondent in *Lehigh Portland Cement Co.*[85] has moved for partial summary decision on the ground that its acquisitions under attack lacked the requisite connection with interstate commerce, drawing on Rule 56 precedent that summary judgment is appropriate in an antitrust

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[78] *Cf.* note 80 *infra*.

[79] *See* 16 C.F.R. § 3.23 (FTC 1970).

[80] *But see* Speech by former Chairman Caspar W. Weinberger, BNA ANTITRUST & TRADE REG. REP. No. 457, X–1, 3 (April 14, 1970) (asserting sharp drop in grants of interlocutory appeals from discovery rulings). However, a count based on the Commission's public records reveals that the agency continues to issue more rather than fewer interlocutory orders. The totals for the January-July periods in 1968, 1969, and 1970 are 48, 57, and 63, respectively.

[81] Letter from Joseph Martin, Jr., General Counsel, FTC, to the *Harvard Law Review*, Sept. 24, 1970.

[82] No. 8807 (F.T.C., July 2, 1970) (summary decision denied by hearing examiner).

[83] *See* note 36 *supra*.

[84] No. 8811 (F.T.C., Oct. 23, 1970) (summary decision denied on ground that material facts still in dispute).

[85] No. 8680 (F.T.C., filed April 1, 1966). Complaint counsel, not disputing the "commerce facts" presented by the respondent, have cross-moved for summary decision on the basis of additional facts which they deem relevant.

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case to resolve this jurisdictional issue.[86] These last two cases demonstrate that summary decision could have a productive place in FTC practice if it were only given a hospitable reception by the Commission's hearing examiners.

In conclusion, the experience of these six agencies with various summary judgment methods indicates that summary judgment is an adaptable tool for reducing delay in the administrative process.

C. Model Summary Decision Rule

The Administrative Conference of the United States made the following recommendation at its Fourth Plenary Session, June 2–3, 1970, in Washington, D.C.:

Recommendation 20: Summary Decision in Agency Adjudication

Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists. Each agency having a substantial caseload of formal adjudications should adopt procedures providing for summary judgment or decision, patterned after the following model rule in suitable cases and with appropriate modifications to meet the needs of its own hearings:

Motion for Summary Decision

§1 Any party to an adjudicatory or rulemaking proceeding required by statute to be determined on the record after opportunity for agency hearing may, after commencement of the proceeding and at least ____ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceedings. Any other party may, within ____ days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for argument and call for the submission of briefs.[87]

§2 The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

§3 Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

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[86] *See* Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 1026 (1969).

[87] The time limit for filing a motion prior to the hearing is left open because the time schedule for pleadings, discovery and prehearing conferences varies widely among agencies.

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When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

§4 Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

§5 The denial of all or any part of a motion for summary decision by the presiding officer shall not be subject to interlocutory appeal to the (*review authority*) unless (a) the presiding officer certifies in writing (i) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion and (ii) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (b) if the presiding officer declines so to certify, a designee of the (*review authority*) so certifies upon appropriate application. The allowance of such an interlocutory appeal shall not stay the proceeding before the presiding officer unless the (*review authority*) shall so order.[88]

Before examining section two of the proposal in more detail, one caveat bears repetition: the proposed rule is offered strictly

[88] Section five of the recommended rule does not have the wholehearted support of the authors. We drafted this provision at the behest of the Administrative Conference's Committee on Agency Organization and Procedure, which sponsored this research. The rationale advanced in support of this provision is straightforward: unless interlocutory review is restricted, the summary decision rule could readily become another device for delay. The provision, therefore, discourages interlocutory review by limiting it to situations where a compelling need for review has been established and delay is unlikely. *Cf.* 28 U.S.C. § 1292(b) (1964) (interlocutory appeal in the federal courts).

Nevertheless, we doubt the desirability of developing a rule for appeals from denials of motions for summary judgment distinct from all other interlocutory questions. The danger of irremediable destruction of important rights and the concern with further delay are unaffected by the type of interlocutory decision involved. *But see Recommendation No. 21: Discovery in Administrative Adjudication*, Administrative Conference of the United States (adopted June 3, 1970) (standard for interlocutory review of an examiner's discovery rulings different from that in summary decision rule). The question of interlocutory appeals in administrative adjudication is, in brief, a subject worthy of separate analysis. Section five, therefore, should not affect an agency's decision on whether to adopt a summary decision rule. For some preliminary suggestions on possible structural responses to the problem of interlocutory appeals facing one agency, see Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 180–83 (1968).

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as a model. The subject matter, purpose, and scope of agency adjudication are almost unlimited. This proposal, therefore, serves only as a starting point for agency action.[89]

Section two of the proposed rule embodies a significant modification in the language of Rule 56 in order to adapt summary judgment to the administrative process. Instead of requiring that the moving party be "entitled to a judgment as a matter of law," as does Rule 56, the proposal permits grant of summary judgment when the party "is entitled to summary decision." [90] As with Rule 56, the moving party has the burden of clearly establishing his right to summary decision, and the tribunal may in its discretion deny summary judgment if justice requires. The modification, however, safeguards administrative discretion; the moving party may be entitled to a decision as a matter of agency policy even though decision is not required as a matter of law.[91]

Furthermore, the requirement of "no genuine issue as to any material fact" has a less restrictive impact in agency adjudication than it has in many civil trials. The administrative process does not incorporate the equivalent of the judge-jury division of function, so that the troublesome dichotomy between questions of "law" and "fact" does not enter into the decision of whether to grant a summary decision. A hearing normally performs one function — the development of evidentiary facts. The hearing examiner is empowered to make all factual inferences and to decide the law and policies to be applied to the case. Thus, once evidentiary facts are undisputed, a hearing serves no purpose.[92] Conflicts as to the "legislative facts" [93] and the proper formula-

[89] An administrative agency can rely on several sources for authority to adopt a summary decision rule. The administrative process, as originally conceived, was designed to yield prompt determinations. Agencies were expected to create flexible procedures which would avoid the outmoded rigidities of the courts. These hopes were expressed in § 6(a) of the Administrative Procedure Act, which provides that every agency shall proceed within a reasonable time to conclude any matter presented to it, giving due regard to the convenience and necessity of the parties. *See* 5 U.S.C. § 555(b) (Supp. V, 1970). In addition, § 7(d) provides agencies with authority to adopt procedures permitting the submission of evidence by affidavits. *Id.* § 556(d). Finally, most enabling statutes authorize the agency to adopt such rules and regulations as are necessary to implement the purposes of the act. *See, e.g.*, National Labor Relations Act § 6, 29 U.S.C. § 156 (1964).

[90] Another modification allows the examiner to consider facts officially noticed, subject to the requirements of § 7(d) of the Administrative Procedures Act, 5 U.S.C. § 556(e) (Supp. V, 1970).

[91] This is in line with present law allowing summary judgment in equitable actions, in which relief rests in the discretion of the court. *See* 3 W. BARRON & A. HOLTZOFF, *supra* note 3, at § 1232.3.

[92] The situation is comparable to that of a judge sitting without a jury. *See* pp. 613–14 *supra*.

[93] Adjudicative facts are relevant in determining whether a given proposition

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tion of policy or interpretation of law to be applied to the case are best aired through oral argument and submission of briefs. In fact, when Professor Davis made his unelaborated suggestion that summary judgment be applied in administrative proceedings,[94] the evil he had in mind was the time-consuming development of issues of policy as if they were issues of fact through the hearing process. The summary decision rule would eliminate this possibility by reserving use of hearings to resolution of disputed evidentiary facts, unless, by analogy to the interpretation of Rule 56, the issues are novel or particularly far-reaching and complex.

III. Conclusion

The impact of the summary decision rule on administrative delay cannot easily be determined in advance. Its applicability in the administrative field of necessity involves an agency-by-agency determination. Furthermore, the profitability of summary judgment procedures for each agency depends in part on the type of delay that agency encounters. The greatest incentive for delay arises in complaint cases, where the action is initiated by the agency for alleged law violations, especially when the remedy is limited to posttrial injunctive relief. Until the order is entered, the respondent is free to continue the questioned practices without fear of direct agency sanction. On the other hand, there would be less pressure for delay, and correspondingly less need for summary techniques, in arbitration cases or license application hearings where agency action does not seriously impinge upon other economic interests.

To the extent that summary judgment is found applicable to the subject matter and procedure of particular agencies, it has a demonstrated capacity to reduce delay. However, permitting summary judgment motions may sometimes result in increased rather than decreased litigation time. Thus, a clearly nonmeritorious motion produces needless delay, which is compounded if the motion is granted and must be reversed on appeal. Furthermore, denial of a meritorious motion, perhaps because an examiner is unwilling to assume the requisite burdens[95] or "plays it safe," means that the parties must undergo a hearing plus wasted

is applicable to a particular situation, and legislative facts are relevant in deciding what general proposition should be recognized as authoritative. *See* H.M. Hart & A. Sacks, *supra* note 5, at 384–85; Davis, *supra* note 23.

[94] *See* p. 612 *supra*.

[95] *See* Letter, *supra* note 81 (effectiveness of rule depends in part on "the hearing examiner's willingness to assume the burden of sifting the opposing parties' contentions").

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prehearing efforts. So far as these costs of establishing summary judgment procedures result from ignorance of the proper function of summary judgment, the interpretive history of Rule 56 may provide protection against misuse. Delay caused by erroneous denials of summary decision can be minimized by limitation on interlocutory appeals.[96] Other measures may be taken to combat use of the summary decision motion as a deliberate delaying tactic, such as requiring examiners to rule on such motions within narrow time limits, implementing rules analogous to Rule 56(g) providing penalties for presentation of affidavits "in bad faith or solely for the purpose of delay," [97] or authorizing direct sanctions against attorneys guilty of such dilatory practices.[98] Even though it is conceded that the risk of increased delay in some cases cannot be completely eliminated, the experience of the federal courts with a rule subject to the same limitations strongly suggests that a summary decision rule will prove to be "a salutary and efficient instrumentality for expedition of the business" [99] of many agencies.

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[96] *See* note 88 *supra*.

[97] FED. R. CIV. P. 56(g). The FTC's new summary decision rule contains such a provision. *See* FTC Rules of Practice for Adjudicative Proceedings § 3.24(b)(1), 35 Fed. Reg. 5008 (March 24, 1970).

[98] *See* FTC Rules of Practice for Adjudicative Proceedings § 3.24(b)(2), 35 Fed. Reg. 5008 (March 24, 1970).

[99] C. WRIGHT, *supra* note 3, at 442.

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