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# INSTITUTIONALIZING THE ENERGY CRISIS: SOME STRUCTURAL AND PROCEDURAL LESSONS*

*Alfred C. Aman, Jr.*†

## TABLE OF CONTENTS

INTRODUCTION
I. THE DEPARTMENT OF ENERGY
A. *An Overview*
B. *The Administration's Bill—The Beginnings of the Department of Energy Organization Act of 1977*
C. *The Department of Energy Organization Act of 1977*
1. *The Federal Energy Regulatory Commission*
2. *Executive Regulatory Functions*
3. *FERC as a Check on Executive Power*
a. *FERC Review of Executive Rulemaking—The Commission Veto*
b. *Commission Review of Executive Adjudication*
II. ADMINISTERING AND ENFORCING OIL PRICE CONTROLS—A TEMPORARY EMERGENCY BECOMES A WAY OF LIFE
A. *Acting in an Emergency—The Initial Lawmaking Stage*

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An explanatory *Glossary* for agency names is at page 597 *infra*.

† Associate Professor of Law, Cornell Law School. A.B. 1967, University of Rochester; J.D. 1970, University of Chicago.

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1. *Legislation in a Crisis*
2. *Regulations in a Crisis*

B. *Administering the Emergency Program*

1. *The Federal Energy Office—The Beginning Stage of the Energy Program*
2. *The Federal Energy Administration—The Middle Years*
3. *Administering the Oil Program Under the Department of Energy Organization Act of 1977*
   a. *FERC Review*
   b. *The Executive Response*
   c. *FERC Review Procedures*
   d. *The Administrative and Judicial Gauntlets*

III. Structural Recommendations

A. *Administrative Agencies, Congress, and the Regulatory Dialogue*

B. *The Problems and Sources of DOE Structure*

C. *Reorganization or New Alliances?—The Problems of Administrative Duplication*

D. *Solving the Problems—The Alternatives*

1. *Separating Judicial Functions from Prosecutorial and Legislative Functions—An Overview*
2. *An In-House Agency Court—The Pure Form*
3. *Making OHA an Independent Agency Court*
4. *Abolishing FERC Review*

E. *A Residual Problem—Duplication of Judicial Review*

IV. Procedural Recommendations

A. *A Uniform Approach*

B. *Conventional APA Enforcement Proceedings*

C. *OHA Enforcement Proceedings*

1. *Beyond Summary Judgment*
   a. *Present Procedure*
   b. *Present Practice*
   c. *Assessing OHA's Approach*
   d. *Recommendation*
   e. *Amending the APA*
2. *Administrative Law Judges*
   a. *Arguments for the ALJ Approach*
   b. *Arguments against the ALJ Approach*

c. *Recommendation*
d. *Amending the APA*
D. *Summary*
CONCLUSION
GLOSSARY

## INTRODUCTION

On April 5, 1979, President Carter announced his intention to end federal price controls on domestic crude oil.[1] Under the authority of the Energy Policy and Conservation Act,[2] the President began to phase out these controls on June 1, 1979.[3] All controls on domestic crude oil will be lifted by October 1981.[4]

The wisdom of these controls has been vigorously debated and intensely criticized.[5] By lifting the controls the President has followed the recommendations of critics who have argued persistently that controls have serious adverse effects. These critics maintain, for example, that controls decrease domestic production of oil, thus increasing American dependency on foreign oil supplies, and give false pricing signals to consumers, thus encouraging excessive consumption.[6] In his speech of April 5, however, the President also emphasized a procedural reason for his decision: "In order to control energy price, production, and distribution, the Federal bureaucracy and red tape have become so complicated, it is almost unbelievable."[7]

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[1] Presidential Energy Address, 15 WEEKLY COMP. OF PRES. DOC. 609, 610 (Apr. 5, 1979) [hereinafter cited as Energy Address].

[2] 15 U.S.C. § 760(b) (1976).

[3] Energy Address, *supra* note 1, at 610.

[4] *Id.*

[5] *See, e.g.*, Bartlett, *There Is No Fuel Like Enough Fuel*, 25 INST. OIL & GAS L. & TAX. 247 (1974); Erickson, Peters, Spann & Tese, *The Political Economy of Crude Oil Price Controls*, 18 NAT. RESOURCES J. 787 (1978); Comment, *The Case for Decontrolling the Price and Allocation of Crude Oil*, 53 TEXAS L. REV. 1275 (1975). *But cf.* Wiener, *Monopoly and Phase III: The Consumer's Case Against Price Increases in the Oil Industry*, ANTITRUST L. & ECON. REV. Winter 1972-73, 43, 50 (federal antitrust action against oil producers would reduce excessive prices resulting from monopolization).

[6] Bartlett, *supra* note 5, at 248-50; Erickson, Peters, Spann & Tese, *supra* note 5, at 795-97; Comment, *supra* note 5, at 1289-90, 1296-97.

[7] Energy Address, *supra* note 1, at 610.

This Article focuses on the development of this federal bureaucracy and its procedures for enforcing its substantive oil policy. Specifically, this inquiry examines the structure of the Department of Energy (DOE) and the functioning of the oil enforcement processes within this new structure. Thus, it concentrates on the process by which DOE issues remedial orders and allows for their appeal, through both administrative agencies and the courts.

This examination yields significant procedural and structural lessons of both a general and specific nature. On a general level, substance, agency structure, and procedure are inextricably woven together. This is as it should be. In addition to being consistent with such trans-substantive process values as efficiency, accuracy, and acceptability to the parties, agency structure and procedure must be appropriate for the regulatory task at hand. In administrative law, as in art, form should be "the very shape of content." [8]

Content, however, can also be the cause of conflicting procedural and structural demands, particularly when the proposed content of an agency's rules or orders is controversial, uncertain, or both. As the saga of DOE reveals, the process of establishing an administrative framework to carry out uncertain or controversial substantive programs easily can become politicized. Agency structure and processes can become a mechanism for absorbing, thwarting, or mitigating actual and potential substantive conflict. The result can be either too much procedure in the case of a particular program or an administrative structure that is more a monument to distrust and wariness of bureaucracies than an efficient means for carrying out a preordained congressional policy.

Because some domestic oil controls will exist for the next year and a half, an examination of the Energy Department's structure and its enforcement processes within that structure yields significant lessons for the short-term future. Recommendations for improving these processes will thus be of significance not only to the numerous enforcement actions now pending within DOE,[9] but also to the new actions that continually are being brought.

More important, an understanding of the evolution of this "almost unbelievable" federal bureaucracy may guide future regulatory reform and reorganization efforts. The Department of

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[8] B. Shahn, The Shape of Content 62 (1960).

[9] As of June 30, 1979, DOE had the following enforcement actions outstanding:

Energy Organization Act (DOE Act)[10] allocated decisionmaking responsibility among a cabinet-level secretary, various executive agencies under his control,[11] and the Federal Energy Regulatory Commission (FERC), an independent agency.[12] Combining an executive agency and an independent commission under one administrative roof risks fragmenting internal policymaking and, at least with respect to enforcement procedures, duplicating administrative processes and functions. A critical examination of the rationale and workability of this type of structural arrangement is, thus, appropriate, particularly in light of proposals for further reorganization of the federal bureaucracy.[13]

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*Pending Administrative Enforcement Actions of the Economic Regulatory Administration (ERA)*

| *Issued Enforcement Documents* | *Number* | *Amount* |
|---|---|---|
| *Office of Special Counsel (OSC)* | | |
| Notices of Probable Violation | 30 | $ 520,847,187 |
| Proposed Remedial Orders | 19 | 1,745,222,829 |
| OSC Subtotal | 49 | 2,266,070,016 |
| *Office of Enforcement (OE)* | | |
| Notices of Probable Violation | 90 | $ 259,419,142 |
| Proposed Remedial Orders | 124 | 34,081,726 |
| OE Subtotal | 214 | $ 293,498,868 |
| DOE Total Pending Actions | 263 | $2,559,568,884 |

Letter from Lynn R. Coleman, General Counsel, DOE, to William C. Bush, Administrative Conference of the United States (Aug. 27, 1979) (on file at *Cornell Law Review*). Enforcement actions have continued to occupy DOE from the time of President Carter's address up to the last few months. *Compare* N.Y. Times, May 3, 1979, §A, at 1, col. 6 *with* EN. USERS REP. (BNA) No. 332, at 9 (Dec. 20, 1979). Moreover, in response to a recommendation made by the Sporkin Task Force Report, an Office of Special Counsel was created in 1977. *See generally* 2 ECONOMIC REGULATORY ADMINISTRATION, UNITED STATES DEPARTMENT OF ENERGY, TASK FORCE ON COMPLIANCE AND ENFORCEMENT, FINAL REPORT at vi (repr. Mar. 1978) (Stanley Sporkin, Task Force Chairman) [hereinafter cited as *Sporkin Report*]. The sole purpose of this office is to enforce oil pricing and allocation regulations as they are applied to the 34 major oil companies. From December 1, 1977 to November 30, 1978, more than 60 proceedings were begun or pending on overcharge violations totaling in excess of $1.5 billion. *See* Status Report, Office of Special Counsel (1979) (on file at *Cornell Law Review*).

[10] 42 U.S.C. §§ 7101-7352 (Supp. I 1977).

[11] *See* text accompanying notes 99-108 *infra*.

[12] *See* text accompanying notes 94-98, 110-20 *infra*.

[13] *See, e.g., Interior Department Revamp Called for in Carter Proposal*, 37 CONG. Q. 379, 379 (1979); *Reorganization Planned for National Resources, Economic Development*, 37 CONG. Q. 33, 33-34 (1979).

Finally, the DOE experience provides lessons regarding the appropriate proceedings for administrative enforcement adjudication. Although Congress usually has not exempted compliance and enforcement proceedings from the adjudicatory requirements of the Administrative Procedure Act (APA),[14] it has consistently provided for such an exemption throughout the administration of the energy program.[15] Thus, DOE enforcement processes repre-

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[14] This, of course, is not the case when rulemaking procedures are called for. Over the years Congress and the courts have added significantly to the procedural requirements of the informal rulemaking process of § 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976). *See* Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 187 (1974). *See generally* Hamilton, *Rulemaking on a Record by the Food and Drug Administration,* 50 TEXAS L. REV. 1132 (1972). For an excellent discussion of what the courts have been doing to § 553, see Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court,* 1978 SUP. CT. REV 345.

The rulemaking requirement of the DOE Act, 42 U.S.C. § 7101-7352 (Supp. I 1977), is an example of the well-established trend to augment the procedural requirements of § 553 on an agency-by-agency basis. The DOE Act provides more extensive rulemaking procedures than the APA. For example, a 30-day comment period is required for all rulemaking, including interpretative rules and rules granting exemptions or relieving restrictions. 42 U.S.C. § 7191(b) (Supp. I 1977). The APA exempts such rules from the 30-day notice period. 5 U.S.C. § 553(d) (1976). The DOE Act requires that before the Secretary may promulgate any rule within his jurisdiction, he must afford interested parties the opportunity *orally* to present their views and data. He may dispense with an oral presentation only if he determines that no substantial issue of law or fact is involved and that the rule, regulation, or order is unlikely to have a substantial impact on the national economy or on large numbers of individuals or businesses. 42 U.S.C. § 7191(c) (Supp. I 1977). The Conference Report makes clear that the Secretary should provide an opportunity for oral argument "in most instances." H.R. REP. No. 539, 95th Cong., 1st Sess. 82, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 925, 953.

When the Secretary determines that no oral presentation is necessary, the DOE Act requires that the rule be promulgated in accordance with the rulemaking procedures of § 553 of the APA. 42 U.S.C. § 7191(c) (Supp. I 1977). These procedures do not apply where the rule involves a military or foreign affairs function or the matter concerns agency management or personnel, public property, loans, grants, benefits, or contracts. 5 U.S.C. § 553(a) (1976). The DOE Act, however, eliminates the exemption for public property loans, grants, or contracts, leaving only the exemption for military or foreign affairs functions, and agency management or personnel matters or benefits. 42 U.S.C. § 7191(b)(3) (Supp. I 1977).

Many of the acts governing the substantive matters transferred to DOE contain their own procedural requirements, in excess of those of the APA. For the procedural provision of the Energy Policy and Conservation Act, see 42 U.S.C. § 6295(b) (1976). Section 6295(b) provides that when the Secretary proposes a rule setting energy efficiency standards for consumer products under the Act, he must allow 90 days for public comment and must wait 120 days before promulgating the rule. The DOE Act provides that when procedural safeguards prescribed by the statutes governing the transferred authorities are greater than those of the APA, the greater safeguards will apply. 42 U.S.C. § 7191(a)(1) (Supp. I 1977).

[15] *See* text accompanying notes 161-93 *infra*. The procedural history of the oil program begins with the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat.

sent an experimental attempt to strike a balance among "accuracy, efficiency, and acceptability"[16] arguably different from that required by the APA. Proposals to amend the adjudicatory sections of the APA are now pending in Congress.[17] An examination of DOE's approach to such adjudication will guide comment on these proposed reforms.

These tasks should begin with an examination of the new administrative context surrounding the developing enforcement of oil regulation. Thus, this Article first examines the 1977 Department of Energy Organization Act, focusing on the legal relationships between the Secretary of Energy, the various executive units under his supervision and control, and the Federal Energy Regulatory Commission. Second, the Article focuses on the procedures used to enforce oil pricing regulations. From this background emerge some general conclusions on administrative procedure and structure and a number of specific recommendations for the improvement of DOE's regulatory process.

## I

## The Department of Energy

### A. *An Overview*

Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA)[18] in the aftermath of an oil embargo imposed by

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743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27. The amendments to this Act exempted the Cost of Living Council from the adjudicatory provisions of the APA. *See* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 207(a), 85 Stat. 747. These exemption provisions were incorporated by reference in the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 5a, 87 Stat. 633 (codified at 15 U.S.C. § 754(a) (1976)). These exemptions were continued in a different form in the DOE Act, Pub. L. No. 95-91, §§ 503, 504, 91 Stat. 590 (codified at 42 U.S.C. §§ 7193, 7194 (Supp. I 1977)).

[16] Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 Mich. L. Rev. 111, 137 (1972); *see* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 Va. L. Rev. 585, 592-93 (1972).

[17] S. 2147, 96th Cong., 1st Sess. (1979); S. 755, 96th Cong., 1st Sess. (1979); S. 262, 96th Cong., 1st Sess. (1979).

[18] Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751-756 (1976)). For discussions of this Act, *see* Task Force on Reform of Federal Energy Administration, Federal Energy Administration Regulation 9-10 (P.MacAvoy ed. 1977) [hereinafter cited as Presidential Task Force Report]; Langdon, *FEA Price Controls for Crude Oil and Refined Petroleum Products*, 26 Inst. Oil & Gas L. & Tax. 55 (1975); Note, *National Energy Goals and FEA's Mandatory Crude Oil Allocation Program*, 61 Va. L. Rev. 903 (1975). For a discussion of the EPAA as later amended, see Richardson, *Crude Oil Pricing—Current Regulations and Practices*, 23 Rocky Mtn. Min. L. Inst. 803 (1977).

the Organization of Petroleum Exporting Countries (OPEC).[19] Congress intended this Act to minimize the adverse economic consequences of oil shortages from the embargo and the fourfold increase in the price of OPEC oil that followed the embargo.[20] To accomplish these goals, Congress gave the President broad pricing and allocation authority over crude oil, residual fuel oil and various refined petroleum products.[21]

Though the EPAA was directed at problems with long-term consequences, it was, in effect, crisis legislation. It was hastily passed[22] and granted the President only "temporary authority to deal with shortages" of crude oil, residual fuel oil, and refined products.[23] Congress never intended to provide for oil pricing and allocation controls on a long-term or permanent basis.[24]

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[19] OPEC, an intergovernmental oil producers' cartel, was formed in 1960 by Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. It now includes Algeria, Indonesia, Abu Dhabi, Libya, Qatar, Nigeria, Ecuador, and Trinidad. OPEC controls approximately 85% of the oil in international commerce and accounts for about 50% of the total amount of oil consumed in the United States. *See* M. WILLRICH, ENERGY AND WORLD POLITICS 6-8 (1975); THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL, ENERGY FUTURE 223-24, 232 (R. Stobaugh & D. Yergin eds. 1979). For a history of the function and impact of the OPEC cartel, see Z. MIKDASHI, THE COMMUNITY OF OIL EXPORTING COUNTRIES (1972); Lenczowski, *The Oil-Producing Countries*, in THE OIL CRISIS 59 (R. Vernon ed. 1976); Mikdashi, *The OPEC Process*, in THE OIL CRISIS 203 (R. Vernon ed. 1976). For an analysis of the relationship between OPEC and the large oil companies, see J. BLAIR, THE CONTROL OF OIL 276-93 (1976).

[20] In addition to curbing the inflationary impact of the OPEC price increase, Congress sought, through the EPAA, to preserve competition within the petroleum industry. Though major oil companies produced and refined their own crude oil, most independent refineries depended primarily on foreign oil supplies and the domestic "spot market." Note, *supra* note 18, at 904. Congress feared that the independents' reliance on higher priced foreign oil could drive them out of the market. *See id.* at 905, 909. One objective of allocation and price regulation is the "preservation of an economically sound and competitive petroleum industry." 15 U.S.C. § 753(b)(1)(D) (1976).

[21] 15 U.S.C. § 753(a) (1976).

[22] S. 1570, 93d Cong., 1st Sess. (1973), was introduced on April 13, 1973. 119 CONG. REC. 12314 (1973). It was reported from committee on May 17 (S. REP. No. 159, 93d Cong., 1st Sess. 1 (1973)) and passed on June 5 (119 CONG. REC. 18064 (1973)). The House version, H.R. 9681, 93d Cong., 1st Sess. (1973), was introduced on July 30, 1973. 119 CONG. REC. 26725 (1973). It was amended in committee and reported to the full House on September 29. H.R. REP. No. 531, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2582, 2582. The House approved the measure on October 17. 119 CONG. REC. 34454-78 (1973). S. 1570 then became H.R. 9681 (*id.* at 34478-79), the conference report was dated November 10 (H.R. REP. No. 628, 93d Cong., 1st Sess. (1973)), and the bill became law on November 27, 1973 (Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751-56 (1976))).

[23] 15 U.S.C. § 751(b) (1976).

[24] The Act's original termination date was later repealed. *See* Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 4(g)(1), 87 Stat. 632, *repealed by* Energy Policy and Conservation Act, Pub. L. No. 94-163, § 401(b)(1), 89 Stat. 946 (1975).

Congress also viewed the administrative machinery necessary to carry out this program as temporary. In 1974, Congress created the Federal Energy Administration (FEA), a temporary[25] executive agency whose primary responsibility[26] was to implement the EPAA.[27] Congress later expanded the substantive powers conferred by the EPAA,[28] and extended the life of FEA.[29] With the passage of the DOE Act in 1977,[30] most pricing respon-

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[25] Long before federal sunset legislation became common Congress included a provision abolishing FEA on June 30, 1976. Federal Energy Administration Act of 1974, Pub. L. No. 93-275, § 30, 88 Stat. 115.

[26] *See generally* H.R. Rep. No. 748, 93d Cong., 2d Sess. 2-4 (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 2939, 2940-41.

[27] Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 (codified at 15 U.S.C. §§ 761-786 (1976)).

[28] In the course of this expansion, Congress amended the EPAA twice. The first amendment came with the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871.

> [This 1975 amendment] attempted to provide revisions of the EPAA and additional legislation, forming the basis for a national energy policy. The EPCA established a comprehensive national energy policy to accomplish the following goals:
>
> 1. maximize domestic production of energy and provide for strategic storage reserves of crude oil, residual fuel oil and refined petroleum products;
> 2. minimize the impact of disruptions in energy supplies by providing for emergency standing measures;
> 3. provide for domestic crude oil prices that will encourage domestic production in a manner consistent with economic recovery; and
> 4. reduce domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs.
>
> In the short term, the EPCA was designed to reduce the vulnerability of the domestic economy to increases in import prices, and to insure that available supplies would be distributed equitably in the event of a disruption in petroleum imports. For the long run, the EPCA was intended to decrease dependence upon foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford.

Sporkin Report, *supra* note 9, app., at A-17 to -18. Pursuant to this Act, President Carter now seeks to phase out price controls completely. *See* note 2 *supra*.

In 1976 Congress amended the Act again by passing the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976). "In addition to amending various provisions of the FEA Act and extending it for an additional 18 month period, [this Act] established a broad range of energy conservation measures and provided for the enhancement of domestic crude oil production." Sporkin Report, *supra* note 9, app., at A-20.

[29] Act of June 30, 1976, Pub. L. No. 94-332, 90 Stat. 784. The first expiration date was June 30, 1976. Federal Energy Administration Act of 1974, Pub. L. No. 93-275, § 30, 88 Stat. 115. Although the Act in 1976 set July 30, 1976 as the next expiration date, it was later extended to December 31, 1977. Federal Energy Administration Act Amendments of 1976, Pub. L. No. 94-385, §112, 90 Stat. 1132.

[30] Pub. L. No. 95-91, 91 Stat. 565 (codified primarily at 42 U.S.C. §§ 7101-7352 (Supp. I 1977)).

sibilities of FEA were delegated to the Economic Regulatory Administration (ERA),[31] and that agency became a permanent part of our energy program.[32] The DOE Act thus institutionalized much of the administrative machinery of the energy crisis.[33]

Chance as well as design may have helped forge this long chain of legislation that culminated in the DOE Act. Though Presidents Nixon and Ford both proposed somewhat similar reorganizations,[34] President Carter's plan to establish a new energy department was superbly timed. The winter of 1977 was one of the harshest in recent years,[35] and it perhaps crystallized the growing consensus that a serious "energy problem" existed.[36] President Carter capitalized on this growing perception and convinced Congress that establishing a centralized energy department was an important first step in addressing this problem in a comprehensive manner.

The support for some federal action was nearly unanimous.[37] But disagreements over the underlying causes of the "energy

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[31] *See* notes 106-07 and accompanying text *infra*.

[32] *See generally* 42 U.S.C. § 7136 (Supp. I 1977).

[33] "A BILL To establish a Department of Energy in the executive branch by the reorganization of energy functions within the Federal Government in order to secure effective management to assure a coordinated national energy policy, and for other purposes." *Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 4 (1977). The bill was introduced that day in the Senate as S. 826, 95th Cong., 1st Sess., 123 Cong. Rec. 5666 (1977), by Senator Ribicoff (123 Cong. Rec. 5666 (1977)), and in the House of Representatives the next day as H.R. 6804, 95th Cong., 1st Sess. (1977), by Rep. Brooks. *Id.* at 5885.

[34] President Nixon first proposed establishing a Department of Energy and Natural Resources in his April 18, 1973, message to Congress: "I shall propose legislation to establish a Department of Energy and Natural Resources (DENR) building on the legislation I submitted in 1971, with heightened emphasis on energy programs." Special Message to the Congress on Energy Policy, 1973 Pub. Papers 302, 318. The bill submitted took form as S. 2135, 93d Cong., 1st Sess. (1973). 119 Cong. Rec. 22889 (1973) (remarks of Sen. Jackson). President Ford also submitted a detailed plan for reorganizing the energy bureaucracy into a new Department of Energy. President Ford submitted his plan on January 11, 1977, just before he left office. *Touchy Policy Issues Complicate Carter Efforts at Energy Reorganization*, 35 Cong. Q. 165, 166-67 (1977).

[35] *See Now, the Gas Crisis*, Newsweek, Feb. 7, 1977, at 14; *The Big Freeze*, Time, Jan. 31, 1977, at 22.

[36] Just prior to the DOE Act, Congress passed the Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, §§ 1-14, 91 Stat. 4. This Act gave the Federal Power Commission (FPC) the authority to allocate natural gas supplies to parts of the country in greatest need. On the heels of this Act, the administration proposed its version of the DOE Act.

[37] Energy reorganization was a major part of presidential candidate Carter's platform in 1976. Popular opinion held that the Nixon and Ford administrations had followed a stopgap, haphazard approach to energy policy. Congress was eager to respond, as evidenced by bipartisan sponsorship of the Carter bill in both the Senate and the House.

problem" as well as a blurring of causes with effects undermined the chances of forming any kind of general consensus over the appropriate substantive responses.[38] For example, those who saw

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Statements and debate over the bill revealed a shared assumption that energy reorganization was an urgent priority. Republican Senator Javits asserted that he "co-sponsored this important measure to help to emphasize the bipartisan nature of this undertaking and to demonstrate to the President that support for a Department of Energy has a broad political base." 123 Cong. Rec. 5671 (1977). Republican Representative John B. Anderson stated that:

> As one who has been closely tied to energy policy through by [*sic*] 13 years on the Joint Committee on Atomic Energy and as one who has for years recognized the real hazards of proceeding without a sense of direction, it has been particularly frustrating the last 2 years as bureaucratic confusion, political confrontation, and technological puritanism have inhibited efforts to come to grips with our growing energy shortfall. This past winter has been a shock to our system economically, politically, and technically and it serves as fair warning that things are not going to get better by themselves. The executive branch and the Congress must forge a new alliance in order to sift through the multitude of options for energy conservation, energy production, and environmental protection.

*Id.* at 6239. Republican Senator Heinz remarked that:

> Another factor in our failure to develop a responsible energy policy over the past 4 years has been the constant partisan wrangling on policy between Congress and the administration. I am pleased to join in sponsoring Mr. Carter's reorganization plan today because I believe that our energy policy, like our foreign policy, should be pursued on a bipartisan basis without regard to short-term political advantage. The issue is far too important for that.

*Id.* at 5672.

[38] The phrase "energy crisis" is used in a variety of contexts and conveys a variety of meanings within those contexts. *See* Aman, *The Energy Crisis: A Few Perspectives*, 5 Cornell L.F. 11 (June 1978). Perhaps the phrase most commonly refers to an overall shortage of energy resources, particularly natural gas and oil. *See, e.g.*, 123 Cong. Rec. H5,319 (daily ed. June 2, 1977) (remarks of Rep. Allen).

Quite apart from agreeing about the existence of a shortage, there is little agreement about the reasons for the shortage.

For remarks by legislators during the debate over the DOE Act expressing diverse opinions, see 123 Cong. Rec. H5,892-93 (daily ed. June 3, 1977) (remarks of Rep. Findley); *id.* H5,274-75 (daily ed. June 2, 1977) (remarks of Rep. Rudd); *id.* S7,941 (daily ed. May 18, 1977) (remarks of Sen. Helms); 123 Cong. Rec. 10907-09 (1977) (remarks of Sen. Kennedy).

Many persons believe that excessive government regulation caused our energy problems. *See, e.g.*, E. Mitchell, U.S. Energy Policy: A Primer 71-73 (1974); 123 Cong. Rec. 6124-25 (1977) (remarks of Sen. Tower); *cf. id* 6123 (1977) (remarks of Sen. Ribicoff) (before DOE, agency fragmentation contributed to energy problems). Artificially low energy prices have not provided the incentives necessary for discovery of new energy sources. At the same time, these low prices have created more demand than would otherwise have existed if prices had been allowed to rise gradually. In an unregulated market, consumers would receive accurate pricing signals, and producers would have greater incentives to take the necessary risks and bear the added costs required to find new energy supplies. Thus, a free-market approach might increase energy supplies and eliminate the price-related shortages we now face. *See* E. Mitchell, *supra*, at 73.

the energy crisis primarily in income redistribution terms and doubted that charging consumers higher prices would result in

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The free-market approach implies that consumers may continue to *use* energy as they please, that is, as much as they can afford. Other analysts, however, focus on our *uses* of energy as the underlying cause of the energy crisis. As one critic has put it:

> Living in the most affluent society in history, Americans took large amounts of the resources of the globe and became the best clothed, housed, fed, transported, and entertained people in the world.
>
> It was, however, never enough. The American people were insatiable. They demanded more of everything; taller buildings; extravagant space programs; more powerful, luxurious autos; weed-free lawns; second houses; boats—everything. And this spiral still didn't bring contentment.

S. Udall, C. Conconi & D. Osterhout, The Energy Balloon 22-23 (1974). Although artificially low prices may have facilitated our materialistic excesses, such criticism suggests that we are the real culprits because we have chosen to consume whatever energy is available. The energy crisis thus raises an entirely different set of issues and presents an opportunity to reexamine our way of life and, perhaps, change it substantially.

Besides tracing the underlying causes of the "energy crisis," various commentators have focused on its socio-economic effects. In particular, they have stressed the economic impact of shortages and high prices on poor and middle class energy users. *See, e.g.*, E. Grier, Colder . . . Darker: The Energy Crisis and Low-Income Americans (1977); Henderson, *Energy Policy and Socioeconomic Growth in Low-Income Communities*, 8 Rev. Black Political Econ. 87 (Fall 1977); Schexnider, *Blacks, Cities, and the Energy Crisis*, 10 Urb. Aff. Q. 5 (1974). Many assume we can have more energy if we are willing to pay the market-clearing price. This, however, entails a transfer of wealth from the consumer to the utility or oil company. Such a result would burden consumers, particularly those with fixed incomes. Viewing the energy crisis in terms of income redistribution, many persons see the chief concern of energy policy as the plight of the poor—rising prices versus fixed incomes. Income redistribution may be the most politically troublesome aspect of the "energy problem." Thus, not surprisingly, the primary purpose of much energy legislation is to soften the economic impact of high priced energy upon these vulnerable segments of the consuming public. *See, e.g.*, H.R. 3919, 96th Cong., 1st Sess. (1979) (windfall profits tax).

The relationship between energy resources development and the environment further complicates the "energy problem." *See generally* Energy and the Environment: A Risk Benefit Approach (H. Ashley, R. Rudman & C. Whipple eds. 1976). Coal is an abundant resource and nuclear power offers a long-term source of supply, but increased reliance on these energy sources means a trade-off between environmental values and energy self-sufficiency. *See generally* House Subcomm. on the Environment and the Atmosphere of the Comm. on Science and Technology, 95th Cong., 2d Sess., Research and Development Needs to Merge Environmental and Energy Objectives (Comm. Print 1978); Senate Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess., Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives (Comm. Print 1973); *Hearings on H.R. 4047, H.R. 4295, and H.R. 7976 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. (1969). *See also* Federal Mine Safety and Health Act of 1977 and Amendments of 1977, 30 U.S.C. §§ 801-825 (Supp. I 1977)); Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7626 (Supp. I 1977). For discussions of safety aspects of nuclear energy, see B. Commoner, The Poverty of Power 82-120 (1976); American Enterprise Institute for Public Policy Research, Is Nuclear Power Safe? (M. Laird moderator 1975); Bodansky & Schmidt, *Safety Aspects of Nuclear Energy*, in The Nuclear Power Controversy 8 (A. Murphy ed. 1976); Kistiakowsky, *Nuclear Power: How Much Is Too Much?*, in The Nuclear Power Controversy 157 (A. Murphy ed. 1976). Yet Congress, in setting up DOE, failed to deal with the environmental aspects of energy choosing to leave control of the environment

increased supplies were less likely to support the deregulation plans urged by others. Such fundamental differences in the perception of the problem involved delayed the legislative process and confused its ultimate substantive product.[39] Moreover, this ambivalence over substance had a significant effect on the administrative structure Congress designed to combat the energy crisis.

### B. *The Administration's Bill—The Beginnings of the Department of Energy Organization Act of 1977*

The introduction of the legislation that ultimately resulted in the Department of Energy Organization Act of 1977 sparked a congressional battle over the substance of a rational energy program.[40] Yet the initial bill contained no indication of what new substantive policies the proposed energy department would implement.[41] The Carter Administration reasoned that centralized

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with other agencies. *See* Byse, *The Department of Energy Organization Act: Structure and Procedure,* 30 AD. L. REV. 193, 194-98 (1978).

Finally the phrase "energy crisis" connotes enormous international problems. The Arab embargo of 1973 and the Iranian cut-off of 1979 indicate our dependence on foreign powers that may prove hostile to our long run interests. For an analysis of the effects on the West of OPEC's various decisions, see Pindyck, *OPEC's Threat to the West,* FOREIGN POL'Y, at 36, *passim* (No. 30 Spring 1978); *see also* Levy, *The Years That the Locust Hath Eaten: Oil Policy and OPEC Development Prospects,* 57 FOREIGN AFF. 287, 287-305 (Winter 1978-79) (OPEC members' interests may diverge from those of the United States). At stake is our national security. The attempt to bolster our security raises important questions about our ability to and the wisdom of achieving energy self-sufficiency in an increasingly interdependent world economy.

The National Energy Act, Congress' response to the "energy problem," consists of five separate major pieces of legislation affecting energy policy. They are: (1) the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350; (2) the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117; (3) the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 42 Stat. 3289; (4) the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978); (5) the Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174 (1978).

[39] *See, e.g.,* The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350. This Act was one of five parts of the National Energy Act and the legislation around which most of the controversy was centered. The disagreement in Congress over whether federal price controls on natural gas should be completely eliminated, phased out on a gradual basis, or retained delayed passage of the National Energy Act for nearly 19 months. The Carter energy plan was presented to Congress in April 1977. It was rejected by the Senate, which approved ending federal price controls for new gas on October 4, 1977. In conference, a compromise was struck which allows for gradual phasing out of all controls by 1985. The Senate passed the conference report on October 9, 1978, the House passed it six days later, and the plan became law November 9, 1978.

[40] *See* notes 37-52 and accompanying text *supra*.

[41] The Administration presented its bill on March 1, 1977, less than six weeks after President Carter took office. The proposed energy *policy* to accompany the new executive

administration of any energy program, regardless of its substantive bent, was far superior to existing fragmented policymaking machinery.[42] To increase centralization, the Administration's bill

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department was not scheduled to be outlined until late April. *See* Department of Energy: Remarks Outlining Proposed Legislation To Create the Department, [1977] 1 PUB. PAPERS 257.

This caused much irritation and some opposition in Congress. *See* notes 89-90 and accompanying text *infra*. Suspicions that the President would use the DOE Act to preempt congressional input into energy policy formulation tempered the desire to jump on the reorganization bandwagon. Thus, many legislators felt that reorganization prior to substantive policy placed the "cart before the horse." *See, e.g.*, 123 CONG. REC. H5,272 (daily ed. June 2, 1977) (remarks by Rep. Armstrong); *id.* H5,391-92 (daily ed. June 3, 1977) (remarks by Rep. Treen); *id.* S13,287 (daily ed. Aug. 2, 1977) (remarks by Sen. Stevens). Senator Roth very aptly asked:

> Is natural gas going to be deregulated? If so, that affects the transfer of power from the Federal Power Commission to the new Department. Is solar energy going to be given a high priority in the new Administration's plans? If so, that may determine whether one of the eight assistant secretaries should be specifically designated as responsible for solar energy. Similar questions are raised on every page of this bill. And those are the kinds of questions which I think should be answered before an organization is cast in concrete.
>
> I also hasten to warn that if this bill is based on a hidden agenda, not one which is merely unknown, then this should be revealed to the Congress. When the administration energy proposals are revealed in another month or two it will be clear to everybody concerned whether this reorganization bill was drawn with policy objectives clearly in mind.

*Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 106 (1977) [hereinafter cited as *Senate Hearings*]. Similar views were also voiced in the House: "Until we finally really know what the President is going to do . . . it is very hard to understand how you can really organize and create a department to carry those policies out." *Department of Energy Organization Act: Hearings on H.R. 4263 Before the House Comm. on Government Operations*, 95th Cong., 1st Sess. 210-11 (1977) (statement of Rep. Wydler).

The public hearings held by both the Senate and the House elicited similar concerns from witnesses: "We . . . support . . . government [energy] reorganization . . . . The main uncertainty involves the lack of an enunciated energy policy for the Department of Energy . . . ." *Id.* at 401 (statement of Jeffrey Knight, Legislative Director, Friends of the Earth).

[42] We need a new organizational entity which has the scope of authorities to make trade-offs in an age of fuel scarcity; which has the public support to pursue a vigorous conservation policy; which has the capability to collect and analyze meaningful energy data, to conduct research and development which relates to policy priorities, and to regulate responsibly and equitably. And we need to insure that this organization does not lose sight of the important considerations that must be intimately involved with our energy problems: Protection of the environment; consultation with States and localities; recognition of the vital role which energy matters will play in foreign affairs; and protection of the consuming public's interest.

There will likely be differences about specific policy objectives in the future. But I believe there should be no dispute about the need for establishing an organizational base within which these policies can be carried out.

. . . .

*Reorganization of the Federal energy establishment to deal more effectively with our energy problems is an idea whose time has come. We can no longer live with the frag-*

sought to abolish the Federal Power Commission (FPC), FEA, and the Energy Research and Development Administration (ERDA).[43]

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*mentation, the duplication, the overlapping jurisdictions, and the conflicting mandates evident in the current organization for dealing with energy problems.*

. . . .

No agency anywhere in the Federal Government has the broad scope of authorities to deal with our energy problems in a comprehensive manner.

. . . .

In the area of national energy policy, for the first time, we will have the responsibility for the formulation of energy policy vested in one Government institution. Assisted by an Under Secretary for Policy and Evaluation, the Secretary will be able to speak authoritatively for the Executive branch on those national energy policies needed to put energy supply and demand back into balance.

By establishing the Department, we will be assured of having one Government body with sufficient scope and authority to effectively oversee the development of national energy policy. Therefore, the need no longer will exist for a formal, statutory Energy Resources Council, and this legislation will abolish it. However, energy-related issues will obviously continue to cut across departmental lines, and a less formal interdepartmental coordinating body will be established by Executive order, with the Energy Secretary as chairman, to address these concerns.

*Senate Hearings, supra* note 41, at 121-24 (testimony of James R. Schlesinger, Assistant to the President) (emphasis added).

In general, duplication, overlapping jurisdiction, fragmentation of responsibility, and conflicting mandates have hampered the government's ability to formulate and implement a coherent, long-range national energy policy.

Foremost among those issues needing organizational resolution is that of energy policy formulation and decision-making. Currently, the central mechanism for directing policy development and coordination, as well as for monitoring and evaluating program implementation, is the statutory Energy Resources Council. The ERC did not and could not, with its members' other duties, devote itself as a body to the day-to-day problems and issues which energy policy formulation demands.

The absence of a single agency responsible for policy development has resulted too frequently in inconsistent and uncoordinated short and long-range planning assumptions and policies.

Energy policy can neither be effectively developed nor implemented without the benefit of a single entity capable of providing coherence to all of our energy-related programs and of melding these efforts together into a planned and concerted effort to achieve national energy objectives.

With the Department of Energy, responsibility for the formulation of energy policy will be directed to the Secretary of Energy. With the support of a consolidated organization with the authority and capability to manage Federal actions needed to implement energy policy, this legislation will achieve the singular task of locating clearly the executive's responsibility for the development and execution of energy policy objectives.

*Id.* at 127-28 (statement of John F. O'Leary, Administrator, FEA). *See id.* at 164 (testimony of Richard L. Dunham, Chairman, FPC); Department of Energy: Remarks Outlining Proposed Legislation To Create the Department, [1977] 1 PUB. PAPERS 257; Department of Energy: Message to the Congress Transmitting Proposed Legislation, [1977] 1 PUB. PAPERS 257, 257-59.

[43] S. 826, 95th Cong., 1st Sess. § 301, *Senate Hearings, supra* note 41, at 4-5 (1977).

The bill proposed the creation of a cabinet level office of Secretary of Energy,[44] various executive agencies under the Secretary's supervision or control,[45] and a Board of Hearings and Appeals.[46] The powers previously exercised by the agencies to be abolished by this legislation were largely retained; however, the proposed bill allocated these powers primarily among new executive administrative units.[47]

Perhaps the most significant aspect of the Administration's bill was its attempt to allocate primary energy policymaking power to an executive agency rather than to an independent regulatory commission. From the Carter Administration's point of view, this had a number of advantages, including greater presidential control over energy policy.[48] Moreover, increased centralization in an executive agency would result in greater accountability to the electorate: policy would be made primarily by a cabinet level official with closer ties to the popularly-elected President.

Executive policymaking signalled a second significant change: a move to more effective use of the rulemaking process in formulating energy policy.[49] Proponents of the bill argued that ad-

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[44] *Id.* §§ 201, 301, *Senate Hearings, supra* note 41, at 5, 7-8.

[45] *Id.* §§ 204-205, *Senate Hearings, supra* note 41, at 6-7.

[46] *Id.* § 401, *Senate Hearings, supra* note 41, at 15-17.

[47] The Act as passed by Congress, however, essentially allocated powers within the Department between the Secretary of Energy and an independent adjudicatory agency (FERC). *See* note 93 and accompanying text *infra*. The Act, however, provides FERC with considerably more power than the Administration had initially planned to delegate to the Board of Hearings and Appeals. *See* note 59 and accompanying text *infra*.

[48] The White House Fact Sheet on Energy Reorganization Legislation 8, 10-11 (Mar. 1, 1977) (on file at *Cornell Law Review)* [hereinafter cited as White House Fact Sheet].

[49] The Administration hoped to accomplish this not only by substituting rulemaking for adjudication, but also by eliminating the bifurcation of oil and natural gas regulation between the FEA and FPC. The gradual shift to rulemaking therefore had substantive as well as procedural consequences. Though not stressed by the Administration, expedited and coordinated oil-gas regulation and increased use of rulemaking procedures lay at the core of the reorganization plan.

> The FEA has regulatory functions that have been exercised since 1974, and has not performed those functions on the basis of an on-the-record formal adjudicatory procedure.
>
> That covers all petroleum products.
>
> By contrast, natural gas, which has been regulated since 1938 by the Federal Power Commission, has had considerable experience in dealing with formal on-the-record adjudicatory procedures.
>
> We do not see the reason for discrepancy in the treatment of petroleum on the one hand, and natural gas on the other, and we think that we should move

judicatory hearings had been used far too extensively in making

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toward administration of these fuel sources in the same manner, preferably within the same agency.

In addition to that, Mr. Chairman, on-the-record hearings by the Federal Power Commission have been most time consuming.

By placing these matters in this same agency, we can trade off more effectively between informal rulemaking authorities, and formal adjudicatory proceedings on-the-record, and it would be our intention to do so.

*Senate Hearings, supra* note 41, at 131 (remarks of James R. Schlesinger, Assistant to the President). Another witness stated that:

[I]n the major energy pricing decisions of the Federal Power Commission, I have not found the legal maxims under which we have been forced to operate particularly useful in making the hard choices presented to us.

In addition, our current standards of judicial review certainly do not further the certainty which I believe to be so important in energy decisionmaking, and to which the President alluded in his recent press conference remarks.

. . . .

Therefore, although I fully support the idea of a single decisionmaker on major energy policy and pricing decisions, we must realize that the bill before us does nothing to eliminate the time lag of judicially created uncertainty.

It has always puzzled me that petroleum product price and allocation responsibility resided with FEA, while virtually identical electric power and natural gas functions remained with FPC.

In just 1½ years that I have served as Chairman of the Commission, large amounts of time and funds have been expended to attempt to reconcile the differences between FEA and FPC regulations and procedures, and to coordinate policies between the two agencies.

These efforts were only partially successful, but the burden in terms of cost, delay, and frequent inconsistency is one the Nation should not have to bear, and one it would not have to bear if the reorganization proposed by the President is accomplished.

There is, of course, a direct economic relationship between licensing, price, and supply of natural gas, electricity, petroleum—indeed, all sources of energy—and it simply makes sense to have all governmental actions related to these functions coordinated within a single agency.

*Id.* at 166-67 (testimony of Richard L. Dunham, Chairman, FPC). However, some expressed reservations that the transition to coordination of oil and gas regulation would prove complicated and messy because of the historical split between the two:

Now, what is good about the way FPC functions is that the same agency decides all aspects of natural gas and electric power cases which come before it, utilizing a single, integrated staff.

. . . .

Under the provisions of the bill, it is impossible to say how the cases would be handled. Indeed, it is impossible to know how the 15,000 cases which are already docketed should be handled. It would be an appalling task to go through the files and attempt to determine which files should be assigned to the Administrator, which to the Hearings and Appeals Board, and perhaps which to the Secretary or to other agencies.

If assignment is to be made on the basis of whether the case is expected to go to hearing, what happens when there is a settlement? Must the file be moved from the Board back to the Administrator?

If so, what are the risks and the frustration if a new staff must begin examination of the transactions de novo.

essentially policy decisions better handled by rulemaking.[50] They claimed that such over-judicialization of energy policymaking resulted in unnecessary delay and cost as well as a decisionmaking

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> Another good thing about the Federal Power Commissin [*sic*] is that there is a close working relationship between the Commission and staff to the extent permissible without violating ex parte considerations.
>
> This is the essence of the advantage of the regulatory agency over the courts, in deciding technical questions involving complex situations and numerous issues.
>
> Now, if there is to be a division of function between the Administrator and the Board, each will need an expert staff. It is difficult enough to assemble one competent group of staff experts. I do not visualize the feasibility of a dual staff arrangement. It would be hard to recruit two staffs or to establish conditions which permitted them to function in tandem.
>
> There would be infinite possibility for delay and confusion if matters were transferred from one staff to another.

*Id.* at 206 (testimony of Joseph C. Swidler, former Chairman, FPC). *See also id.* at 166 (testimony of Richard L. Dunham, Chairman, FPC).

[50] For example, James Schlesinger testified that:

> We would hope over a period of years to move increasingly toward informal rulemaking and decisionmaking procedures, and to reduce the amount of formal on-the-record adjudicatory proceedings; however, in individual cases which determine the rights of individuals we shall always expect to retain adjudicatory proceedings of sufficient formality to assure due process.
>
> But I think more and more can be moved by these more flexible methods, and that would be our intention.

*Id.* at 132. *See also id.* at 125. Groups at both ends of the political spectrum tempered their criticisms of FPC by cautious appreciation of the due process protections afforded by formal adjudication, and suspicion that undue emphasis on expedition of cases might, in fact, be more harmful than helpful. As former FPC Chairman Joseph C. Swidler observed:

> [T]he FPC is probably unique in the very large number of so-called big cases it handles proceedings which involved very large investments, large revenues, numerous parties, intervenors, distributors, producers, and an enormous consumer interest.
>
> Hundreds of millions of dollars are at stake here. I do not say that all of the proceedings before the FPC are handled with the efficiency and dispatch that we ought to expect, but I do say that it proceeds in a very careful way that all interests are taken into account, that its procedures have been highly developed over a long period of time, and that they are generally satisfactory to the industries and to the intervening parties.

*Id.* at 204-05. Lee C. White, another former FPC Chairman, echoed Swidler's analysis and noted that competing policies favored different groups, thus making energy reorganization a politically sensitive issue:

> Again, as Mr. Swidler said, I think there are a number of areas where rulemaking and simplified procedures can be used. You cannot kid yourself. One guy's due process is another fellow's inability to get something done.
>
> Here we are asking the administration to move forward. The new administration is seizing the responsibility. As a lawyer, sometimes I know that time is my client's friend and sometimes his enemy, and so it is the age-old question of how do you cut through and make sure the due process is really not undue process, or unduly burdensome, or lengthy.

*Id.* at 208.

process incapable of responding quickly to future energy emergencies.[51]

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[51] We need to construct an effective Government organization that can meet the challenge and propose a rational solution. In my opinion, such an organization can only be effective if we confer upon the Secretary of Energy the authority to establish overall policy direction on energy matters, the right to manage resources, to coordinate the manner and the ability to meet energy demands, including recurrent crises, in an expeditious and effective manner.

123 CONG. REC. H5,296 (daily ed. June 2, 1977) (remarks of Rep. Brooks).

But the old FPC structure and system had its defenders. Rising to the defense on this point was FPC Administrative Law Judge Curtis L. Wagner, Jr., in an exchange with Senator Ribicoff:

> Chairman RIBICOFF. This is the trouble. If you are talking about an emergency situation where there is an actual allocation for an emergency, and if it takes 3 or 4 months to make a decision, in 3 or 4 months the emergency is over. How do you solve that?
>
> Judge WAGNER. In an emergency situation, we hold an emergency hearing. We waive briefs. We have on-the-record arguments, and we issue our decision the next day if necessary. We quite often do this.
>
> I had an emergency situation this past month in the case of *Philadelphia Gasworks v. Transcontinental Gas Pipeline Co.* The case was set for hearing by the Commission on Friday. I convened hearings on Monday morning at 9. I concluded the hearings on Thursday afternoon and immediately certified the record and recommended action to the Commission which issued a final order the next day.
>
> The case was handled in less than a week.
>
> Chairman RIBICOFF. All right.

*Senate Hearings*, *supra* note 41, at 784-85.

Senator Metcalf, on the other hand, challenged the emergency notion itself, thereby reframing the argument over location and efficiency of government energy action:

> In the name of emergency—one that is yet to be proved to this Senator—we are being asked, in essence, to delegate all Federal powers over the price and allocation of energy supplies to the head of a new department, subject to the direct control of the President, without adequate standards, and without sufficient safeguards of due process, or administrative protection against arbitrary abuse of discretion.
>
> . . . .
>
> In time of war or other imminent and endangering threats to our security, such aggregation of power in the President may be justified, but today it is very questionable and must be looked at with much more than the peripheral inspection we have thus far given it in the Senate.

123 CONG. REC. S7,956-57 (daily ed. May 18, 1977).

Senator Percy, in support of increased use of rulemaking, remarked that:

> If there is any one thing we know in any area where there is rulemaking or decisionmaking, it is that we really need decisions made as swiftly and as expeditiously as possible. It is indecision that causes so many mistakes in judgment and so much condemnation of Government, because of our inability to get off the dime and make up our minds.
>
> It is the decision of the committee, then, that the proposal that we have made best handles this sensitive and difficult issue. By emphasizing rulemaking, it does attempt to speed up economic regulatory decisions on energy resources.

*Id.* S7,918.

1. *Board of Hearings and Appeals*

Even though most of the policymaking power was to reside in the executive, the proposed Department of Energy Organization Act also provided for the creation of a Board of Hearings and Appeals. This was to have been an independent regulatory commission with the sole function of rendering adjudicatory decisions in certain cases.[52] In essence the Board was to have been a specialized in-house energy court.

In functioning as the agency's own judicial branch the Board was to have been completely independent of the Secretary. Its members—a chairman and two others—were "not [to] be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Department."[53] Members were to have been appointed to four-year terms of office and could be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office."[54] Action by the Board was to have been "final agency action"[55] and thus subject to judicial review,[56] but board decisions were not to have been subject to any further review within the Department of Energy.[57]

Under the Administration's proposal, the Board would have had no power to initiate any actions nor could it define its own jurisdiction.[58] The proposed bill would have limited the Board by granting it jurisdiction "to hear and determine matters arising under any function vested in or delegated to the Secretary involving . . . any agency determination required by law to be made *on the record* after opportunity for an agency hearing."[59] By use of the magic words "on the record," proponents of the bill clearly intended the Board to be involved only if adjudication or formal rulemaking were statutorily required.[60] If there was any doubt as to whether a statute required adjudication or formal rulemaking, the Board would not be empowered to decide such a question.

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[52] S. 826, 95th Cong., 1st Sess. §§ 401, 402, *Senate Hearings, supra* note 41, at 15-18 (1977).

[53] *Id.* § 401(d), *Senate Hearings, supra* note 41, at 16.

[54] *Id.* § 401(b), *Senate Hearings, supra* note 41, at 16.

[55] *Id.* § 401(e), *Senate Hearings, supra* note 41, at 16-17.

[56] *Id.* § 501(a), *Senate Hearings, supra* note 41, at 18.

[57] *Id.* § 401(e), *Senate Hearings, supra* note 41, at 16.

[58] *Id.* § 401 (a)(2), *Senate Hearings, supra* note 41, at 15.

[59] *Id.* § 401(a)(2)(A)(i), *Senate Hearings, supra* note 41, at 15 (emphasis added).

[60] Concerns over the procedural safeguards for those proceedings that were not statutorily required to be "on the record" prompted opposition to this provision.

Rather, the Secretary would decide whether the Board had jurisdiction to hear the case.[61] In addition, when adjudicatory proce-

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> Another apparent problem with the bill seems to be the reduction of due process protections which have always been associated with ratemaking under the EPA and NGA. Any person familiar with the ratemaking process recognizes that ratemaking, regardless of how classified in the lawyers' lexicon, is an adjudicatory process and that cross-examination is the consumer's best and sometimes only ally. However, under the bill, specifically Sec. 401(a)(2) . . . , the Board would have mandatory jurisdiction only over those agency determinations "required by law to be made on the record after opportunity for an agency hearing," and since the ratemaking provisions of the FPC (Sections 205 and 206) and the NGA (Sections 4 and 5) do not specifically require "on the record" hearings, the bill as written opens the door for the Secretary (through the Administrator of ERA) to set rates by rulemaking. Thus under the bill, there exists the very real possibility that the long-established practice of settling rates for public utilities and natural gas companies only after full adjudicatory hearings will be abolished in favor of settling rates by informal rulemaking procedures.
>
> I have not seen any viable reason yet advanced for shifting the certificate and ratemaking functions of the FPC to the DOE. The shift of such functions from an independent regulatory agency to an executive branch can only reflect the desire of the bill's authors to effect substantive changes in the administration of the FPA and NGA, under the guise of a reorganization bill. Under the bill's approach the consumer-protection objectives of the FPA and NGA are being jettisoned by the administration in order to achieve, inter alia, ratemaking by rulemaking (rather than by adjudication) which could enable the administration to effect a policy of deregulation of electric and gas prices by administrative fiat.

*Senate Hearings, supra* note 41, at 108-09 (statement of Sen. Metcalf). *See id.* at 227-28 (statement of Robert C. McDiarmid, former Assistant to the General Counsel for FPC); *id.* at 514, 527 (testimony of Alex Radin, Executive Director, American Public Power Association); *id.* at 749 (statement of George M. Stafford, Chairman, ICC); *id.* at 785-86 (letter of Judge Curtis L. Wagner, Jr., Chairman, Committee on Status and Compensation, Member of Legislative Committee, Federal Administrative Law Judges Conference).

[61] S. 826, 95th Cong., 1st Sess. § 401(a) *Senate Hearings, supra* note 41, at 15 (1977). During hearings on the bill this proposed power of the Secretary was clearly recognized and heavily criticized. *See* note 99 *supra*.

> First it is, I think, essential to take a look at each of the functions performed presently by the FPC and determine whether they should or could be better handled in the Hearings and Appeals Board instrumentality rather than within other elements of the proposed department. As I understand it, the current proposal would give to the Secretary the right to decide which responsibilities should be assigned to the Hearings and Appeals Board. I believe that Congress should mandate those particular functions that in its judgment are to be handled by such a board and permit the Secretary to refer any matters in addition to those Congressionally mandated that he wishes to assign to the more formal judicial-like process of the Appeals Board. As an illustration, the responsibility for handling rate cases on the electric utility side of the FPC responsibilities, which normally involve disputes between sellers of electric energy to other utilities (privately, publicly, and cooperatively owned) is the type of issue that lends itself to a trial-like procedure rather than Executive Branch policy-making.

dures clearly were not statutorily required, the Secretary would have had the discretion to assign any other matter to the Board if he determined that adjudicatory procedures were nevertheless appropriate.[62] As the judicial arm of the new department, the Board could only have reacted to cases statutorily required to be brought before it or assigned to it at the discretion of the Secretary.[63]

Many proponents of the bill hoped that the Board's jurisdiction would be relatively limited.[64] They anticipated that matters

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*Senate Hearings, supra* note 41, at 212 (statement of Lee C. White, former Chairman, FPC). Senator Roth remarked that:

> They talk about any agency determinations required by law to be made on the record. But we will be doing away, as I understand it, with the FPC commission. And it is only FPC administrative practices that require determinations on the record. The law does not impose such requirements, so is there assurance that this Board has any jurisdiction beyond what the Secretary wants to give?
>
> . . . .
>
> I have an open mind as to whether rulemaking is the proper approach or not, but it does seem to me that if they are going to move in that direction we have to build in some safeguards.

*Id.* at 522. Judge Curtis L. Wagner, Jr., Member of Legislative Committee, Federal Administrative Law Judges Conference stated that:

> As S. 826 now stands, the Board of Hearings and Appeals, or the energy court as we would prefer to call it, would have jurisdiction to hear and decide most rate cases only if, and to the extent that, the Secretary chose to delegate authority to the Board.
>
> It is not beyond the realm of reason to conjecture that some Secretary in the future might become dissatisfied with the Board's interface of facts, law, and policy and discipline the Board by merely withdrawing its jurisdiction.

*Id.* at 783. To similar effect, Representative Brown of Ohio observed that:

> Under the legislation submitted by the administration, the authorities of the Secretary that are taken over from the Federal Power Act and the Natural Gas Act—those authorities formerly held by the Federal Power Commission—would also embrace his opportunity to change those administrative procedures at his will. That is one of the big hooks here, because he might limit the administrative procedures under his own authority when the choice comes to him. I do not think they should be limited.

123 Cong. Rec. H5,297 (daily ed. June 2, 1977).

[62] S. 826, 95th Cong., 1st Sess. § 401(a)(2)(B), *Senate Hearings, supra* note 41, at 15 (1977).

[63] *See id.* § 401(a)(2), *Senate Hearings, supra* note 41, at 15.

[64]

> The assumption is that the matters to be decided by the Hearings and Appeals Board would be the minimum that the courts will insist be decided that way, and the ones that the Secretary or the Administator decides should be determined in the rulemaking mode.

*Senate Hearings, supra* note 41, at 205 (testimony of Joseph C. Swidler, former Chairman, FPC). The Administration believed that the Secretary would be the dominant figure in the Department.

previously decided by adjudication, but fully susceptible of resolu-

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*Secretarial role:* The Secretary or the Administrator of the Economic Regulatory Administration, as the Secretary's delegate, will carry out *informal rulemaking* and issuance of policy statements covering the regulatory areas within the Department. . . .

In addition, the Secretary (or the Administrator of the Economic Regulatory Administration) will have the ability to issue *prospective rules simplifying some of the proceedings now conducted by on-the-records* [*sic*] *rulemaking or adjudication* to the extent that he is not constrained from doing so under the applicable organic statutes. *Until such time as the Secretary or the Administrator issues such rules, however, these types of formal rulemakings or adjudications will be performed by the Board of Hearings and Appeals,* as described below. . . .

*Board of Hearings and Appeals role:* Initially, the Board of Hearings and Appeals would have jurisdiction over all proceedings which must be conducted on the record by law, and which the Secretary determines should be conducted on the record. Initially, it is anticipated that all proceedings conducted on the record under the practice of the constitutent agencies and commissions involved would continue to be so conducted.

The Board of Appeals may determine to hear such matters initially itself, or may use Administrative Law Judges to make initial determinations which the Board would then review.

In practice, this means that the Board would have jurisdiction over *much* of the FPC's current work load. Many of these proceedings, however, are now conducted by the FPC in a formal, on-the-record manner even though this is not required by existing statute and case law. In these areas, principally natural gas transportation and electric power rate-making, *the Secretary (or the Administrator of the Economic Regulatory Administration) would be free to attempt to establish, by rule, less formal procedures for determination in these areas.*

White House Fact Sheet, *supra* note 48, at 11 (emphasis added). *See generally Senate Hearings, supra* note 41, at 115-20 (letters from James R. Schlesinger, Assistant to the President, to Sen. Lee Metcalf as appended to statement of Sen. Metcalf).

In addition, many witnesses pointed out that the Secretary's potential control over the Board was not confined to jurisdiction, but also extended to staffing, budgeting appropriations, and other housekeeping areas.

Senator ROTH. Dr. Schlesinger, I would like to follow up the question by Senator Glenn, with respect to an independent energy regulatory administration.

You mentioned physically they will be separate.

What about the housekeeping and personnel, will that come under the jurisdiction of the Department of Energy, or would they make their recommendations independently?

Dr. SCHLESINGER. They make their recommendations independently.

The administration would be handled by the central personnel office, but the selection of individuals would come from the Board of Hearings and Appeals and the like.

Senator ROTH. What about the size of their personnel, and budget, would that be approved by the Department, or would that be directly, would that go directly to the Congress?

Dr. SCHLESINGER. Both.

If prior precedent were followed, the Congress would hear of any requests for money, or for personnel, from the Board of Hearings and Appeals, and the budget would be presented as a unified budget, rather than as a separate budget.

tion by rulemaking, could then be handled by rulemaking procedures.

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Senator ROTH. But to that extent, and I am not saying that is wrong or right, it is a matter of policy, and the Cabinet Secretary would have assistants who would help with respect to those recommendations?

Dr. SCHLESINGER. Yes, sir.

*Id.* at 139.

There are other threats to true independence. For example, the bill gives the Secretary broad powers over the Board's budgetary process, over hiring, and over general administrative control. In addition, since the members of the Board are to be appointed by the President and are to hold relatively short terms of office (four years), there is a potential for dramatic changes with each change of administration.

*Id.* at 750 (statement of George M. Stafford, Chairman ICC).

As an independent body, the Commission employs its own personnel. The present staff has developed considerable expertise and is of invaluable service to the Commission. Assuming these individuals are transferred to the Department of Energy, under the present structure they would presumably be assigned to the Economic Regulatory Administration. From there, they could be detailed to the Board. The failure to provide the Board with its own staff could thus give rise to at least two potential problems.

The first and most obvious problem is that the ability of the Board to carry out its responsibilities could be crippled by the Secretary of the Department of Energy, if he were unsympathetic or unresponsive to the needs of the Hearings and Appeals Board. By his control over the budget and personnel functions of the new department, the Secretary would be in a position to dictate the size and character of the staff of the Board. If the staff were inadequate to perform properly the duties of the Board, regulation would suffer.

A second problem is the ability of the Board to secure information it may need a [*sic*] regulate effectively. The Administration's energy reorganization plan calls for a centralization of energy information collection and dissemination. This approach should not foreclose assignment to the Board of personnel which will permit it to obtain data required to implement the provisions of the Federal Power Act, and to make available to the public information which will be of aid to consumers.

*Id.* at 528-29 (statement of Alex Radin, Executive Director, American Public Power Association).

If the Board of Hearings and Appeals is to truly have the independence proposed by the President, it should have the authority to transmit appropriation requests directly to Congress without review by either the Secretary of Energy or any other element within the proposed department.

*Id.* at 782 (testimony of Judge Curtis L. Wagner, Jr., Member of Legislative Committee, Federal Administrative Law Judges Conference).

In addition, the members of the Board of Appeals are reduced in level of pay from present FPC Commissioners. See, section 713 of S. 826. And by being located "within" the Department of Energy, the Board may necessarily become dependent upon the agency for appropriations, staff, office space and other operational necessities to a degree of practical dependence upon the Department.

*Id.* at 808 (Library of Congress, Congressional Research Services Analysis of Titles IV and V of S. 826, by Robert Poling, Legislative Attorney, American Law Division).

2. *The Economic Regulatory Administration*

As initially proposed, the Economic Regulatory Administration (ERA) clearly would have been one of the most powerful agencies within the Energy Department.[65] In addition to exercising control over the price and allocation of oil, ERA also was to have been in charge of natural gas ratemaking, natural gas curtailment and, in effect, all matters capable of being handled by rulemaking.[66] ERA's precise relationship to both the Secretary and to the Board of Hearings and Appeals was not entirely clear;[67] however, ERA clearly was intended to be one of the most powerful executive agencies under the Secretary.[68]

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[65] *See* S. 826, 95th Cong., 1st Sess. §§ 205, 301-310, 501(c), 502, 601-623, *Senate Hearings, supra* note 41, at 6-15, 19, 23-37 (1977).

[66] *See id.* §§ 205, 301, *Senate Hearings, supra* note 41, at 6-8. Section 301 transferred FEA authority to the Secretary, and § 205(b)(1) specified that the Secretary would "utilize the Economic Regulatory Administration to administer . . . any function which may be delegated to the Secretary under the Emergency Petroleum Allocation Act of 1973." Section 205(b)(3) authorized the Secretary to confer upon the ERA "such other functions as the Secretary may consider appropriate." As the Administration explained, the Secretary or the ERA "as the Secretary's delegate" would handle "all FEA regulatory activities." White House Fact Sheet, *supra* note 48, at 11. Moreover, "[a]ppeals from individual orders issued in the area of petroleum pricing and allocation will be through the same type of exceptions and appeals processes as are now used in FEA." *Id.* Administration statements and testimony show that rough comparisons were made between FEA and ERA on the one hand, and FPC and BHA on the other, at least insofar as their procedural nature was concerned. The major exception to the transfer of FEA to the Secretary/ERA was the proposed Energy Information Administration (EIA). *See* S. 826, 95th Cong., 1st Sess. § 204, *Senate Hearings, supra* note 41, at 6 (1977). FEA information-gathering functions, as well as those of other bodies incorporated within DOE, were to become EIA responsibilities. Notably, however, the *Secretary* was to make this delegation and could do so on a "non-exclusive basis," presumably permitting him to duplicate EIA authority elsewhere within DOE. Still, the EIA administrator could "act in the name of the Secretary for the purpose of obtaining enforcement of the delegated function." *Id.* § 204(c), *Senate Hearings, supra* note 41, at 6.

[67] Though the Secretary could "utilize" ERA to administer designated functions and "such other functions as the Secretary may consider appropriate" (S. 826, 95th Cong., 1st Sess. § 205(b), *Senate Hearings, supra* note 41, at 7 (1977)), the administrator of ERA was to be appointed by the President with the advice and consent of the Senate, rather than by the Secretary (*id.* § 205(b), *Senate Hearings, supra* note 41, at 6-7). The Board of Hearings and Appeals was to have jurisdiction "to hear and determine matters arising under any function vested in or delegated to the Secretary" involving agency determinations to be made on the record. *Id.* § 401(a)(2), *Senate Hearings, supra* note 41, at 15. Members of the Board were not to be "responsible to or subject to the supervision or direction of any officer, employee, or agent of the Department" (*id.* § 401(d), *Senate Hearings, supra* note 41, at 16), nor were Board decisions to be subject to further review by the Secretary or any officer or employee of the Department (*id.* § 401(e), Senate Hearings, *supra* note 41, at 16). *See* notes 53-57 and accompanying text *supra*.

[68] Indeed, the most significant fact about ERA authority was its definition as a secretarial creature. The Administration bill and supplementary explanations make it clear that no line of independence between ERA and the Secretary was foreseen; the latter had dis-

### C. *The Department of Energy Organization Act of 1977*

The Department of Energy created by Congress[69] differed significantly from the Administration's proposal. Congress rejected the President's plan to centralize substantial power under executive control.[70] Congress preferred a relatively weak executive whose power is, to a large extent, offset by a strong independent regulatory commission—the Federal Energy Regulatory Commission (FERC).[71] The Administration's proposed Board of Hearings and Appeals would have been simply an agency court; the commission Congress created, however, is essentially the Federal Power Commission reincarnated, an independent commission responsible for a wide range of energy programs similar to those of its predecessor.[72]

The resulting Department of Energy thus consists of both an executive agency[73] and an independent regulatory commission.[74] The Act allocates significant powers to a newly created cabinet level office of Secretary, and to various executive departments under his supervision and control.[75] But it provides even greater powers to FERC.[76] The net result is not only an agency of enormous size, complexity and power, but one whose power is considerably fragmented.

Under the new Act, the old problem of interagency fragmentation has, to a large extent,[77] given way to a new problem—

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cretion to make and change the division of authority between them. *See* S. 826, 95th Cong., 1st Sess. § 205(b), *Senate Hearings, supra* note 41, at 7 (1977). There was never an attempt to distinguish ERA as a clearly defined and autonomous office; in fact, ERA itself received relatively little comment or analysis. Instead, the congressional focus was directed at the Secretary and the Board of Hearings and Appeals as the significant statutory entities. *See generally* notes 61 & 64 *supra*.

[69] DOE Act, Pub. L. No. 95-91, 91 Stat. 567 (codified primarily at 42 U.S.C. §§ 7101-7352 (Supp. 1 1977)).

[70] *See* notes 110-14 and accompanying text *infra*.

[71] *See* notes 47-48 and accompanying text *supra;* notes 112-14 and accompanying text *infra*.

[72] *See* text accompanying notes 94-98 *infra*.

[73] Byse, *supra* note 38, at 198-201.

[74] 42 U.S.C. §§ 7171-7177 (Supp. I 1977) ("Federal Energy Regulatory Commission").

[75] *See* notes 99-108 and accompanying text *infra*.

[76] *See* notes 94-98 and accompanying text *infra*.

[77] Interagency fragmentation still exists to a large extent. Though many agencies were consolidated within the new Department,

> there are still at least sixteen federal regulatory agencies, within and outside the executive branch, each created and governed by its own separate statutes, with responsibilities that directly affect the price and supply of energy:

intraagency fragmentation. The Act disperses powers among the

| *AGENCY* | *FUNCTION* |
|---|---|
| Department of Energy (Executive) | Price and allocation regulation for oil products, fuel selection for power plants, energy research and development. |
| Federal Energy Regulatory Commission (Quasi-Independent) | Interstate gas pipeline and electricity rates and gas field prices; new conventional power plant licensing; veto over certain DOE decisions. |
| Nuclear Regulatory Commission (Independent) | Nuclear energy plant licensing, nuclear fuel export. |
| Department of the Interior (Executive) | Offshore oil and gas leasing, public land leasing for oil, gas, and coal, coal mine safety, wilderness and endangered species protection. |
| Interstate Commerce Commission (Independent) | Oil and coal slurry pipeline routes and rates. |
| Department of Commerce (Executive) | Tanker construction and safety, marine sanctuaries. |
| Environmental Protection Agency (Executive) | Vehicle and smokestack emission levels, water quality, wildlife impact, veto over DOE power plant coal conversion orders. |
| National Highway Traffic Safety Administration (Department of Transportation) (Executive) | Safety regulations affecting vehicle weight and fuel consumption; miles per gallon requirements for vehicle output. |
| U.S. Coast Guard (Department of Transportation) (Executive) | Inspection of tankers and LNG carriers and monitoring their movements. |
| Materials Transportation Bureau (Department of Transportation) (Executive) | Pipeline safety. |
| Occupational Safety and Health Administration (Department of Labor) (Executive) | Workplace levels for benzene and other energy-related substances. |

various executive units and FERC.[78] FERC exercises broad authority over wholesale electric rates[79] and wellhead and pipeline natural gas rates,[80] as well as oil pipeline rates,[81] but the Secretary, or an executive unit under his supervision and control, regulates wellhead oil prices[82] as well as the allocation of oil among various categories of buyers.[83] The Commission has authority to develop natural gas curtailment plans,[84] but the Secretary is authorized to set curtailment priorities.[85] The Commission can issue certificates of public convenience and necessity relating to the importation of liquid natural gas,[86] but authority to determine overall import policy resides with the Secretary.[87] In addition to

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|---|---|
| Consumer Product Safety Commission (Independent) | Safety of home insulation and other energy-related materials and equipment. |
| Internal Revenue Service (Department of Treasury) (Executive) | Tax regulations affecting energy producers and consumers. |
| International Trade Commission (Independent) | Import injury and relief, including tariffs and quotas on energy imports. |
| Federal Trade Commission (Independent) | Antitrust regulation and litigation involving energy industry. |
| Department of Justice (Executive) | Antitrust regulation and litigation involving energy industry. |

With sixteen captains holding a different spoke of the wheel, it is no wonder that the Government finds it difficult to steer a firm energy course.

COMMISSION ON LAW AND THE ECONOMY, AMERICAN BAR ASSOCIATION, FEDERAL REGULATION: ROADS TO REFORM 105-08 (proof of final report Sept. 1979) (footnote omitted) [hereinafter cited as ABA REPORT].

[78] 42 U.S.C. §§ 7131-7172 (Supp. I 1977).

[79] *Id.* § 7172(a)(1)(B).

[80] *Id.* § 7172(a)(1)(C).

[81] *Id.* § 7172(b).

[82] *Id.* § 7151. *See* S. REP. No. 164, 95th Cong., 1st Sess. 39-40, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 854, 893; H.R. REP. No. 539, 95th Cong., 1st Sess. 78, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 925, 949. In general, FPC functions not transferred to or vested in the FERC by § 7172 are transferred to the Secretary by § 7151.

[83] 42 U.S.C. § 7151 (Supp. I 1977).

[84] *Id.* § 7172(a)(1)(E).

[85] *Id.* §§ 7151(b), 7172(a)(1)(E).

[86] *Id.* § 7172(a)(1)(D).

[87] *Id.* § 7172(f). *See* note 82 *supra*. *See also* 42 U.S.C. §§ 7151, 7172(a)(1)(D) (Supp. I 1977); H.R. REP. No. 539, 95th Cong., 1st Sess. 65, 74-79, *reprinted in* [1977] U.S. CODE

this separation of substantive powers between the executive and the Commission, the Act provides for further checks and balances within the agency. The most important provisions of this sort authorize Commission review of both adjudicatory and legislative decisions made by the executive agency.[88]

The evolution of the Federal Energy Regulatory Commission and its powers was precipitated by Congress' fear of excessive executive control.[89] At the root of this fear was the uncertainty in Congress over the possible substantive policies the President actually might propose and in any event the lack of any consensus on the appropriate substantive policy options.[90] Many legislators anticipated the worst. Congress eventually assuaged at least some of its fears, not by resolving the substantive questions, but by building a set of checks and balances into the structure of the new agency.

Perhaps the foremost "anticipated problem" was the possibility of total deregulation of natural gas.[91] Many members of Con-

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CONG. & AD. NEWS 925, 935-36, 945-950.

There was, however, a good deal of uncertainty over the extent of the Secretary's authority over imported natural gas. On October 17, 1978, the Secretary published a final order delegating to ERA and FERC certain functions concerning the regulation of exports and imports of natural gas. Importation and Exportation of Natural Gas, 43 Fed. Reg. 47,769 (1978). The question as to which agency had jurisdiction over which aspects of such cases arose because § 402 of the DOE Act, 42 U.S.C. § 7172 (Supp. I 1977), specifically gave to FERC regulatory jurisdiction under §§ 4, 5, and 7 of the Natural Gas Act, 15 U.S.C. § 717c, 717d, 717f (1976), but assigned to the Secretary of Energy the general authority to "regulat[e] the exports or imports of natural gas." 42 U.S.C. § 7172(f) (Supp. I 1977). The provision failed to limit the Secretary's authority specifically to matters arising under § 3 of the Natural Gas Act, 15 U.S.C. § 717b (1976), and the Secretary could have construed his authority broadly to regulate *all* aspects of natural gas import or export projects. The delegation orders attempt to clear this problem up by, in effect, assigning all nuts and bolts matters to FERC. Specifically, FERC now has authority over such applications pursuant to §§ 1, 4, 5 and 7 of the Natural Gas Act, 15 U.S.C. §§ 717, 717c, 717d, 717f (1976), but also pursuant to § 3, 15 U.S.C. § 717b (1976), insofar as the functions thereunder are representative of those areas traditionally within the expertise of FERC's predecessor, the Federal Power Commission.

Nevertheless, it is interesting to note that Charles Curtis, Chairman of FERC, recently urged Congress to consider "whether the decision with regard to importation of natural gas should best be placed entirely in the Commission in one proceeding." Foster Report No. 122, Aug. 9, 1979, at 5 (on file at *Cornell Law Review*).

[88] *See generally* 42 U.S.C. §§ 7172(b)-(c), 7173, 7174, (Supp. I 1977). *See also* text accompanying notes 142-48 *infra*.

[89] Byse, *supra* note 38, at 198-203.

[90] *See* notes 35-40 and accompanying text *supra*.

[91] *See* note 93 *infra*.

The deregulation battle lines began to form prior to the submission of the bill that eventually became the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat 3350 (codified at 15 U.S.C. §§ 3301-3432 (Supp. II 1978)). Congress' fears over deregulation were

gress feared that James Schlesinger would become the new Secretary and that given secretarial authority over natural gas pricing, he might attempt to effect substantial or total decontrol.[92] To guard against a decontrol-oriented policy of any new Secretary, as well as to prevent too great a concentration of power within the executive, many of these members favored structural proposals that would provide significant administrative checks and balances within the department, particularly on pricing decisions made by the Secretary.[93]

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made explicit when debate over that bill began. *See Natural Gas Pricing Proposals of President Carter's Energy Program: Hearings on S. 256 and S. 1469 (Part D) Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 42-45 (1977). Congress stalled the bill for over a year and passed it in such a compromised form that the effectiveness of the Act has been extensively criticized since the day it went into effect. One commentator has described it as "an intricate labyrinth of regulatory provisions" that "may well be the most complex regulatory statute ever enacted in the United States." Pierce, *Natural Gas Policy Act of 1978—Change, Complexity, and a Major New Role for the KCC*, 47 J. KAN. B.A. 259, 274 (1978). This complexity resulted from Congress' inability to decide the decontrol issue. *Id.* at 260-61.

[92] *See Nomination of Dr. James R. Schlesinger to be the Nation's First Secretary of Energy: Hearing Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 9, 12-13, 63, 73-74 (1977).

Many observers recognized that one reason Congress created FERC was to prevent the Energy Secretary from effecting substantial decontrol. In urging Congress to give the power to determine natural gas prices to the Secretary rather than FERC, one editorial writer stated:

> The fear of the legislators, of course, is not the the President [and the Secretary] would peg prices too low but that [they] would raise them higher than the voters might enjoy. Exactly the President's intent although he himself was less than forthright about it when he first proposed this innocent sounding "reorganization" measure to consolidate all Government agencies dealing with energy.

N.Y. Times, June 7, 1977, at 34, col. 1-2. This reason for the amendment was at least implicitly acknowledged during the House debate over the amendment:

> Mr. SYMMS: . . .
>
> Then is the gentleman telling us that the Secretary of Energy of the Department of Energy will deregulate the price of natural gas because if the Congress will not do that, all of this argument is superficial anyway?
>
> Mr. LEVITAS: I cannot speak for what the new Secretary will do. He certainly cannot do any worse than what has happened so far.
>
> I have heard the President's energy message, and it sounds a lot more like a movement in the direction of deregulation to stimulate production than do the actions taken by the Federal Power Commission . . . .

123 CONG. REC. H5,314 (daily ed. June 2, 1977). *Cf.* note 93 *infra* (because of these fears compromise plan checked Secretary's power to set price regulations).

[93] Senator Percy stated:

> Authority for setting oil and gas prices was, perhaps, the most controversial issue which was resolved in conference. Many were worried by the administration proposal to place all pricing authority in the hands of the Secretary of

### 1. *The Federal Energy Regulatory Commission*

The foremost structural check on executive power was (and still is) the Federal Energy Regulatory Commission (FERC), an in-

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Energy. At the same time it was necessary that pricing issues be resolved expeditiously and with some input from the Secretary so that pricing policy is consistent with other energy policies.

This legislation accomplishes both ends. It establishes an independent 5-member Federal Energy Regulatory Commission to oversee all pricing decisions. It also allows the Secretary of Energy, a political appointee, to initiate pricing actions and to participate in Commission proceedings where appropriate.

123 CONG. REC. S13,282 (daily ed. Aug. 2, 1977). Senator Javits remarked that:

Mr. President, the key point is not where the central power lies; the key point is how well will the public be served. The conferees have placed great authority in a five-member politically balanced and independent commission, the Federal Energy Regulatory Commission. When decisions regarding the fair and reasonable price to be charged consumers is in issue, these decisions will be made without regard to political pressures. These decisions will be made as a result of public hearings with all parties represented.

This balance is essential to ensure that the functions of the Department, other than its regulatory functions, will not interfere with the quasi-judicial, regulatory function. We have, in that respect, I believe, tread successfully the fine line between the interests of producers and the needs of consumers.

*Id.* S13,286. Representative Eckhardt declared:

Mr. Chairman, I feel that those who have said it makes no difference whether the authority to regulate price be within the executive department or be protected by a collegial body simply do not understand the basis of this process. We have delegated, and probably necessarily so, the greatest amount of power in this area of energy that this Congress has ever delegated. If we delegate that power directly to the Secretary of a department of the executive branch, we are confounding the situation. We are creating a situation in which the delegation of authority from Congress to engage in policymaking is to the head of a department of the executive branch. I think that would be a grave mistake.

The gentleman from Ohio (Mr. BROWN) has pointed out the enormous authority, almost unlimited with respect to procedure, that has been granted to the FEA. Add to that the authority of the Federal Power Commission and leave all this to an executive department's unbridled authority and Congress will have indeed abdicated from its constitutionally defined position as prime policymaker in our divided system of government. We all know that we have some greater opportunity to oversee and influence a regulatory agency, from both sides of this aisle, than to oversee and influence a part of the executive family. We know that the regulatory agencies have to be more nonpartisan, because they have to answer to Congress more directly than do those receiving a part of the executive budget—that of a department. These departments in the executive family can transfer funds from one area to another. Why should we delegate so much authority here today?

*Id.* H5,316 (daily ed. June 2, 1977).

But these fears were, to some extent, misguided. As Representative Brooks succinctly observed in urging passage of the energy bill: "[T]he Secretary will not have any powers that have not been created by Congress. What Congress gives, it can take away." *Id.* H5,270.

dependent commission which replaced the old Federal Power Commission. Like its predecessor, FERC consists of five members appointed for staggered terms of four years.[94] They are appointed by the President with advice and consent of the Senate, and can effectively be removed only for cause.[95] The new Commission is thus independent of direct Presidential or Secretarial control. It retains virtually all of the old FPC's powers under the Natural Gas Act including its ratemaking, certificate and licensing authority[96] and now has jurisdiction over oil pipelines as well.[97]

In exercising its powers, FERC clearly is in the Department of Energy but not of it. FERC decisions are not subject to review within the Department. They constitute final agency action and can be reviewed only by the courts.[98] This is not, however, the case for many oil pricing decisions made by the executive wing of the Department.

2. *Executive Regulatory Functions*

The Secretary and executive agencies under his supervision exercise broad authority with regard to gathering and collecting information,[99] research and development,[100] conservation,[101] self-

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[94] 42 U.S.C. § 7171(b) (Supp.I 1977).

[95] *Id.* It is important to note that the members of FERC are not "statutorily protected against summary removal from office; but the 'political inadvisability of such a traumatic step' helps protect them against dismissal, none the less." W. Gellhorn, C. Byse & P. Strauss, Administrative Law 131 (7th ed. 1979). The authors go on to speculate that: "The reason that . . . FERC . . . members have no explicit statutory protection against removal is, doubtless, that those agencies were created after the Myers case and before the Humphrey case, at a time when legislative draftsmen believed the President's power to be illimitable." *Id.* at 131 n.7.

[96] 42 U.S.C. § 7172(a)-(b) (Supp. I 1977), *as amended by* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301-3432 (Supp. II 1978)).

[97] 42 U.S.C. § 7172(b) (Supp. I 1977). The Conference Report makes clear that FERC's jurisdiction over oil pipelines is extremely broad. *See* H.R. Rep. No. 539, 95th Cong., 1st Sess. 75-76, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 946-47.

[98] *See* 42 U.S.C. §§ 7172(g), 7192 (Supp. I 1977).

[99] *Id.* § 7135(a) (gathering and collecting information which is relevant to energy resource reserves, production, demand, technology, and related information relevant to adequacy of energy resources to meet demands).

[100] *Id.* § 7139 (energy research and development).

[101] *Id.* § 7112(2) (delaring Congress's purpose that DOE coordinate energy conservation throughout the federal government); *id.* § 7132(b) (providing for an Under Secretary who "shall bear primary responsibility for energy conservation" as well as whatever other duties the Secretary delegates); *id.* § 7133(a)(9) (listing various conservation functions as among the duties of Assistant Secretaries); *id.* § 7266 (requiring various other departments and agencies to designate their own "principal conservation officer[s]").

inspection,[102] and certain energy-regulatory duties.[103] Of particular interest are the executive regulatory functions. The DOE Act transferred to the Secretary the authority to regulate the price and allocation of domestic crude oil.[104] The Secretary, in turn, has delegated this power to FEA's successor, the Economic Regulatory Administration (ERA).[105] Thus, ERA has the power to set the price of first sales of domestic crude oil, the price of residual fuel oil, and the price of refined petroleum products such as propane, butane, and naptha.[106] It also has the authority previously exercised by FEA to allocate coal among those plants prohibited from consuming oil or gas.[107] In addition, the Secretary controls the regulation of imports and exports of natural gas and electricity.[108]

### 3. *FERC as a Check on Executive Power*

By arming the Secretary with the significant powers outlined above, as well as other functions,[109] Congress granted formidable

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[102] *Id.* § 7138 (self-inspection to detect fraud or abuse in programs and operations).

[103] *Id.* § 7136 (establishing the Economic Regulatory Administration as the Secretary's primary vehicle for regulatory action).

[104] *Id.* § 7151(a). These powers previously had been exercised by FEA under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760(h) (1976). *See id.* § 757 (granting authority to President to regulate price and allocation of domestic crude oil); *id.* § 754(b) (granting authority to President to delegate his authority under this Act); *id.* § 764(a) (functions of FEA include those delegated to it by President); Exec. Order No. 11,748, 38 Fed. Reg. 33,575 (1973) (delegating to FEO all authority vesting in President by EPAA and § 203(a)(3) of Economic Stabilization Act of 1970); Exec. Order No. 11,790, 39 Fed. Reg. 23,185 (1974) (transferring to FEA functions previously exercised by FEO).

[105] DOE Delegation Order No. 0204-24, 42 Fed. Reg. 60,726 (1977).

[106] ERA derives its authority by delegation of powers that originate in the old substantive provisions of 15 U.S.C. §§ 757, 753 (1976).

[107] *Id.* § 792(d).

[108] The DOE Act, 42 U.S.C. §§ 7151(b), 7172(f) (Supp. I 1977), transferred from the old FPC to the Secretary the authority to regulate imports and exports of natural gas under section 3 of the Natural Gas Act, 15 U.S.C. § 717b (1976). *See also* note 87 *supra*. Similarly, the Secretary assumes FPC's authority over the importation and exportation of electrical power under Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (1953).

[109] *See, e.g.*, 42 U.S.C. § 7152(a) (Supp. I 1977). That section transfers to the Secretary the power to regulate and control certain power-marketing and power-transmission functions which previously were scattered among several authorities, including the Southeastern Power Administration, the Southwestern Power Administration, the Alaska Power Administration, and the Bonneville Power Administration. The Secretary also took over from the Department of Interior a number of functions concerning the leasing of federal lands. *Id.* § 7152(b). Such functions included: (1) developing and regulating bidding systems for the award of federal leases; (2) the establishment of diligence requirements for operations on federal leaseholds; (3) the specification of lease terms and procedures; and (4) the setting of production rates for leaseholds. *Id.* The Act also transferred to the Secretary from

authority to a centralized executive department. But the powers simultaneously accorded FERC substantially offset this executive power. Indeed, FERC's capability to check the exercise of executive power is particularly evident in the Commission's authority to review many executive decisions.

a. *FERC Review of Executive Rulemaking—The Commission Veto.* The DOE Act delegates a legislative veto power to FERC.[110] The Secretary may not take certain energy action[111] or adopt "rules, regulations, and statements of policy" which "may significantly affect any function within the jurisdiction of the Commission"[112] unless the Commission agrees with this action or the Secretary adopts the changes specified by the Commission.[113] Where the Commission recommends nonadoption, the Secretary may not act at all. The Commission's veto authority is absolute, for both the entire proposed rule and any portion of it.[114] Thus, in reviewing certain secretarial rules FERC can effectively thwart certain policy actions proposed by the Secretary.

b. *Commission Review of Executive Adjudication.* In addition to its veto power, the Commission exercises judicial powers over sec-

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the Department of Housing and Urban Development the authority to develop and promulgate energy standards for new buildings, pursuant to § 304 of the Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. §§ 6833, 7154 (Supp. I 1977). In addition, the Act transferred to the Secretary from the Secretary of the Navy jurisdiction over various naval petroleum reserves and oil shale reserves. *Id.* § 7156.

There are, however, certain key omissions from the Secretary's authority. In addition to those powers exercised by FERC, the Secretary apparently lacks authority over coal-slurry pipelines and the rail transportation of coal. *See* 123 Cong. Rec. H8,256 (Aug. 2, 1977) (remarks of Rep. Horton, a Conference Committee member).

[110] 42 U.S.C. § 7174 (Supp. I 1977). Congress has retained a veto power over certain energy actions as well. Under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976), *as amended by* the Energy Policy and Conservation Act, 42 U.S.C. § 6421 (1976), any major oil pricing or allocation decision by the then-FEA was subject to a 15-day congressional veto procedure. The DOE Act retains this congressional veto power, but provides an opportunity for a Commission veto before the congressional veto. 42 U.S.C. § 7172(c)(1) (Supp. I 1977).

[111] 42 U.S.C. § 7172(c)(1) (Supp. I 1977). Energy actions are any actions taken by the Secretary under 15 U.S.C. §§ 757, 760 (1976). They include, for example, any rules seeking to exempt petroleum products from regulation as well as any amendment to adjust the composite price of crude oil in excess of 10% per annum. The Secretary must refer such matters to the Commission. 42 U.S.C. § 7174(a) (Supp. I 1977); H.R. Rep. No. 539, 95th Cong., 1st Sess. 77, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 948.

[112] 42 U.S.C. § 7174(a) (Supp. I 1977).

[113] *Id* § 7174(c). *See also* H.R. Rep. No. 539, 95th Cong., 1st Sess. 80, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 951. FERC's action, however, is not final agency action, and there can be no judicial review until the Secretary acts upon FERC's recommendations. 42 U.S.C. § 7174(c) (Supp. I 1977).

[114] 42 U.S.C. § 7174(c) (Supp. I 1977).

retarial action. It may review the Secretary's issuance of remedial orders directed at alleged violators of any rule, regulation, or order promulgated under the Emergency Petroleum Allocation Act of 1973.[115] Moreover, the Commission has the authority to review all denials of petitions for various adjustments from rules or regulations issued pursuant to the DOE Act.[116] With regard to certain oil pricing decisions made by the Secretary, FERC is, in effect, an in-house court.

The DOE Act was not sufficiently clear when it came to defining the relationship between the Secretary and the Commission in general[117] and the scope of the Commission's adjudicatory role

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[115] *Id.* § 7193(c).

[116] *Id.* § 7194(b).

[117] Though the primary result of the Act's progress from Carter bill to congressional enactment is the division of power between two competing entities, the Secretary and the FERC, Congress left their precise relationship unresolved. Debate over the Moss amendment to the bill included at least one recognition that, regardless of the statutory allocation of authority, an inevitable tension would exist between these two entities:

> Mr. Evans of Colorado. . . . It seems to me that we might have a two-headed horse, in a way. We might have a President and a Secretary of Energy who want to take a certain direction in regard to energy, and we might have an independent commission that thinks that the President and Secretary are wrong and feel that we ought to go another way. What would be the situation if this amendment passes?
>
> Mr. Dingell. I think we have a horse with two heads or two tails—the gentleman can take his pick—where under the bill as drawn, or under the amendment as offered by the gentleman in California, in either event we have a Secretary and we have a Commission. What we are doing is defining which end of the horse is going to go which way under which particular set of circumstances at which time. Also, we lay out a set of circumstances where it will function more in the daylight and less in the dark, where there will be more public input and more public appreciation of what is going on, and less action by that two-headed horse, or two-tailed horse, in the dark. That is the basic difference.
>
> Mr. Evans of Colorado. The problem to which the gentleman alludes is inherent within the bill?
>
> Mr. Dingell. Regardless of whether the Moss amendment is present or absent.

123 Cong. Rec. H5,313 (daily ed. June 2, 1977).

Members of both houses expressed the view that since DOE would be a new agency, Congress should take a wait-and-see attitude regarding its ultimate structure and size:

> This has been a hard assignment; it will continue to be. I think all of us agree that it is not the final word in a Department of Energy. The Senator from Connecticut, the distinguished chairman, observed from time to time that there had to be trial and error in this kind of operation. After this department has functioned awhile and has gone through a shake-down period, we will be in a better position to determine whether any changes are necessary and will be able to deal with those issues at an appropriate time.

*Id.* S7,916-17 (daily ed. May 18, 1977) (remarks of Sen. Jackson).

> I also feel that this agency needs to have the opportunity to find out how best to perform its functions. It might be that after operating for a while, it can

in particular. From the face of section 503 of the statute, the Commission arguably could have the power of de novo review of executive adjudications.[118] The Commission has chosen, instead, to play more of an appellate role. The preference for the appellate role is prompted largely by the executive agency's development of elaborate procedures for issuing remedial orders in the executive wing of the agency.

## II

## Administering and Enforcing Oil Price Controls—A Temporary Emergency Becomes A Way of Life

The overlay of FERC review with executive remedial order procedures has resulted in a gaggle of administrative procedures.

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> reduce the number of employees. However, it does have a tremendous responsibility. I believe the Congress has a hold on the number of employees, through the authorizing and appropriating committees when this agency has to come before us for its budget authorizations. . . . That would be the manner in which we should attack this.

*Id.* H5,387 (daily ed. June 3, 1977) (remarks of Rep. Horton concerning proposed, but later defeated, amendment to place a statutory limit on the number of DOE employees).

The political climate which gave rise to the DOE Act did not encourage careful, deliberate consideration of details or implications. For example, Senator Durkin offered some rather acerbic comments that illustrate the atmosphere during final debate over the Administration Bill:

> This may be the finest bill this body has ever passed, or it may be the worst, but I estimate that 75 percent of the membership does not know whether it is the best or the worst.
>
> This thing is slid through. I am afraid that many constituents across the country, when they see the impact of this bill on energy prices and the impact on the appeal procedure, will want to know who voted for this thing, will want to know who supported it.
>
> However, as the Senator from Idaho said, I can read the tea leaves; I can read the handwriting on the wall. This bill is going to be passed. . . .
>
> . . . .
>
> . . . I am not going to keep people here any longer tonight. I am going to vote "no" on this bill because I think it has been taken up and moved too fast, and I submit that there are many Members in the Chamber who do not know what this bill does.

*Id.* S7,958 (daily ed. May 18, 1977). Durkin later voted against the Conference Report. *See id.* S13,291 (daily ed. Aug. 2, 1977).

[118] Section 503(c) of the DOE Act provides:

> If within thirty days after the receipt of the remedial order issued by the Secretary, the person notifies the Secretary that he intends to contest a remedial order issued under subsection (a) of this section, the Secretary shall immediately advise the Commission of such notification. Upon such notice, the Commission shall stay the effect of the remedial order, unless the Commission finds the public interest requires immediate compliance with such remedial order. The Commission shall, upon request, afford an opportunity for a hearing,

Congress authorized FERC review largely in response to the inadequate procedures employed by the executive agencies originally charged with enforcing the Emergency Petroleum Allocation Act.[119] But the executive procedures that recently have evolved may now render FERC review superfluous. To understand why Congress conferred this authority on FERC in the first place, as well as to evaluate the wisdom and efficacy of continuing FERC review, the history of the oil enforcement process must first be examined.[120]

### A. *Acting in an Emergency—The Initial Lawmaking Stage*

Hasty lawmaking often breeds future difficulties. The initial federal response to the OPEC embargo of 1973 was rushed and confused both at the legislative stages and the administrative stages of the program.

#### 1. *Legislation in a Crisis*

Congress passed the Emergency Petroleum Allocation Act (EPAA) during a time of perceived crisis.[121] Like many

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> including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's remedial order, or directing other appropriate relief, and such order shall, for the purpose of judicial review, constitute a final agency action, except that enforcement and other judicial review of such action shall be the responsibility of the Secretary.

42 U.S.C. § 7193(c) (Supp. I 1977). This section can be read to require de novo review by FERC. *See* note 192 *infra*.

Section 503, however, provides for secretarial issuance procedures. This section has been read to authorize substantial procedural requirements in the executive wing of the agency. *See* note 192 *infra*.

[119] *See* notes 156-70 and accompanying text *infra*.

[120] Though the focus of this Article is on the enforcement process within DOE, much of the analysis dealing with unnecessary duplication of administrative procedures is applicable to the adjustment process carried out by the Department under its authority in § 504 of the DOE Act, 42 U.S.C. § 7194 (Supp. I 1977). Pursuant to this provision, FERC has authority to review denials of requests for adjustments by the executive. Like § 503 of the Act it mandates certain minimum procedures the commission must provide. This process is considered in detail in a preliminary report submitted to the Administrative Conference. A. Aman, The Concept and Process of Administrative Equity: A Preliminary Report to the United States Administrative Conference (Apr. 30, 1979) (on file at *Cornell Law Review*).

[121] *See Federal Energy Administration's Enforcement of Petroleum Price Regulations: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 7 (1975) [hereinafter cited as *FEA Hearings*] (testimony of Frank G. Zarb).

"emergency" measures, including various energy bills enacted to date,[122] a sense of an acute need, sugarcoated by an expectation that the emergency was temporary, spurred the passage of the EPAA; the shock to our system caused by OPEC's actions was serious but its effects were not expected to linger. Under these circumstances, the strong medicine Congress prescribed—a broad grant of substantive power to the executive branch to control the price and allocation of domestic crude oil coupled with expedited procedures to implement and enforce this program—was readily acceptable.

In passing the EPAA, Congress borrowed heavily from the wage and price control legislation that immediately preceded its action, the Economic Stabilization Act of 1970.[123] The EPAA simply incorporated by reference the procedures for administrative decisionmaking and judicial review promulgated in the 1970 Act and employed by the Cost of Living Council. Like the Stabilization Act, the EPAA specifically exempted its administrators from many of the requirements of the Administrative Procedure Act, particularly those governing adjudicatory hearings.[124] Similarly, the EPAA incorporated the two-tier judicial review approach used under the Economic Stabilization Act: final enforcement orders are appealable first to a federal district court and then to a specialized appellate court, the Temporary Emergency Court of Appeals.[125]

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*See also* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 5-14; notes 21-24 and accompanying text *supra*. *See also* 2 SPORKIN REPORT, *supra* note 9, at i.

[122] *See, e.g.*, Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4 (codified at 15 U.S.C. §§ 717-717u (Supp. I 1977). For pending legislation, see S. 1308, 96th Cong., 2d Sess. (1979); H.R. 4985, 96th Cong., 2d Sess. (1979) (presently pending Energy Mobilization Board legislation).

[123] Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, *reprinted at* 12 U.S.C. § 1904 note (1976).

[124] Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 207(a), 85 Stat. 747. As one commentator has noted: "Having concluded that the requirements of the Administrative Procedure Act would result in 'too cumbersome and dilatory a procedure,' Congress exempted, in the 1971 amendments, the control agencies from most of the Act's provisions." Comment, *Administration and Judicial Review of Economic Controls*. 39 U. CHI. L. REV. 566, 579-80 (1972) (footnotes omitted). For a discussion of these procedures and their relationship to the APA, see Note, *Phase V: The Cost of Living Council Reconsidered*, 62 GEO. L.J. 1663, 1679-90 (1974).

[125] The EPAA, 15 U.S.C. § 754 (a)(1) (1976), incorporated by reference §§ 205-207, 209-211 of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat.

2. *Regulations in a Crisis*

The urgency of the crisis, which had hurried Congress' enactment of the EPAA, undoubtedly would have accelerated the administrative action pursuant to this Act. But the administrators involved were subject to a congressional edict to act with dispatch. The EPAA required that regulations providing for the mandatory allocation at "equitable prices" of crude oil, residual fuel and various refined petroleum products[126] be issued within fifteen days of the Act's passage.[127] Shortly after President Nixon signed the Act

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743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, *reprinted at* 12 U.S.C. § 1904 note (1976). Section 211 (d)(1) of the amended Act sets forth the appropriate standard for judicial review of agency action:

> [N]o regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(d)(1), 85 Stat. 749.

Agency actions are reviewable in two stages. Section 211(a) of the Economic Stabilization Act, as amended, granted exclusive original jurisdiction over controversies arising under the title in the federal district courts. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(a), 85 Stat. 748, *reprinted at* 12 U.S.C. § 1904 note (1976). Section 211(b)(2) of the Act's amendments further created a special appellate court to review district court decisions under the EPAA—the Temporary Emergency Court of Appeals—and provided that "Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." *Id.* § 211(b)(2), 85 Stat. 749, *reprinted at* 12 U.S.C. § 1904 note (1976).

Both the district courts and the Temporary Emergency Court of Appeals historically took a most deferential approach in reviewing FEA decisions. *See* Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 128-29. Moreover, even district court review of an FEA remedial order is appellate in nature. The provisions of the Economic Stabilization Act incorporated by reference did not authorize a district court reviewing FEA decisions to grant a de novo hearing as a matter of right. Rather the statute authorized application of a substantial evidence test (Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(e)(1)(B), 85 Stat. 749) to a record that may have been incomplete and was compiled by a factfinder who may not have been completely independent (*see* text accompanying notes 156 & 162 *infra*). In short, although judicial review was provided, the complainant may not have received a full or fair evidentiary hearing.

[126] 15 U.S.C. § 753(a),(b)(1)(F) (1976). *See also* Mandatory Petroleum Allocation Regulations, 39 Fed. Reg. 1,924, 1,932-49 (1974).

[127] 15 U.S.C. § 753(a) (1976).

into law, he established the Federal Energy Office (FEO).[128] Within one week of FEO's creation, it issued the mandatory regulations required by the Act.[129]

Administrators of any complicated regulatory program often are denied the luxury of time to think through all of the consequences of the drastic actions required in a crisis. The energy program was an acute case: the time constraints were unusually tight, and technical expertise in and an understanding of regulation as it affected a diverse and enormously complex petroleum industry was, to a large extent, lacking.[130] Given such handicaps, it is hardly surprising that FEO officials followed Congress' example and relied heavily on the work of others—specifically the regulations previously drafted and used by the Cost of Living Council (CLC)[131] in administration of its Phase IV price controls under the Economic Stabilization Act of 1970.[132] The CLC regulations had been designed to apply to a variety of industries.[133] But the

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[128] Exec. Order No. 11,748, 3 C.F.R. 822 (1973), *revoked by* Exec. Order No. 11,790, 3 C.F.R. 882 (1974).

[129] Mandatory Petroleum Allocation Regulations, 39 Fed. Reg. 1,924, 1,932-49 (1974). For a general history of the implementation of this Act and the beginnings of FEO, see M. WILLRICH, ADMINISTRATION OF ENERGY SHORTAGES 139-40 (1976); PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 9-11; *see also* SPORKIN REPORT, *supra* note 9, app., at A1-A24.

[130] *See, e.g., FEA Hearings, supra* note 121 (testimony of Frank Zarb). According to Mr. Zarb: "FEA confronted an entirely new problem with which none of us had any direct experience. Most of the people involved had little direct knowledge of the energy industry's complexity. We were in a true emergency situation which put a premium on decisive action." *Id.* at 7. *See also Crude Oil Pricing Compliance Problems: Hearings Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 99 (1977) (testimony of David G. Wilson, former Deputy General Counsel of FEA).

Paul Bloom, presently Special Counsel of DOE in charge of enforcement actions against major oil companies, recently observed with respect to the regulations issued to carry out the oil pricing programs that:

> This scheme of regulations was developed literally during emergency conditions, and while it was constructed in good faith, the framers of this regulatory program were unable to enjoy optimal conditions where they could objectively and cautiously construct a complex regulatory package of importance and significance to the United States. . . . In addition, this rather extraordinary and complex program had to be administered by an agency set up as a temporary emergency agency, which therefore had difficulty in obtaining a permanent, highly qualified staff.

Bloom, *Enforcement Procedures for Price Regulation Audits and Overcharges*, 13 TULSA L.J. 715, 716-17 (1978) (footnote omitted).

[131] *See* M. WILLRICH, *supra* note 129, at 181.

[132] Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, *reprinted at* 12 U.S.C. § 1904 note (1976).

[133] *See generally* SPORKIN REPORT, *supra* note 9, app., at A-1.

FEO adopted and applied them to the petroleum industry, initially without much in the way of adaptation or modification.[134]

B. *Administering the Emergency Program*

Many of the problems plaguing the oil enforcement program today are traceable to this emergency incorporation-by-reference approach to legislation and regulation. Congress and the administrators involved drew upon imperfect statutes and rules in shaping the EPAA program that arguably were problematic even when applied to the task for which they were specifically designed—Phase IV of the wage and price control program administered by the Cost of Living Council.[135] Moreover, there was no reason to suspect that this scheme was adequate to handle the different task of regulating the petroleum industry. As a result, the initial substantive regulations issued often were vague and imprecise,[136] and the procedures by which they were to be enforced were exceed-

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[134] M. WILLRICH, *supra* note 129, at 181. Robert Montgomery, then General Counsel of FEA, noted that the regulation writers operated in a crisis atmosphere.

"It is important to recognize, during this time period, the embargo was in full swing, and the actions that FEA were taking with regard to its initial regulations were by and large feverish attempts on our part to reconcile the initial regulatory program, notwithstanding everyone's efforts. Thus, our actions were not at all perfect or absolutely consistent with the real world, to the changing situation and to the problems that were developing in certain geographic locations in certain parts of the industry, which in our view required immediate and the most expeditious possible actions." *Congressional Oversight of Administrative Agencies (Federal Energy Administration): Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 5 (1975).

[135] *See* Note, *supra* note 124, at 1669-77.

[136] The result of this process was a set of regulations possessing the immediately discernible characteristic of incomprehensibility. *See* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 6; Trowbridge, *Enforcement of Criminal Sanctions for Violation of Federal Controls on the Price of Crude Oil and Petroleum Products*, 17 AM. CRIM. L. J. 201, 215 (1979).

Though there were attempts to clarify these regulations they often confused matters even more. Major changes were constantly being introduced into the regulations. *See* Longview Ref. Co. v. Shore, 554 F.2d 1006, 1016 n.26 (Temp. Emer. Ct. App. 1977). The result was an enormously complex set of regulations that required a team of lawyers and accountants to understand. *See FEA Hearings, supra* note 121, at 13 (testimony of Gorman C. Smith, Assistant Administrator for Regulatory Programs). Mr. Smith noted that some of the major refiners had lawyers "who [spent] their time analyzing every line and phrase in our regulations," and accountants "who [had] access to the numbers and . . . computerized capabilities," but the refiners still could not ensure compliance because of the difficulty in interpreting the regulations. *Id.*

Much of the recent and past litigation surrounding the enforcement process stems from these unclear regulations. Some courts have suggested that new interpretations of these regulations constitute retroactive rules and cannot be applied to past transactions. *See, e.g.,* Standard Oil Co. v. DOE, 596 F.2d 1029, 1062-63, 1065 (Temp. Emer. Ct. App. 1978).

ingly informal. The fairness of the procedures first used to enforce EPAA regulations was questionable, even for a short-lived emergency program. This question of fairness became even more pronounced as the emergency program gradually became a more permanent part of our regulatory landscape.[137]

1. *The Federal Energy Office—The Beginning Stage of the Energy Program*

The EPAA offered little procedural guidance to the Federal Energy Office (FEO), the first agency charged with the responsibility of enforcing this act. FEO relied heavily on procedures used by the Cost of Living Council,[138] and adopted exceedingly informal, and at times abusive, procedures. In *OKC Corp. v. Oskey Gasoline & Oil Co.*,[139] for example, the district court noted a number of irregularities in FEO's enforcement procedures, including:

> presence of an ill disclosed tape recorder; refusal of FEO to swear witnesses; and the unwillingness for FEO to have the proceedings reported by a court reporter. The most serious irregularity in this Court's view is an apparently unsolicited "friendly" ex parte communication from one of the parties to the hearing officer after the hearing. This is a most serious result from FEO's attempt to be informal.[140]

Despite finding irregularities that were unwise, deficient, and a disservice to everyone involved,[141] the court felt "constrained to find that FEO was acting within its lawful authority," and upheld FEO's decision in this case.[142] This case is typical of the hands-off approach applied by courts. The usual rationale was that the temporary emergency nature of the energy program necessitated deference to the agency.[143] In short, the courts did little to cor-

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[137] Oil regulation began in 1970 with the Economic Stabilization Act, Pub. L. No. 91-379, 84 Stat. 79, *reprinted at* 12 U.S.C. § 1904 note (1976). As the authority to issue and enforce orders and regulations under that Act was about to expire in 1974, price regulation on the oil industry was retained with passage of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 4(g)(1), 87 Stat. 627. Regulation under this Act should have ended in 1975, but was extended. Enforcement proceedings are expected to carry on past the new termination date in 1981. *See* notes 1-9 and accompanying text *supra*.

[138] *See* SPORKIN REPORT, *supra* note 9, app., at A-10.

[139] 381 F. Supp. 865 (N.D. Tex. 1974).

[140] *Id.* at 869 n.15.

[141] *Id.* at 869.

[142] *Id.*

[143] Elkins, *supra* note 125, at 129 & n.73 (discussing the Temporary Emergency Court of Appeals). *See* Atlantic Richfield Co. v. FEA, 556 F.2d 542, 548 (Temp. Emer. Ct. App.

rect the legislature's lack of procedural guidance to FEO. The emergency powers of the agency were largely unfettered.[144]

2. *The Federal Energy Administration—The Middle Years*

Five months after President Nixon established FEO, Congress passed the Federal Energy Administration Act of 1974[145] thereby abolishing FEO and replacing it with the Federal Energy Administration (FEA). This agency was created primarily to ensure the existence of a more elaborate and centralized administrative framework than FEO, outside the office of the President.[146]

Like its predecessor, FEA continued an informal adjudicatory approach in its enforcement proceedings.[147] FEA regulations au-

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1977); Mandel v. Simon, 493 F.2d 1239, 1240 (Temp. Emer. Ct. App. 1974) ("The [allocation] plan must necessarily be considered in light of the fact that the governing statute demanded immediate and extensive regulation of a new and complex area; the program is only in its first month of operation."). The Temporary Emergency Court of Appeals has stated that:

> Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate.

Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975). Even earlier the court had declared that:

> In light of the emergency nature of the authority delegated to the FEO and the difficulty of its duty to establish complex but fair procedures within a short time, a requirement that it submit any and every amendment to the Attorney General and the FTC would be counterproductive. We do not believe that the Act itself or the legislative history thereof establish such a requirement.

Reeves v. Simon, 507 F.2d 455, 459-60 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

[144] *See, e.g.*, Mode, *Federal Petroleum Regulation in the Courts*, 29 INST. OIL & GAS L. & TAX 39 (1978).

[145] Pub. L. No. 93-275, 88 Stat. 96 (codified at 15 U.S.C. §§ 761-790h (1976)).

[146]

> [W]hen H.R. 11793 [the FEA Act] is enacted into law and the Federal Energy Administration is established, it will supersede and replace the Federal Energy Office, established by Executive Order 11748 . . . .
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> . . . .
>
> H.R. 11793 . . . retains and enlarges upon the combination of policy and administrative responsibilities assigned to the [FEO] Administrator under Executive Order 11748. Because administrative responsibilities are pre-eminent in an emergency, it is appropriate to remove the office from the Executive Office of the President and constitute it an independent agency.

H.R. REP. No. 748, 93d Cong., 1st Sess. 13, 15 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2939, 2951-52.

[147] The continued perception of the emergency nature of the substantive regulatory program generated a feeling that flexibility and speed were needed. The continued exemption from the adjudicatory provisions of the APA allowed for procedural ex-

thorized its office of enforcement to issue a remedial order whenever "any report required by the FEA or any audit or investigation discloses, or the FEA otherwise discovers, that there is reason to believe a violation of any provision of this chapter, or any order issued thereunder, has occurred, is continuing or is about to occur."[148] Under such circumstances, FEA could begin an enforcement proceeding "by serving a notice of probable violation or by issuing a remedial order for immediate compliance."[149] Informal conferences could be requested and were routinely granted.[150] The recipient of the notice bore the burden of proving any inaccuracies in the notice of probable violation. If the recipient failed to convince the prosecutors that the allegations were incorrect, FEA could issue a remedial order.[151] The order consisted of "a written opinion setting forth the relevant facts and the legal basis of the remedial order."[152] It was effective upon is-

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perimentation. *See generally* M. Willrich, *supra* note 129, at 184 (FEA exempt from APA adjudicatory hearing requirements). *See also* notes 123-38 and accompanying text *supra*. *But see* 15 U.S.C. § 766(c),(i) (1976) (continued requirement of elaborate rulemaking procedures). These factors militated in the direction of informal adjudicatory procedures even in enforcement cases.

In addition, the FEA initially had a short life expectancy. *See* H.R. Rep. No. 748, 93d Cong., 1st Sess. 2, *reprinted in* [1974] U.S. Code Cong. & Ad. News 2939, 2940. Frank Zarb, an early FEA administrator, pointed out that the short life span of FEA "made it difficult for me and my predecessors to plan and execute an adequate staffing program. It has been hard to plan future requirements and attract fully qualified and dedicated people to an agency that offered very limited job security." 2 Sporkin Report, *supra* note 9, at ii. *See generally* Standard Oil Co. v. FEA, 453 F. Supp. 203, 206 (N.D. Ohio), *aff'd*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978); Bloom, *supra* note 130, at 716-17. Thus FEA was forced to enter into a Memorandum of Understanding with the Internal Revenue Service (IRS) in which FEA temporarily transferred its enforcement and compliance responsibility to IRS. M. Willrich, *supra* note 129, at 193. Professor Willrich has noted that:

> For the period from January 11, 1974, through June 30, 1974, the FEA transferred all compliance and enforcement responsibility for allocation and price regulation to the IRS. IRS assigned 300 investigators to this work. . . . The FEA assumed control of enforcement activities in July with about 850 investigators.

*Id.* Though FEA eventually regained control of enforcement, the legacy of the IRS investigatory approach, with its emphasis on informal conferences and lack of well defined procedures prior to judicial review, contributed to the development and continuation of FEA's flexible approach to procedure.

[148] 10 C.F.R. § 205.190(b) (1974).

[149] *Id.* A person receiving a notice of probable violation had 10 days to respond. *Id.* § 205.191(b). Failure to do so was treated as a concession of the "accuracy of the factual allegations and legal conclusions stated in the notice." *Id.* § 205.191(f). The response was to be in a writing as full and complete as possible. *Id.* § 205.191(c).

[150] *See generally* 39 Fed. Reg. 32,262 (1974).

[151] 10 C.F.R. 205.192(a) (1974).

[152] *Id. See* Atlantic Richfield Co. v. Zarb, 532 F.2d 1362 (Temp. Emer. Ct. App. 1976).

suance and, though an administrative appeal was provided, appeal of the order did not automatically stay its effectiveness.[153]

If a party took an appeal, FEA regulations required its filing with the Office of Exceptions and Appeals (OEA), an administrative unit within FEA.[154] The procedures used for adjudicating contested orders on appeal also were informal, and full blown evidentiary hearings were seldom granted. As one commentator noted: "Officials in OEA believe that, given the time delays involved, hearings contribute so slightly to improving decisions that they should be used only rarely."[155]

FEA's enforcement procedures were criticized for various reasons. Though administrative enforcement proceedings may threaten severe civil sanctions usually in the form of pay back obligations,[156] FEA's procedures purposefully did not allow for a full evidentiary hearing as a matter of right.[157] Nor was an enforcement action automatically stayed when an administrative appeal was filed.[158] Moreover, it was argued that the process was seriously flawed because: (1) the burden of proof rested on the recipient of a remedial order and it remained on the recipient throughout the administrative enforcement process;[159] (2) ex parte contacts, though not openly encouraged, nonetheless occurred and FEA's regulations did not address this problem;[160] and most important, (3) there appeared to be a combination of prosecutorial and judicial functions within the Office of Exceptions and Appeals (OEA)[161]—all OEA decisions were subject to

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[153] 10 C.F.R. 205.192(b) (1974).

[154] *Id.* § 205.195(b). In addition to remedial order appeals, the Office of Exceptions and Appeals was responsible for all applications for exception (*id.* § 205.52), modification or rescission (*id.* § 205.132(a)), and appeals from the denial of such applications as well as appeals from all orders and interpretations issued by FEA's national office (*id.* § 205.103(a)). 205.103(a) ).

[155] M. WILLRICH, *supra* note 129, at 197.

[156] *See* text accompanying notes 306-07, 318-320 *infra*. The statute also provides for criminal and civil penalties. *See* 15 U.S.C. § 754(a)(3) (1976).

[157] *See* Craven, *New Dimension in Federal Regulation of Crude Oil and Petroleum Products under the Department of Energy*, 29 INST. OIL & GAS L. & TAX. 1, 11 (1978); notes 150 & 155 and accompanying text *supra*.

[158] *See* C.F.R. 205.192(b) (1974); Craven, *supra* note 157, at 12; note 153 and accompanying text *supra*.

[159] *See* 10 C.F.R. § 205.106 (1974); Craven, *supra* note 157, at 12; note 151 and accompanying text *supra*.

[160] *See* Craven, *supra* note 157, at 11 n.42. *See generally* note 140 and accompanying text *supra*.

[161] *See* Craven, *supra* note 157, at 11.

review by a committee that included representatives from the enforcement wing of the agency.[162]

Access to the courts did not cure these problems. District court review of administrative enforcement proceedings was appellate in nature. The Economic Stabilization Act prescribed this kind of district court review for the Cost of Living Council's program, in part to assure easy access to judicial review. The assumption was that, particularly in small cases, it would take the place of appellate review at the circuit level.[163] This type of review may have had some justification for the 1970 wage and price control program, but Congress incorporated it by reference into the Federal Energy Administration Act with little apparent thought. Other alternatives—either eliminating district court review altogether or recasting it in the more familiar mold of an independent factfinder developing a complete record de novo—may have been preferable. As it was, both the district court and the Temporary Emergency Court of Appeals had to rely on the record developed by FEA.[164]

### 3. *Administering the Oil Program Under the Department of Energy Organization Act of 1977*

Section 503 of the DOE Act was devised primarily to meet many of the criticisms made of FEA's remedial order procedures. Though this provision resolved some of the earlier problems, its success was by no means complete.

a. *FERC Review*. The DOE Act authorized review of executive remedial orders by the Federal Energy Regulatory Commission.[165] By granting such power to an independent agency not involved in the enforcement of the oil program in any way, Congress was able to meet one of the major criticisms of the old scheme: the apparent combination of enforcement and judicial functions within the old Office of Exceptions and Appeals. Further, FERC review of executive orders dealing with oil pricing

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[162] *See id.*; notes 150-56 and accompanying text *supra*.

[163] *See* note 125 *supra*.

[164] *See id.*

[165] The legislative history makes clear that the primary purpose of § 503 of the DOE Act was to "assure that the Department's review of any initial action . . . will be by officials who in no way were involved in the Department's original action. *This guarantees a separation of the prosecutorial and judicial functions relating to enforcement*." H.R. Rep. No. 539, 95th Cong., 1st Sess. 85, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 956 (emphasis added).

matters is consistent with another overall goal of FERC review—checking executive power.[166]

Beyond such structural changes, the DOE Act corrected deficiencies in FEA procedures as well. Section 503 of the DOE Act explicitly provides for the granting of stays of remedial orders unless "the Commission finds [that] the public interest requires immediate compliance with such remedial order."[167] More important, the new Act provides a right to a hearing which must include, "at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments."[168] Though the new Act guarantees a hearing, a full evidentiary hearing is not guaranteed as a matter of right.[169] Congress sought to correct the abuses of the past, but it also sought to preserve the flexible procedural approach that evolved during the emergency phase of this program. As Congressman Eckhardt, the sponsor of the new Act's procedures, noted:

> We do not grant quite as many procedural safeguards to the person subjected to agency action as does [*sic*] sections 554 and 556 of the Administrative Procedure Act: but [the new Act] does give the right to a person to have an oral hearing, gives him an opportunity to contest the agency position and gives him a record on which a court may ultimately determine whether the agency decision was based substantially on the record as a whole. No such procedures are now provided.[170]

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[166] *See generally* text accompanying notes 92 & 93 *supra*.

[167] 42 U.S.C. § 7193(c) (Supp. I 1977).

[166] *Id.*

[169] *Id.* It can be argued, however, that § 503's requirement in § 503 of "an opportunity for a hearing" triggers §§ 554, 556, 557 of the APA. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950); United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). This argument has been rejected by Professor Byse, who pointed out that:

> [S]ection 5 of the Emergency Petroleum Allocation Act of 1973 exempts remedial orders from the adjudicative provisions of the APA. Accordingly when Congress added the remedial order amendment to the DOE bill, it was working in a context of an exemption from the APA. Rather than simply deleting the exemption or providing that sections 554-557 should apply to remedial orders . . . the amendment provided for a "hearing" and then identified certain of the ingredients of the hearing. This is a strong indication that the proposed amendment was to give recipients of remedial orders the procedural safeguards contained in the amendment rather than those contained in the APA. I agree with Representative Eckhardt that the adjudicative provisions of the APA are not applicable to remedial order procedures.

Byse, *supra* note 38, at 222 (footnotes omitted). *See also* text accompanying note 170 *infra* (statement of Rep. Eckhardt).

[170] 123 Cong. Rec. H5,372 (daily ed. June 3, 1977). Pursuant to § 503 of the DOE Act FERC can grant full-blown evidentiary hearings. Section 503 does not, however, explicitly

b. *The Executive Response*. If the FERC procedures mandated by the DOE Act alone controlled in enforcement proceedings, they would constitute an adequate procedural framework for the task at hand.[171] But the procedural issues surrounding the enforcement process are more complex because of the executive's reaction to FERC's statutorily mandated role. Congress failed to specify the precise procedural relationship between DOE's executive wing, which issues remedial orders, and FERC, which reviews them; the legislature provided only that the Secretary was not precluded from developing procedures prior to or incident to initial issuance of a remedial order[172] by the Office of Hearings and Appeals (OHA), successor to FEA's Office of Exceptions and Appeals. Given FERC's mandatory procedural safeguards, minimal executive procedures for this issuance process would have sufficed. Instead, an elaborate set of issuance procedures has been developed on OHA's behalf almost as if the executive wing was oblivious to the existence of the FERC review process. The net result is a set of procedures at OHA that resembles the minimal procedures section 503 of the DOE Act requires FERC to provide.

This redundancy began when the Economic Regulatory Agency (ERA), an executive agency charged with the enforcement of the EPAA,[173] acting on behalf of OHA, issued an elaborate set

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provide for the use of administrative law judges. Furthermore, it is interesting to note that the linguistic approaches of the APA and the DOE Act differ significantly. The APA places emphasis on the rights of the litigant. Section 556 of the APA states that "a party is entitled to present his case or defense by oral or documentary evidence, [and] to submit rebuttal evidence." 5 U.S.C. § 556(d) (1976). Section 503 of the DOE Act, however, emphasizes the Commission's discretion. Thus, "[t]he Commission shall, upon request, afford an opportunity for a hearing, including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments." 42 U.S.C. § 7193(c) (Supp. I 1977).

[171] *See* note 168 and accompanying text *supra*.

[172] DOE Act of 1977, Pub. L. No. 95-91, § 503(e), 91 Stat. 590 (codified at 42 U.S.C. § 7193(e) (Supp. I 1977)), *as amended by* the Powerplant and Industrial Fuel Use Act of 1978, 95-620, § 805(b), 92 Stat. 3348. Section 503 presently provides that:

> Nothing in this section shall be construed to affect any procedural action taken by the Secretary prior to or incident to initial issuance of a remedial order which is the subject of the hearing provided in this section, but such procedures shall be reviewable in the hearing.

42 U.S.C. § 7193(e) (Supp. I 1977).

[173] As noted earlier (*see* text accompanying notes 110-13 *supra*), the Economic Regulatory Agency is the primary executive unit under the Secretary of Energy. It has, in effect, taken over the duties of the old Federal Energy Administration. The Office of Hearings and Appeals was initially placed within ERA. This Office, in effect, replaces the Office of Exceptions and Appeals which previously handled, among other things, adjudication of contested remedial orders.

of procedures "to provide a fuller administrative review of the issues raised in each remedial order prior to the issuance of the order in final form."[174] Enforcement proceedings still begin by serving the alleged violator with a notice of probable violation (NOPV),[175] and an alleged violator may request an informal conference.[176] Up to this point, these provisions make a good deal

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[174] 43 Fed. Reg. 3,995 (1978).

[175] Administrative Procedures and Sanctions, 10 C.F.R. § 205.191(a) (1979). NOPV's may be issued either by ERA's national Office of Enforcement, ERA's Office of Special Counsel or by regional ERA enforcement offices. Within 30 days of service of the NOPV, the recipient may file a written reply containing "a statement of all relevant facts pertaining to the act or transaction that is the subject of the Notice of Probable Violation." *Id.* § 205.191(c). In addition, "the reply shall include a discussion of the relevant facts pertaining which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies." *Id.* § 205.191(d).

If a reply is not filed, a firm "shall be deemed to have admitted the accuracy of the factual allegations and legal conclusions stated in the Notice of Probable Violation, and the ERA may proceed to issue a Proposed Remedial Order." *Id.* § 205.191(f). Thus, a litigant cannot choose to ignore a NOPV. Failure to reply to a NOPV will result in a proposed remedial order (PRO) and most likely a claim that there was a failure to exhaust administrative remedies, should the litigant choose to contest the PRO.

[176] *Id.* § 205.191(e). If the reply to the NOPV and conference fail to convince the enforcement staff that an order should not be issued, a proposed remedial order (PRO) may be issued by ERA. *Id.* § 205.192(b). The PRO must set forth the proposed findings of fact and conclusions of law upon which it is based. In addition, "[i]t shall also include a discussion of the relevant authorities which support the position asserted, including rulings, regulations, interpretations and previous decisions issued by DOE or its predecessor agencies." *Id.* § 205.192(d). Within 20 days after service of the PRO, ERA can supplement this order with further "information relating to the calculations and determinations which support the findings of fact set forth in the Proposed Remedial Order." *Id.* § 205.193A. At this stage of the proceeding, ERA has the burden of establishing a prima facie case against an alleged violator. This burden is met, however, "by the service of a Proposed Remedial Order that meets the requirements" set forth above. *Id.* § 205.192A(a).

A copy of the PRO must be served on the alleged violator and a notice of the proposed order must be published in the Federal Register. A copy of this notice is then mailed by ERA "to all readily identifiable persons who are likely to be aggrieved by issuance of the Proposed Remedial Order as a final order." *Id.* § 205.192(c). "Within 15 days after publication of the notice . . . in the FEDERAL REGISTER, any aggrieved person may file a Notice of Objection." *Id.* § 205.193(a).

Once a PRO is issued, all further proceedings take place before the Office of Hearings and Appeals. As the regulations state, "[i]n order to exhaust administrative remedies with respect to a Remedial Order proceeding, a person must file a timely Notice of Objection and Statement of Objections with the Office of Hearings and Appeals." *Id.* § 205.193(f).

Upon receipt of a Notice of Objection, the Office of Hearings and Appeals must publish a notice in the Federal Register. This notice sets forth the basic outline of the PRO and states that any person who wishes to participate in the proceedings must file an appropriate request with OHA within 20 days after publication. Based on the response to this notice, OHA then prepares an official service list. *Id.* § 205.194.

Within 40 days of service of a Notice of Objection, the contestant must file a Statement of Objections. *Id.* § 205.196. This is intended to be a very detailed response to the PRO and a thorough discussion of the contestant's case. Any participant, including the ERA Office of Enforcement, may file a response within 30 days of receipt of the objections. *Id.* §

of sense. They provide the government and an alleged violator an opportunity to discuss the case, define the issues, and possibly settle the dispute.[177] This is not, however, the extent of the executive's remedial order procedures. If the parties fail to settle the dispute at the informal conference stage, more elaborate adjudicatory proceedings begin before OHA.[178]

Viewed in isolation—without regard to the FERC hearing requirements imposed by section 503—the adjudicatory procedures developed by OHA represent a substantial improvement over those used by FEA. For example, unlike FEA remedial orders, which were subject to review by internal committees that included members of the enforcement section of FEA,[179] OHA remedial orders are specifically excepted from such internal committee review.[180] In addition, OHA regulations provide for stays of its orders,[181] have a provision prohibiting ex parte contacts,[182] place the burden of proof on the government,[183] and provide at least

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205.197. At the same time a party files a Statement of Objections, a motion for an evidentiary hearing may be filed (*id.* § 205.199) and a motion for discovery must be filed (*id.* § 205.198).

[177] If the parties fail to settle the case at this stage, one possible approach might have been for the ERA Office of Enforcement simply to issue a remedial order which, if it were contested, would then trigger a hearing at the FERC. The general DOE Act procedures outlined in § 503 would then apply. This approach would have eliminated the adjudicatory stage at OHA.

[178] *See generally* 10 C.F.R. §§ 205.191-192 (1979).

[179] *See* Craven, *supra* note 157, at 11; text accompanying notes 157-62 *supra*.

[180] DOE Order No. 1100.3 (Sept. 15, 1978). As this order makes clear, a review committee is still in existence; however, it stated: "The Office of Hearings and Appeals shall be the decisionmaker with respect to the review of Proposed Remedial Orders. . . ." *Id.* at 5. Other orders, such as exceptions, for example, can be issued only after "the Director of the Office of Hearings and Appeals shall obtain the unanimous concurrence of the Administrative Review Committee." *Id.* at 4. This Committee consists of the Director of OHA, the General Counsel, and any officer that has primary responsibility for the subject matter involved. *Id.* To the extent that the General Counsel's involvement with the exceptions process may affect or influence the outcome of a particular enforcement case, it may also be appropriate to prohibit participation by this office in such proceedings.

In effect, OHA has been playing a role similar to that envisioned for the proposed Board of Hearings and Appeals—that of an in-house energy court. The Secretary's delegation order to the director of OHA vests in OHA broad adjudicatory powers. Similar to the jurisdictional grant to the proposed Board, this order provides that OHA shall review and issue "all final DOE orders of an adjudicatory nature in accordance with Departmental regulations and procedures, other than those orders involving matters over which . . . [FERC] exercises jurisdiction, or those matters within the jurisdiction of the Board of Contract Appeals." *Id.* at 1.

[181] 10 C.F.R. § 205.199D(h) (1979).

[182] *Id.* § 205.199F.

[183] *Id.* § 205.192A(a).

the opportunity for an evidentiary hearing if the agency determines that this is necessary.[184]

Organizational changes also have been made. OHA is no longer within the Economic Regulatory Agency. Rather, it is directly responsible to the Secretary of Energy.[185] This organizational change was made in response to criticism that even with OHA's more elaborate procedures, a separation of powers problem remained. OHA was a part of the Economic Regulatory Agency. This agency was charged with enforcement of the Emergency Petroleum Allocation Act. Members of OHA were, in effect, working for the chief enforcement officer of the department, the head of ERA.

Placing OHA under the Secretary for organizational purposes does not completely eliminate this "problem." The Secretary of Energy, of course, supervises both the director of OHA and the director of ERA. To that extent, OHA is not as independent of the enforcement process as the initially proposed Board of Hearings and Appeals would have been. Nevertheless, the internal separation of functions that now exists within the Department clearly satisfies the dictates of the due process clause and is similar to adjudication in other executive agencies.[186]

The question of OHA's procedures, however, cannot be viewed in isolation. The fact is that section 503 of the DOE Act requires FERC to provide substantially the same procedures after the OHA proceedings. The net result is two sets of adjudicatory procedures.

c. *FERC Review Procedures*. FERC has attempted to minimize this procedural duplication while complying with its statutory mandate to review DOE remedial orders by reserving its right in appropriate cases to rely on the record developed by OHA. Thus, FERC has not interpreted section 503 to require a de novo hearing when OHA "proposed remedial orders" are contested.[187] Rather, the FERC's regulations establish it as a flexible appellate court—one capable of reviewing a record made elsewhere, but also capable, without remand, of supplementing that record, when necessary.[188] The Commission's regulations provide, under cer-

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[184] *See* notes 308-09 and accompanying text *infra*.
[185] *See* DOE Order No. 1100.3, at 1 (Sept. 15, 1978).
[186] *See* note 241 *infra*.
[187] Summary of the Commission's Final Regulations, 43 Fed. Reg. 52,219, 52,223 (1978).
[188] Commission Review of Remedial Orders, 18 C.F.R. § 1.38(g) (1979).

tain limited circumstances, an opportunity to present new evidence to the Commission as well as to contest portions of the executive record;[189] however, one contesting a remedial order must make his initial stand at OHA, not the Commission.[190] When the case comes to the Commission, it must provide "independent scrutiny" of the record, but not necessarily allow for further evidentiary proceedings. As the preamble to the regulations makes clear:

> A separation of the judicial and prosecutorial functions is accomplished by Commission review supplemented by limited evidentiary proceedings where necessary. . . . [T]he extension of due process is satisfied in many cases by an *independent scrutiny* of the record and by less than a de novo proceeding, so long as each side has been afforded an opportunity to present its case in full.[191]

It is a close question whether the Commission's procedures satisfy Congress' intent as embodied in the DOE Act;[192] providing

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[189] *Id.* § 1.38(f)(2)(ii)(A).

[190] Administrative Procedures and Sanctions, 10 C.F.R. § 205.199C (1979).

[191] Summary of the Commission's Final Regulations, 43 Fed. Reg. 52,219, 52,223 (1978) (emphasis added).

[192] It has been forcefully argued that the Commission must provide a de novo hearing and cannot rely on the OHA record in any way. *See, e.g.*, Carlson, FERC Review of Remedial Orders (Dec. 6-7, 1978) (summary paper presented at Executive Enterprises Briefing on DOE Exceptions, Enforcement and Litigation, New Orleans, La.) (on file at *Cornell Law Review*) (arguing that § 503 requires a de novo hearing and FERC should conduct *all* of its own fact-finding). Several arguments are made. At one point during consideration of the DOE Act, the House proposed that the review of remedial orders should be placed in ERA. Congress, however, explicitly rejected this option and chose to place the review function with FERC. *Id.* at 3-4. In so doing, it can be argued that:

> Congress made clear that an evidentiary hearing was to be held after, not before, issuance of a remedial order and that the hearing was to be before an independent decision-maker. It would not appear that this requirement could be satisfied by an arrangement which precludes an independent adjudicator from taking the evidence and observing and judging the demeanor and credibility of witnesses, an opportunity denied by reliance upon the record developed before the Secretary.

*Id.* at 8-9.

Second, it also has been argued that the explicit requirements of § 503 "are 'trial' functions, not appellate functions." That is to say, § 503 "provides for an opportunity to submit oral and documentary evidence and to cross-examine witnesses." Moreover, it implicitly "places the burden of proof on the Secretary and requires that the Commission make its own affirmative findings of fact." *Id.* at 9. It is noted in the summary to the Commission's regulations that the Commission must give "independent scrutiny" to the facts *initially* found by OHA. *See* note 191 and accompanying text *supra*.

Third, it is argued that the legislative history of § 503 proves that in placing hearing responsibilities in the Commission, the Congress ordered "a clean separation of prosecuto-

an opportunity for "independent scrutiny" of OHA factfinding and, on occasion, cross-examination and the submission of new facts and issues arguably satisfies the primary purpose of the DOE Act's mandate, at least in theory. In practice, however, FERC's backlog of cases and the scarcity of its own resources may result in substantial reliance on OHA in most cases,[193] and much less "independent scrutiny" than might be desired.

d. *The Administrative and Judicial Gauntlets.* Though greater and indeed even extensive reliance on OHA factfinding will minimize some of the procedural duplication that now is possible, it cannot eliminate repetition. Given OHA's issuance procedures as well as the minimum procedural requirements imposed on FERC, at least five separate stages of the administrative process precede issuance of a final remedial order. Three levels of appellate judicial review may then follow.

The administrative process begins with the issuance of a notice of probable violation by a regional Office of Enforcement.[194] This triggers a set of informal procedures aimed at settlement or clarification of the charges.[195] A second round of informal procedures is triggered at the federal level if a proposed remedial order is issued and contested.[196] If the matter is not settled at that level and a motion for an evidentiary hearing has been filed, a third, more formal stage within the executive branch begins at OHA.[197] While an evidentiary hearing in the APA sense is not likely,[198] a full evidentiary hearing is theoretically pos-

rial and judicial functions." Carlson, *supra*, at 9. Senator Javits, the Senate sponsor of § 503, stated that this section would "require that the Secretary exercise the executive functions of investigating and prosecuting administrative violations, but that the [Commission would] exercise the quasi-judicial function of determining whether in fact the violation has occurred." 123 Cong. Rec. S7,668 (daily ed. May 16, 1977). Moreover, Javits also stated that "the corporation charged may have a factual hearing upon the evidence [before the Commission], with the right of cross-examination, et cetera, instead of depending upon the record, which the agency itself may make as the basis for the appeal, which can then be decided only on the substantial evidence rule." *Id.* S7,935 (daily ed. May 18, 1977). He also recognized that the placement of decision-making responsibilities in the Commission "would put all . . . original hearings in the same forum resulting in consistency and the development of administrative expertise." *Id.* S7,668 (daily ed. May 16, 1977).

[193] For a discussion of FERC's backlog and a suggested solution by the natural gas industry, see Lawrence & Muchow, *The FERC's Case Load Management Problem*, Pub. Util. Fort. Jan. 18, 1979, at 9-15.

[194] *See* note 175 *supra*.

[195] *See* note 176 *supra*.

[196] *See id.*

[197] *See* note 178 and accompanying text *supra*.

[198] As will be explored later, OHA hearings differ from conventional APA adjudication in two primary ways: administrative law judges are not used and material issues of disputed facts do not necessarily trigger an *oral* evidentiary hearing.

sible.[199] If the alleged violator continues to protest, the stage shifts to the independent FERC. A "presiding officer" at FERC can hear the case de novo if he feels it is necessary. But even if he relies fully on the record developed at OHA, there is at a minimum an opportunity for oral argument, briefs and, possibly, some new testimonial evidence.[200] The opinion rendered by this presiding officer then goes to FERC for review. FERC then issues a final remedial order which only then may be appealed to the federal courts.[201]

The appeals route through the federal judiciary is nearly as laborious as the administrative process. The DOE Act retained the judicial review provisions of the Economic Stabilization Act.[202] Thus, judicial review continues to begin with district court review of FERC orders. The review, however, is appellate rather than de novo.[203] Decisions rendered by the district court are then appealable to the Temporary Emergency Court of Appeals.[204] Following a decision by this court, a writ of certiorari lies with the Supreme Court. Mercifully, no enforcement cases have, as yet, progressed so far.

When President Carter referred to the "almost unbelievable" federal bureaucracy that has grown up around oil controls, he surely was referring, at least in part, to this administrative and judicial gauntlet.

## III

## Structural Recommendations

The evolution of the administrative and judicial gauntlets that presently characterize the DOE oil enforcement process raises important structural and procedural issues. Part III focuses on the structural issues and sets forth specific recommendations applicable to the Department of Energy for the remainder of its oil pricing program. To put these structural issues in some perspective, however, it is useful to begin by examining briefly the evolving

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[199] In any event, OHA does provide for a hearing consisting, at a minimum, of oral argument plus an opportunity to submit documentary evidence and extensive briefs. *See* Administrative Procedures and Sanctions, 10 C.F.R. § 205.199-.199A (1979).

[200] *See* text accompanying note 170 *supra*.

[201] 42 U.S.C. § 7193(c) (Supp. I 1977).

[202] *See* note 125 *supra*.

[203] *See id.*

[204] *See id.*

role of administrative agencies in general and the increasing skepticism that now surrounds them.

A. *Administrative Agencies, Congress, and the Regulatory Dialogue*

The administrative process has become a "surrogate political process."[205] Administrative agencies cannot be viewed simply as a means by which clear congressional policies are more fully developed, fine-tuned and then implemented. For a variety of reasons, not the least of which is the ambitious nature of much of today's regulation, congressional delegations of legislative power to administrative agencies often are vague, amorphous provisions that provide little in the way of substantive guidance to the agencies involved.[206] As a consequence, agencies represent a distinct and often quite independent voice in the regulatory dialogue that ensues among Congress, the courts, the agency and the affected public.

A variety of procedural safeguards such as those embodied in the APA[207] have developed to check agency power and to ensure that the exercise of this power is reasoned and fair. Moreover, the undemocratic aspects of agency power have been at least partially tempered by the decline of such doctrines as standing and intervention as barriers to participation in the administrative process. As Professor Stewart has noted, the traditional model of the administrative agency has given way to an interest representation model, an essential element of which is "fair representation of a wide range of affected interests in the process of [an] administrative decision."[208]

The administrative process, however, also has been increasingly affected by a growing distrust of government in general and

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[205] Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1670 (1975).

[208] As Professor Stewart has noted:

> The factors responsible for this lack of specificity are (1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; (2) lack of legislative resources to clarify directives; (3) lack of legislative incentives to clarify directives; (4) legislators' desire to avoid resolution of controversial policy issues; (5) the inherent variability of experience; (6) the limitations of language.

Stewart, *supra* note 205, at 1677 n.27. *See generally* T. Lowi, The End of Liberalism 92-126 (2d ed. 1979); Freedman, Book Review, 43 U. Chi. L. Rev. 307 (1976).

[207] 5 U.S.C. §§ 551-559 (1976). With regard to the problems inherent in broad delegations of power by Congress to administrative agencies and the role of procedural safeguards, see 1 K. Davis, Administrative Law Treatise 207-08 (2d ed. 1978).

[208] Stewart, *supra* note 205, at 1670.

increased antipathy towards administrative agencies in particular.[209] Clean air, clean water, worker safety, a healthy environment, abundant but reasonably priced energy, safe nuclear power, in short a relatively risk free, yet economically affluent society are noble legislative goals. But there is growing skepticism over the ability of traditional New Deal regulatory approaches and bureaucracies to attain them, an increasing awareness of the often harsh political and economic tradeoffs their accomplishment requires and, more fundamentally, an overall lack of consensus over what the costs of these goals may be, who should bear these costs, and, in some cases, over what the actual goals should, in fact, be.[210]

The skepticism concerning traditional government responses to perceived problems in general and administrative action in particular has increased Congress' participation in the dialogue. This is reflected by its willingness to increase the number and variety of checks on agency power from both outside and within agency walls. Currently, there are, for example, sunset laws,[211] legislative veto provisions,[212] and proposed requirements that agencies perform elaborate regulatory analyses before they issue regulations.[213] In addition, there is an increased willingness on the part of Congress to intervene directly in the affairs of a particular agency, such as the Federal Trade Commission, when that agency engages in activities that are arguably within its authority, but not politically acceptable.[214] At least one house of Congress has also

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[209] *See generally* J. Freedman, Crisis and Legitimacy 259-66 (1978).

[210] This is particularly true in the case of energy. *See* note 38 *supra*.

[211] For example in the Federal Energy Administration Act Congress provided for the demise of the FEA by June 30, 1976. *See* note 25 *supra*. Various bills have from time to time been proposed that would impose sunset laws on all or many federal agencies. *See, e.g.*, S. 3318, 94th Cong., 2d Sess. (1976) (proposing termination of several agencies, including CAB, FAA, OSHA, FEA, ICC, and FMC); S. 2, 95th Cong., 1st Sess., 123 Cong. Rec. 496 (1977) (requiring authorizations of new budget authority for programs every 5 years and periodic review of those programs). *See generally* Vidas, *The Sun Also Sets: A Model for Sunset Implementation*, 26 Am. U.L. Rev. 1169 (1977).

[212] For an analysis of veto provisions, see Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

[213] *See, e.g.*, S. 2147, 96th Cong., 1st Sess. §§ 602, 603, 125 Cong. Rec. S19,040 (daily ed. Dec. 18, 1979). This bill to amend the APA would require elaborate analyses of the need for regulations before rulemaking could commence.

[214] Both the House and the Senate recently have included elaborate procedural provisions in FTC appropriation bills. *See* H.R. 2313, 96th Cong., 1st Sess. (1979) (passed on Nov. 27, 1979, as amended by voice vote on Feb. 7, 1980) and S. 1991, 96th Cong., 2d Sess., 126 Cong. Rec. S1,074 (daily ed. Feb. 6, 1980) passed as S. 2313, 96th Cong., 2d Sess., 126 Cong. Rec. S1,242 (daily ed. Feb. 7, 1980), on Feb. 7, 1980). These bills contain

voted to remove the presumption of validity that attaches to agency rules under judicial review.[215] All these examples are illustrative of increased congressional distrust of bureaucratic power and the political appeal of attempting to exert more direct control over bureaucracies and their policies. Given the undemocratic character of administrative agencies, such measures can also be viewed as legitimate attempts to ensure at least a minimum level of political accountability and responsiveness on the part of bureaucracies. But the cumulative effect of these approaches and the potentially paralyzing effect they can have on agency initiative and action may be indicative of a deeper, more substantive concern—the disintegration of any consensus about the wisdom of and need for the specific substantive missions of the agencies involved.

The evolution of the structure of the Department of Energy is consistent with, and in large part the result of, both the increasing trend toward distrust of bureaucratic power in general and the overall lack of consensus concerning the substantive mission and goals of agencies in particular. The structural result is, in many ways, the logical extension of the basic premise that the administrative process has become a surrogate political process—an agency which, at least with regard to oil policy, begins to resemble our own tripartite form of government and the constitutional system of checks and balances inherent in this approach. As noted above, the DOE consists of an executive department whose power is offset by FERC, an independent commission. Due to its power to exercise a Commission veto over various secretarial

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elaborate regulatory analysis provisions, separation of functions requirements, and a legislative veto provision. They also effectively terminate one adjudicatory proceeding under way at the FTC and jeopardize a number of other rulemaking and investigatory proceedings. These bills have gone to conference but a final product has yet to emerge. The Administrative Conference has opposed this approach. Administrative Conference of the United States, Resolution Concerning Congressional Termination of Pending Administrative Proceedings at the Federal Trade Commission (adopted Dec. 14, 1979) (to be codified in 1 C.F.R.).

[215] For a formulation of what has come to be known as the Bumpers Amendment, see S. 2408, 94th Cong., 1st Sess. (1975). This amendment would amend § 706 of the APA (5 U.S.C. § 706 (1976)), so as to abolish the presumption in favor of the validity of agency rules and regulations challenged in court. For recent formulations of this amendment see S. 86, 95th Cong., 1st Sess., 123 Cong. Rec. S286 (daily ed. Jan. 10, 1977); S. 111, 96th Cong., 1st Sess., 125 Cong. Rec. S410 (daily ed. Jan. 23, 1979). The Administrative Conference of the United States has opposed this amendment. *See* Administrative Conference of the United States, Recommendation 79-6, Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, As Exemplified by the Bumpers Amendment (adopted Dec. 14, 1979) (to be codified in 1 C.F.R.).

rules, FERC's role is akin to that of Congress when it exercises its legislative veto powers; due to its power to review certain executive adjudications, de novo if it so chooses, FERC is, in effect, an in-house judiciary, separate and distinct from the executive branch of the agency.

### B. *The Problems and Sources of DOE Structure*

There are a variety of reasons why the efficacy of such a structural model should be seriously questioned. Significant practical problems emerge. Dividing power between separate branches of the agency government results in jurisdictional ambiguities,[216] and can thus encourage procedural duplication[217] as well as substantial policy fragmentation.[218] These practical problems, how-

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[216] *See* text accompanying notes 73-98 *supra*. The DOE Act has divided authority between the executive wing of the agency and the FERC in ways which often make the jurisdiction of either agency unclear. The control of imports and exports of natural gas is one such example (*see* notes 86-87 *supra*), as is the setting of curtailment priorities and the making of curtailment plans (*see* notes 84-85 *supra*). Similarly, FERC's authority to review secretarial action that affects its jurisdiction fails to define clearly what kinds of actions affect FERC and fall into the reviewable category. Indeed, if FERC were to interpret this mandate very broadly, its veto power could paralyze the Secretary. Happily this has not yet happened. For example, FERC has recently indicated that certain proposed regulations do not significantly affect FERC functions: "[T]he Federal Energy Regulatory Commission received a copy of the proposed rulemaking and has notified the ERA that it has not determined that the proposed regulation would significantly affect any function within its jurisdiction." Incentive Prices for Newly Discovered Crude Oil, 44 Fed. Reg. 25,828, 25,829-30 (1979).

[217] *See* text accompanying notes 193-94 *supra*.

[218] Dividing jurisdiction over important matters (*see* note 216 *supra*), as well as giving FERC review power over certain proposed secretarial rules and orders (42 U.S.C. § 7174 (Supp. I 1977)), can lead to a clash of two distinct views on policy matters. FERC has played an active role in reviewing secretarial rules in some instances. *See, e.g.*, Petroleum Allocation Regulations—Revision for Propane and Other Natural Gas Liquids, 44 Fed. Reg. 60,638 (1979); Motor Gasoline Decontrol and Transition Regulation, 43 Fed. Reg. 14,491 (1978). Thus, though there may be policy conflict, it can be resolved either by issuing a rule acceptable to the Commission or issuing no rule at all.

Other opportunities for policy fragmentation exist when FERC reviews OHA remedial orders and exceptions. Since very few cases have been presented to both OHA and FERC, it is difficult to assess in any complete way the actual impact of the FERC review on executive price-control policy at this time. To date, 16 appeals of OHA remedial orders have been docketed at FERC. *See* DOE Memorandum on OHA RO cases Appealed to FERC from Floyd Robinson to Tony Miles, Assistant General Counsel (Jan. 9, 1980) (on file at *Cornell Law Review*). Only one remedial case has been decided by FERC. *See* Chester F. Dolley and Atlantic Oil Co., No. RO79-3 (FERC Feb. 12, 1980) (summary affirmance of presiding officer's proposed order). Similarly, only one case concerning an exception has been decided. *See* Lunday-Thagard Oil Co., [1979] 6 EN. MNGM'T (4 DOE) ¶82,506 (Nov. 16, 1979) (affirming in part and reversing in part OHA's proposed decision).

For a study of an analogous split that developed over the policy differences between the Secretary of Labor and the Occupational Health and Safety Commission, see Sullivan,

ever, are ultimately less significant than the underlying reasons that account for them—Congress' approach to energy administration legislation.

Historically, Congress has tended to resist bureaucratic reorganizations aimed at increasing executive power and control over vital national programs.[219] The creation of the Department of Energy is a particularly good example of congressional antipathy toward executive power. The uncertainty over the precise substantive energy policies actually favored by the executive, coupled with the lack of consensus within Congress itself over the underlying causes of the energy crisis[220] exacerbated Congress' distrust of executive power in general, and the substantive role of the proposed new agency in particular.

Rather than resolving substantive issues first, Congress, along with the administration, chose to establish a new super agency. In effect, creation of the Department of Energy institutionalized the existing energy crisis. The unresolved substantive controversies and ambiguities simply were transferred to DOE. In the process, these unresolved conflicts underlay much of the debate over the structure of the new department and motivated many of the internal checks and balances built into the agency.

Questions of substance logically should precede questions of agency structure. This is particularly true when, as in the case of energy pricing regulation, the fundamental substantive question is whether there should be any regulation at all. Once such fundamental questions have been resolved, substantive disagreement is, perhaps, less likely to politicize the design of agency structure.[221] Indeed, a new administrative structure may not be needed at all. In any event, if substantive issues are resolved first, at least the general powers to be wielded by the agency would be clearer, and a structure and procedures appropriate for the regulatory tasks at hand could more easily be created.[222]

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*Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 Ad. L. Rev. 177 (1979). *See generally* Currie, *OSHA*, 1976 Am. B. Foundation Research J. 1107. Professor Currie notes that since a judicial commission necessarily has a certain policymaking character, it should have been given rulemaking authority: "[T]o give rulemaking authority to the Secretary is not to unify but to divide the power to make interstitial policy." *Id.* at 1116.

[219] *See* Karl, *Executive Reorganization and Presidential Power*, 1977 Sup. Ct. Rev. 1.

[220] *See* text accompanying notes 38-40, 91-93 *supra*.

[221] *See also* Scalia, *supra* note 14, at 402.

[222] Of course, even if the major substantive questions have been resolved, agency structure and procedure may still be susceptible to manipulation by the losers of the substantive

Attempts to soften or, perhaps, thwart the implementation of potentially controversial substantive legislation by building complex procedural protections into the agency administering the program only postpones substantive conflict. It does not aid in its resolution. Moreover, the resulting structure of DOE creates a risk of significantly contributing to administrative paralysis. Congress may have been unwilling or unable to decide what an appropriate energy policy should be, but setting up a complicated and fragmented agency did little to ensure that the new department would efficiently carry out whatever policies ultimately emerged. For DOE, it was virtually inevitable that the organizational structure should be a procrustean bed on which substantive energy policy presently rests most uncomfortably.[223]

### C. *Reorganization or New Alliances—The Problems of Administrative Duplication*

In addition to the extensive checks and balances built into DOE, Congress created an organization arguably prone to the development of duplicative procedures in the parallel operations of the commission and the agency.[224] The extensive issuance procedures developed by the Office of Hearings and Appeals are

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battles. But with at least a basic policy direction in mind, attempts at using procedure to thwart a substantive program would be more apparent and more easily defeated.

[223] Woodrow Wilson's criticism of our constitutional system of checks and balances may be particularly appropriate when applied to the internal workings of an administrative agency.

> The trouble with the theory [of checks and balances] is that government is not a machine, but a living thing .... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their cooperation is indispensable, their warfare fatal. There can be no successful government without leadership or without the intimate, almost instinctive, coordination of the organs of life and action. This is not theory, but fact, and displays its force as fact, whatever theories may be thrown across its track.

W. Wilson, Constitutional Government in the United States 56-57 (1908).

Of course, it should also be noted that structuring an agency so as to allow for a Commission veto of an executive rule ensures that there be a check on such power in the event that one-house legislative veto provisions prove to be unconstitutional, impractical, or both. For a discussion of various legislative veto provisions, see generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

[224] *See generally* text accompanying notes 173-93 *supra*.

primarily responsible for the administrative gauntlet described above.[225] These procedures represent more than an attempt by OHA to be thorough and fair. They represent a certain bureaucratic resolve to retain primary adjudicatory decisionmaking authority within the agency that traditionally has handled oil enforcement proceedings.[226] OHA has thus broadly construed section 503's regulation of procedure to require elaborate safeguards in the form of OHA "issuance procedures" despite the existence of similar protections in FERC proceedings. Though not statutorily compelled,[227] this interpretation is not at all surprising and, perhaps, is even predictable.

When Congress allocated major gas and oil ratemaking and price control functions within DOE, it did not create new administrative agencies with new identities and powers to carry out these tasks.[228] With regard to these functions, the Department created by the DOE Act consists of new alliances between two pre-existing agencies, now under new names—the Federal Energy Administration, predecessor of ERA, and the Federal Power Commission, predecessor of FERC.[229] A reorganization leaving pre-existing administrative identities and powers intact risks retaining past policies and past modes of operation. In the case of OHA, enforcement procedures have improved considerably, but in apparent oblivion to the role Congress designed for FERC, which arguably was to have been the sole or at least primary adjudicator of contested remedial orders. Thus, either OHA or FERC procedures involve a wholly unnecessary layer of adjudicative procedures within the agency; the question is, which?

### D. *Solving the Problems—The Alternatives*

Potentially, many solutions are available to cure the procedural duplication that presently plagues DOE's enforcement process. First, OHA could abolish its remedial order proce-

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[225] *See generally* text accompanying notes 173-86 *supra*.

[226] *See generally OHA's Goldstein: A Bureaucratic Mastermind*, Legal Times of Washington, July 9, 1979, at 5; *Obscure, Bristly Energy Official: A Power Center*, Legal Times of Washington, July 31, 1978, at 1.

[227] *See* text accompanying notes 169-170 *supra*.

[228] FEA has handled such matters since passage of the Federal Energy Administration Act in 1974. With the passage of the DOE Act, most of FEA's duties were transferred to the Secretary and then delegated to ERA. *See* notes 104-105 and accompanying text *supra*.

[229] *See* text accompanying notes 94-98 *supra*.

dures.[230] Agency adjudication would then occur primarily at FERC. This approach most closely tracks Congress' apparent intent.[231] The second option approaches the problem from the opposite direction: Congress could abolish FERC review, leaving agency adjudication entirely at OHA. One variant of this approach would be the establishment of OHA as an independent, in-house court, not unlike the Board of Hearings and Appeals proposed in the Administration's Department of Energy Bill. A second variant would ensure independence in the factfinding process by having administrative law judges render initial opinions, appealable to OHA. Since the choice among these options[232] turns largely on the extent to which agency adjudication should be separate from other agency functions, we will first examine the need for and extent of such judicial independence.

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[230] *See* text accompanying notes 171-85 *supra*. There it was suggested that executive procedures be limited to essentially settlement conferences. If the case could not be settled and litigation could not be avoided, the case would be handled at FERC.

[231] *See* text accompanying notes 187-93 *supra;* Carolson, note 192 *supra,* at 3-4. *See generally* 42 U.S.C. § 7193 (Supp. I 1977). It can be argued that providing for secretarial "issuance procedures" along with Commission review of these procedures gives the agency the discretion to come up with their own procedures for handling remedial order and adjustment cases. Nevertheless, it strains credulity to think that Congress anticipated *two* sets of adjudicatory procedures. Congress was more likely to have anticipated development of the informal settlement procedures in the executive wing of the agency and adjudicatory proceedings at FERC.

[232] There are, of course, others as well. For example, a third approach is simply to bypass agency adjudication altogether and bring all enforcement actions directly in the district courts. This approach is similar to the appeals procedure for a tax deficiency notice issued by the Internal Revenue Service (IRS). Upon receipt of such an IRS notice, a taxpayer may file a notice of appeal with the United States Tax Court, a United States District Court, or with the Court of Claims. 26 U.S.C. § 7422 (1976).

It is important to note that some remedial order proceedings also are taken directly to district court under the Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 209, 84 Stat. 799, *reprinted at* 12 U.S.C. § 1904 note (1976). Despite vigorous argument that the Act in § 211 does not allow filing such suits without exhausting the administrative remedies of FERC review under the DOE Act (42 U.S.C. § 7193 (Supp. I 1977)), a district court recently has upheld this approach. *See* United States v. Exxon Corp., 470 F. Supp. 674 (D.D.C. 1979), *aff'd*, No. DC-75 (Temp. Emer. Ct. App. Feb. 26, 1980). *See also* 10 C.F.R. §§ 205.190(a), .204 (1979) (regulations purporting to authorize this approach).

Moreover, "DOE has recognized that it does not have authority to impose [civil penalties] itself and must instead refer such cases to the Justice Department for prosecution in the Federal Courts" even though "DOE does compromise, settle and collect civil penalties whenever deemed advisable," *See* Trowbridge, *supra* note 136, at 208 n.51. As the *Exxon* case illustrates DOE is now trying, in some cases, to "bypass those procedures and initiate . . . civil action[s] in District Court." *Id.* Utilizing various district courts around the country to enforce EPAA regulations on recovery of overcharges would seriously undermine the important goal of policy coherence. Given gradual decontrol of oil prices, however, this goal is of diminishing importance. Nevertheless, since this Article is primarily concerned with what is required for fair and efficient administrative adjudication in general, as well

### 1. *Separating Judicial Functions from Prosecutorial and Legislative Functions—An Overview*

Proposals for increasing judicial independence in the administrative process have been common throughout our regulatory history. They were forcefully advocated during the early twentieth century and especially during the New Deal.[233] Federal administrative courts, separate and distinct from administrative agencies, often were proposed as methods of ensuring that the judicial function remains separate from other agency activities.[234] Though such courts never were created, the agencies themselves gradually assimilated the judicial decisionmaking model.[235] In part, assimi-

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as with oil pricing litigation in particular, it does not examine district court proceedings as an alternative approach to agency regulation in detail. It assumes that the bulk of the overcharge cases are and should be handled in the first instance by OHA.

Finally, there are other variants of the approaches analyzed in the text. For example, OHA could issue a remedial order subject to appeal to FERC with FERC's role clearly designated by statute as appellate in nature. The same risk of policy fragmentation would, however, remain.

[233] *See* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 264-74 (1978).

Independent commissions were roundly criticized by many commentators during the New Deal because of their combination of executive, prosecutorial and judicial functions which compromised judicial independence. In 1937, the Brownlow Committee proposed that independent commissions be placed within the various executive departments and their administrative and judicial functions be separated into distinct divisions. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40-41 (1937), *partially reprinted in* SUBCOMM. ON SEPARATION OF POWERS OF THE SEN. COMM. ON THE JUDICIARY, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS S. DOC. No. 49, 91st Cong., 1st Sess. 343, 347 (1970). Professor Cushman summed up these criticisms of independent commissions: "[The independent commission] lack[s] the atmosphere of detachment and impartiality in which private rights ought to be adjudicated." R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 701 (1941).

[234] *See* Verkuil, *supra* note 233, at 262, 268-69, 271. For a recent proposal to establish an administrative court, see de Seife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. L. REV. 229, 242-43 (1979). For recent proposals to broaden the scope of federal judicial review of agency action, see note 181 *supra*.

[235] There are various explanations why administrative agencies easily assimilated adversary procedures. Dean Pound observed that the emerging legal characteristics of the early twentieth century—the sequence of rules, principles, conceptions, and standards—was a phase in the development of modern conceptions of justice and truth. Pound, *The Administrative Application of Legal Standards*, 42 A.B.A. REP. 445, 458-64 (1919). The application of these standards to administrative bodies was necessary to maintain the objectivity and confidence inspired by legal standards. *Id.* at 463-65. Professor Bernstein, on the other hand, explains this development differently:

> Original preoccupation with the inadequacies of the legislative and judicial processes gave way gradually to skepticism about the judicial capacity of the commissions and even to charges that they were by nature inherently absolutist and arbitrary. Commissions, it was claimed, could achieve fairness only by following the pattern of the courts in handling cases. Kept on the defensive by the

lation was the natural response to the skeptical view taken of government's relatively new regulatory role.[236] The check on regulatory power provided by an adversarial system perhaps allayed some of this skepticism. Moreover, as Jerome Frank observed, "the 'fight' [or adversary] theory of justice is a sort of legal laissez-faire."[237] A gloves off adversarial approach theoretically ensured the "best" decision possible. It also provided the regulated industries with every opportunity to contest, and perhaps thwart or delay, substantive agency action.

There are, of course, other reasons to adopt an adversarial decision-making model. It embodies certain notions of fairness that are appropriate regardless of one's view of the wisdom or efficacy of the substantive regulation involved. For example, the APA's adversarial model fulfills the litigants' general expectation that the same person or tribunal cannot be both prosecutor and judge.[238] The reason is clear, particularly in enforcement proceedings: a

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> attacks of the bar and the courts, commissions have judicialized their procedures.

M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 72 (1955).

In explaining this development, other commentators recognized that administrative decisions were actually judicial determinations made by an agency rather than by a court and that these judicial-like decisions were best left to agencies because of their inherent expertise and procedural flexibility. *See, e.g.*, J. LANDIS, THE ADMINISTRATIVE PROCESS 93-100 (1938); B. SCHWARTZ, THE PROFESSOR AND THE COMMISSIONS 45-46 (1959). A more recent suggestion is that the push for political independence, especially in the independent regulatory commissions, resulted in the judicialization of regulatory procedures. Reformers believed that they could obtain freedom from political influence and corruption by adopting the judicial model as opposed to the political model. *See* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1402-03 (1975).

[238] *See, e.g.*, M. BERNSTEIN, *supra* note 235, at 72; *see also* Pound, *supra* note 235, at 446, 458-59. Dean Pound saw the growth of administrative law as an adjunct to the overall "shifting of the center of gravity in our polity" to the executive branch. *Id.* at 446. He was concerned with this shift because the executive gave more authority and responsibility to administrative agencies. In nineteenth century American thinking, law and administration were put as rivals rather than complementary agencies. *Id.* at 450. The appropriate role for administration had yet to be worked out in the scheme of governmental powers. R. POUND, ADMINISTRATIVE LAW 1-5 (1942). Dean Pound recommended that adjudication be given to the courts and not left with administrative agencies. Pound, *supra* note 235, at 464.

Felix Frankfurter also noted that the general fear of administrative arbitrariness surrounding the growth of administrative agencies would only be eliminated by the institutionalization of judicial standards and by the increasing of awareness and zealousness of the populace. Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927).

[237] J. FRANK, COURTS ON TRIAL 92 (1st Princeton paperback ed. 1973).

[238] *See* 2 K. DAVIS, *supra* note 207, §§ 12.01-.06; K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 12.01-.06 (1976 & Supp. 1980); *see generally* Hamilton, *supra* note 14, at 1179; Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1002-03 (1978).

basic tenet of procedural fairness in such proceedings is impartiality on the part of the decisionmaker.[239] A presiding officer who is intimately involved in the prosecution or investigation of an individual is likely to have a predetermined opinion of the ultimate outcome of the case and, in any event, usually will be perceived by litigants as being biased against them.[240] The Supreme Court has held that complete separation of judicial, prosecutorial, and investigatory functions is not necessarily constitutionally required,[241]

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[239] *See* Cramton, *supra* note 18, at 588.

[240] A first and fundamental principle of natural justice is that no man shall be judge in his own cause; a tribunal that has enforcing functions has by that fact an interest in the outcome of the litigation to which it is a party and hence should not take part in the process of decision.

J. LANDIS, *supra* note 235, at 92. *See* Pedersen, *supra* note 238, at 1002. *Cf.* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 778-90 (1974) (suggesting that full adversary proceedings inappropriate in nonaccusatory social welfare cases).

[241] Withrow v. Larkin, 421 U.S. 35, 47 (1975). The Supreme Court rejected the argument that a combination of functions was constitutionally impermissible.

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

*Id.*

In Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493-94, 497 (1976), the court held that a school board's unsuccessful negotiations of a collective bargaining agreement with a teacher's union did not taint the board's subsequent decision to dismiss striking teachers. Neither the board's familiarity with the facts of the case, nor its prior public position on a policy issue related to the dispute were sufficient to overcome the presumption of honesty and integrity in policymakers with decision-making power.

It has been suggested that the separation of prosecutorial or investigative functions from adjudicatory functions may be more constitutionally desirable with regard to "prosecuting agencies" such as the FTC or the NLRB than with "non-accusatory" hearings before bodies such as the Social Security Board or the Veterans Administration. 2 K. DAVIS, *supra* note 207 § 13.01, at 173; Pedersen, *supra* note 238, at 993-96. Courts have not generally recognized such a distinction. *See, e.g.*, Marcello v. Bonds, 349 U.S. 302, 311 (1955) (due process not violated in deportation case when adjudicating officers were supervised by investigators and prosecutors); Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1265 (9th Cir. 1977) (due process not violated when regional administrator, who made initial decision on permit issuance, reviewed his decision after additional hearings); NLRB v. Aaron Bros. Corp., 563 F.2d 409, 413 (9th Cir. 1977) (regional director's exercise of both investigative and adjudicative responsibilities in connection with issuance and resolution of unfair labor practice complaint did not violate due process). *See also* 2 K. DAVIS, *supra* note 207 § 13.02, at 175.

but the adjudicatory provisions of the APA clearly provide for such separation.[242] Nevertheless, even for purposes of APA adjudication, adequate separation of these functions does not require that such tasks be confined to separate and distinct agencies.[243] Internal separation of these functions has long been considered a satisfactory way of resolving the inevitable problems confronting an agency charged with legislative, executive, and judicial tasks.[244] Moreover, while prosecutorial and adjudicatory functions are separate in most agencies,[245] independent commissions as well as executive officials regularly mix their judicial and policymaking functions.[246]

There is, however, precedent for the establishment of an in-house agency court devoted solely to "on the record" adjudicatory disputes. The Occupational Health and Safety Commission is an

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[242] 5 U.S.C. §§ 554, 556, 557 (1976) (governing on the record adjudicatory proceedings). Section 554(d) provides that:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—
>
> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency . . . .

[243] *See, e.g.*, Jaffe, *Invective and Investigation in Administrative Law*, 52 Harv. L. Rev. 1201, 1218 (1939); Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 Ill. L. Rev. 901, 934-35 (1941).

[244] Jaffe, *supra* note 243, at 1216-18; Nathanson, *supra* note 243, at 934-35. *But see* Pedersen, *supra* note 238, at 994 (on the breakdown of this concept in nonaccusatory proceedings).

[245] For recent proposals calling for complete separation, see note 234 *supra*. *Compare* The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies (1971) [hereinafter cited as The Ash Council Report] *with* R. Noll, Reforming Regulation: An Evaluation of the Ash Council Proposals (1971).

[246] For example, the Federal Trade Commission has rulemaking powers under 15 U.S.C. § 57a (1976), and also hears appeals from decisions of administrative law judges in cases applying those rules. *See* Appeal from initial decision, 16 C.F.R. § 3.52 (1979). *See also* Petitions for discretionary review of initial decisions or recommended decisions—review proceedings, 14 C.F.R. § 302.28 (1979) (CAB). Similarly, executive departments have administrators involved in both adjudication and policymaking. For example, the Clean Air Act empowers an administrative law judge in the Environmental Protection Agency to conduct an adjudicatory hearing in a determination of noncompliance. The judge's decision is in turn appealable to an agency administrator. 42 U.S.C. § 7420 (Supp. I 1977). *See* Orloff, *Buttressing the Traditional Approach to Enforcement of Environmental Requirements: Noncompliance Penalties Under the Clean Air Act*, 9 Envt'l L. Rep. 50029, 50037 (1979).

independent agency within the Department of Labor. It consists of three independent commissioners whose sole function is to decide adjudicatory disputes.[247] The Board of Hearings and Appeals proposed in the initial DOE bill appears to have been modeled on this commission.[248] Abolishing FERC review and making OHA an independent commission with jurisdiction over adjudicatory disputes such as contested remedial orders similarly would approximate the Occupational Health and Safety Commission approach as well as the proposal in the Administration's initial DOE bill.[249] But neither independent FERC review of remedial orders nor an independent in-house agency judiciary is necessary for fair and efficient agency adjudication.

2. *An In-House Agency Court—The Pure Form*

An independent commission whose sole function is to resolve adjudicatory disputes within an agency offers several advantages, particularly in enforcement cases. Since agency judges would be independent factfinders, they would be neither responsible for the specific rule applied in the particular case, nor accountable to agency policymakers in cases of disagreement over a rule's meaning or application. Further, as independent commissioners, they would be above the political fray and presumably immune to

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[247] 29 U.S.C. § 661 (1976). *See generally* Sullivan, *supra* note 218, at 181-83.

[248] *See* text accompanying notes 53-64 *supra*.

[249] There is, however, one major difference. OHA also engages in policymaking through its exceptions program. The DOE Act, 42 U.S.C. § 7194 (Supp. I 1977), authorizes the Secretary to grant adjustments to any rule, regulation or order issued under the laws presently governing the price and allocation of oil and various petroleum products. The purpose of such adjustments is "to prevent special hardship, inequity, or unfair distribution of burdens" in the application of such rules to any person. *Id.* The Secretary has delegated the power to grant or deny adjustment requests to OHA. In effect, OHA now plays the role of an equitable court exercising significant policymaking functions. *See generally* A. Aman, *supra* note 120, at 20-48. This is a continuation of the policymaking role played by the Office of Exceptions and Appeals in the old FEA. *See generally* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 111.

The scope of exceptions relief can vary from regulatory fine tuning to serious encroachment on DOE's rules. The complexity of the petroleum industry and the DOE regulatory program makes it impossible to anticipate all, or even a significant portion of, the factual circumstances that might arise in energy regulation. The flexibility provided by the exceptions process allows these varied circumstances to be met. However, the exceptions can swallow up the rules, in effect, becoming an alternative form of rulemaking. *See* A. Aman, *supra* note 120, at 76-84. Decisions significantly changing a rule should be referred to the Secretary for a rulemaking proceeding). Both OHA and its predecessor, the Office of Exceptions and Appeals, have used the exceptions process to formulate significant new pricing policies. *See* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 110-11.

political pressure.[250] Decisions by an in-house agency court could thus enhance litigants' perceptions of fairness and, in some cases, perhaps the actual fairness of the adjudicatory process.[251] Furthermore, if recent reforms aimed at streamlining the administrative processes are to survive judicial attack, courts must have confidence in the agency's procedural expertise.[252] Perhaps courts would grant more deference to innovative procedural decisions made by an agency judiciary.

There are, however, serious disadvantages to in-house agency courts. The foremost is policy fragmentation. Policy considerations underlie any application of law to fact even though they do not generally dominate enforcement proceedings. The separation of judicial and policymaking functions increases the possibility of conflicting decisions between those who make the rules and those who apply them.[253] The likelihood of such conflict becomes greater still if appointments to the agency court extend from one administration into the next, when new executive officers may differ with the policy perspectives of the incumbent judges.[254]

Furthermore, if an agency court is granted jurisdiction over all agency adjudication, including licensing or ratemaking, policy determinations may become overjudicialized.[255] In many areas, only integration of judicial and legislative functions offers the court the broad perspective and data base necessary for an enlightened decision. As one commentator recently pointed out, de-

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[250] This notion of independence from politics often is a primary reason for advocating that policymaking and judicial functions should be combined in decisionmakers who are immune from pressure by elected officials or cabinet-level presidential appointees. *See, e.g.*, K. Davis, *supra* note 238, § 1.09-1. Independence from politically accountable officials, however, has been sharply attacked and criticized. *See, e.g.*, M. Bernstein, *supra* note 235, at 294-95; W. Cary, Politics and Regulatory Agencies 19 (1967); Cutler & Johnson, *supra* note 235, at 1399-1400, 1402-09. *But see*, Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 Va. L. Rev. 947, 950-56 (1971) (asserting that independent commissions are no less politically accountable than executive agencies). *See generally* ABA Report, *supra* note 77, at 99-154.

[251] *See* Currie, *supra* note 218, at 1160. *See also* R. Cushman, *supra* note 233, at 701-02 (emphasizing that those before an administrative tribunal need to feel that they are receiving impartial justice).

[252] *See generally* Verkuil, *supra* note 233, at 309-10.

[253] *See* Currie, supra note 218, at 1116-20 (discussing problems of policy fragmentation and conflict between Secretary of Labor, rulemaking authority, and OSHRC, independent adjudicator). For a discussion of the institutional conflict between OSHA and OSHRC, see Sullivan, *supra* note 218, at 183-94.

[254] This, of course, is entirely possible given the staggered terms of office agency judges would be likely to have.

[255] *See* Pedersen, *supra* note 238, at 1002-07.

cisions "in complicated technical fields, such as those concerning licenses for nuclear power plants, permits to discharge substances into water, and removal of pesticides from the market" require the decision-maker to face "a large number of policy-related choices that fall within the statutory mandate."[256] To the extent that an in-house agency court encourages adherence to the judicial decision-making model even when policy questions are involved, it might undercut sound decisionmaking on energy-related matters.[257]

3. *Making OHA an Independent Agency Court*

Even if one were to decide that the advantages of an in-house court outweigh the disadvantages, conferring independent status on OHA would not produce an agency court in the pure form described above. OHA is directly involved in agency policymaking because of its role in granting or denying requests for adjustments to secretarial rules and orders.[258] Indeed, OHA has utilized the adjustments process as a cutting edge of policy formulation within the department.[259] Given FERC's power to review and possibly to veto certain secretarial "energy actions" and rules pertaining to oil regulations, an independent OHA would further fragment policymaking by splitting authority over oil matters among two independent commissions and the executive.

In addition to exacerbating the likelihood of policy fragmentation, creating a second independent commission within DOE would further remove policymaking powers from political controls. The wisdom of entrusting significant policy decisions to undemocratic institutions such as independent commissions has long been debated.[260] Recent reform proposals urge that policymak-

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[256] *Id.* at 995-96 (footnotes omitted).

[257] *See id.* at 1008-10.

[258] *See* note 23 *supra*.

[259] *Id.* This is a continuation of the old FEA approach. *See generally* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 111-23.

[260] Though they are labeled "independent commissions," some have argued that these commissions are anything but independent. The theory that independence assures "judge-like wisdom, balance, and insight" in administration is a dangerous illusion. Fesler, *Independent Regulatory Establishments*, in ELEMENTS OF PUBLIC ADMINISTRATION 227 (F. Marx ed. 1946). Notions of independence allow us to pretend "that we can preserve democracy and still vest economic powers in a governmental agency that is not clearly subject to officials who in turn are responsible to the people." *Id.* at 228. But "[t]he process of regulation is unavoidably political." M. BERNSTEIN, *supra* note 235, at 258. Thus, the "most serious implication of the theory of the independent commission is a dangerously naive concept of

ing functions should rest in the hands of officials more directly accountable to the electorate.[261] Making OHA independent would help to insulate another policymaking unit within the government from more direct political control. Yet even if one were to reject the policy arguments underlying the criticisms of independent regulatory commissions, there are, nevertheless, less drastic means of providing for independence in the OHA decision-making process, short of the creation of another commission. The use of administrative law judges would, for example, ensure com-

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democracy as a scheme of government to which political responsibility has no necessary relevance." *Id.* at 146; *cf.* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188-91 (1973) (independent commissions susceptible to political process and their failure to satisfy public interest cannot result from political immunity). Critics through the years have argued for a reappraisal of the role of independent commissions on this ground. *See, e.g.*, M. BERNSTEIN, *supra* note 235, at 281-84; R. CUSHMAN, *supra* note 233, at 616-21 (experience of British Unemployment Assistance Board demonstrates futility of placing impartial, nonpolitical board in charge of program whose past administration has been controversial).

One of the focal points of present criticism is the independent commission's failure to integrate its substantive policy with that made by other independent commissions:

> While Congress establishes the goals, it cannot legislate the details of every action taken in pursuit of each goal, or make the balancing choices that each such decision requires. It has therefore delegated this task to the regulatory agencies. But we have given each of the regulatory agencies one set of primary goals, with only limited responsibility for balancing a proposed action in pursuit of its own goals against adverse impacts on the pursuit of other goals. For most of these agencies, no effective mechanisms exist for coordinating the decisions of one agency with those of other agencies, or conforming them to the balancing judgments of elected generalists, such as the President and Congress.

ABA REPORT, *supra* note 77, at 99-100. Lack of policy integration impedes not only the political goals of the executive and legislature but also regulation in the broad public interest. M. BERNSTEIN, *supra* note 235, at 164-66. Thus, any reform of independent regulatory commissions must attempt to restore political accountability as the basis for policy integration. *See* THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK 13-15 (1971). *But see* Robinson, *supra* note 24, at 950-55 (political accountability and policy integration would not necessarily be achieved by replacing independent commissions with executive agencies under presidential control); Thomas, *Politics, Structure and Personnel in Administrative Regulation*, 57 VA. L. REV. 1033, 1062-65 (1971) (factors impeding policy control extend beyond structural characteristics to include inherent political nature of regulation). For another source discussing independent commissions, see J. FREEDMAN, *supra* note 209, at 58-77.

[261] *See* ABA REPORT, *supra* note 77, at 99-154. *See also* Cutler & Johnson, *supra* note 235, at 1397, 1399. The authors argue that in the absence of any political control, agency decisions on substantive policy often fail to coincide with the policy decisions that politically accountable bodies would have preferred. We allow the independent agency to make its decision independently; but when we dislike this decision, we then resort to the political process to change it. This failure of regulation can be avoided in the first instance with political checks and oversights, which have been proposed in various reorganization schemes. Cutler and Johnson argue that the President should be given the authority to modify or direct agency actions and priorities. *Id.* at 1414-17. Bernstein condemns the

plete independence at the crucial factfinding stage of the proceeding.[262]

Finally, there are practical reasons for rejecting a proposal to make OHA an independent commission. The oil program is being phased out. Enforcement actions are likely to be completed within a few years. OHA undoubtedly will have other regulatory tasks to perform for which independence may be neither necessary nor desirable.[263]

4. *Abolishing FERC Review*

Rather than creating a second independent commission within DOE, FERC review of contested remedial orders should be abolished.[264] OHA would then have sole responsibility for adjudicating these cases. In addition to minimizing the policy frag-

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entire regulatory commission concept, arguing that "new forms, techniques, and ideas" must be adopted. M. BERNSTEIN, *supra* note 235, at 296-97.

[262] *See* text following note 338 *infra*.

[263] *See* note 9 *supra*. Of course, to the extent new enforcement proceedings are begun, these cases may go on well into the 1980's.

[264] Abolishing FERC review will be controversial and, in general, likely to be opposed by the regulated companies involved. A primary argument on their behalf is that DOE's structure should continue to protect the judicial function, "both in fact and in appearance, from undue political influence." Letter from Donald B. Craven, Attorney for Exxon Corp., to Betty Jo Christian, Chairman, Administrative Conference Committee on Ratemaking and Economic Regulation (Jan. 18, 1980) (on file at *Cornell Law Review*). Unlike politically accountable cabinet officers, independent commissioners are presumed to be relatively immune to the ever-changing political winds.

> We may conclude, then, that Congress has had two general aims in creating independent regulatory bodies: first, to secure reasonably impartial and nonpartisan handling of quasi-judicial tasks; second, the honest and efficient handling of tasks too big to be entrusted to the politicians in the executive departments.

R. CUSHMAN, *supra* note 233, at 669. *See also* THE ASH COUNCIL REPORT, *supra* note 18, at 16-18.

There are, however, other possible reasons. The regulated industries often accept the combination of functions inherent in an independent commission because they do not always perceive the regulators as their foes. In many agencies, the regulators are sympathetic to industry's point of view. M. BERNSTEIN, *supra* note 235, at 87-90; W. CARY, *supra* note 250, at 67-68; B. SCHWARTZ, *supra* note 235, at 118-19; Cutler & Johnson, *supra* note 235, at 1404; McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 424-25 (1961). *But cf.* Jaffe, Book Review, 65 YALE L.J. 1068, 1071-72 (1956) (reviewing M. BERNSTEIN, *supra* note 235) (arguing that industry orientation occurs in executive departments as well as independent agencies). Independence is also related to the ideas of expertness, judicialization, and freedom from political influence. M. BERNSTEIN, *supra* note 235, at 148. The independent regulatory commissions are perceived to combine these characteristics into one group. Courts may also be independent, but they lack the necessary expertise and executive departments lack freedom from political pressures.

mentation that is likely to result under the present approach, there are other reasons why Congress should adopt this approach.

First, FERC's present judicial role differs significantly from an independent agency court in its pure form, primarily in that FERC's duties extend far beyond agency adjudication dealing with oil pricing matters. As successor to the Federal Power Commission, FERC inherited a substantial backlog of cases, and acquired a number of new responsibilities as well.[265] It has enormous day-to-day policymaking and enforcement responsibilities for a variety of programs including the enormously complex Natural Gas Policy Act of 1978.[266] Moreover, prior to passage of the DOE Act, FERC's predecessor, the Federal Power Commission, had no expertise in oil regulation.[267] Adding one more new task, such as review of OHA remedial orders, to an already overburdened agency is impractical and, in any event, is likely to result in FERC playing primarily an appellate role.[268] To the extent this occurs, the FERC layer of review does not provide much additional actual protection for the litigants, but rather serves primarily as a source of delay before issuance of a final agency order. Indeed, the appellate role in this process is, and should be, played by the judiciary.

Second and more important, even if FERC were to exercise its apparent authority to review OHA orders on a de novo basis, such scrutiny no longer appears to be necessary. The primary reasons for Congress' institution of FERC review no longer exist. DOE's adjudicatory and enforcement responsibilities now are adequately separated: OHA handles adjudicatory functions, ERA deals with enforcement, and each unit independently reports to the Secretary of Energy.[269] Moreover, OHA's enforcement procedures provide much more protection to litigants than those in existence at the time Congress authorized FERC review. Though some may question why OHA developed such elaborate proce-

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[265] For FERC's new responsibility, and for authority on its backlog of cases, see Lawrence & Muchow, *supra* note 193; text accompanying notes 110-116 *supra*.

[266] 15 U.S.C.A. §§ 3311-3432 (West Supp. 1979).

[267] *See generally* text accompanying notes 94-97 *supra*.

[268] *See* text accompanying notes 110-116 *supra*.

[269] As the new regulations issued on behalf of OHA demonstrate, internal separation of adjudicatory and enforcement responsibilities can be achieved within an executive agency. *See* text accompanying notes 173-91 *supra*. It is possible to establish substantial independence within an executive agency without necessarily becoming a fully independent regulatory commission.

dures in the first place,[270] their beneficial, protective effects can and should be preserved by statute.

In short, though acceptability, efficiency, and accuracy considerations permit various ways to overcome the present problems, abolition of FERC review of OHA remedial orders provides the best solution. It would ease FERC's burden and eliminate the present duplication of administrative functions. Most important, it would lessen the risk of policy fragmentation between FERC and DOE.[271] A unified, coherent approach to energy policy was one of the main goals of the reorganization attempt that led to the creation of DOE. Retaining adjudicatory responsibility for an executive program within the executive wing of the agency would further this goal. Congress should abolish FERC review and, at the very least, make the procedural provisions for FERC review under the DOE Act applicable to OHA. As is discussed below, Congress should also consider applying the adjudicatory provisions of an amended APA to all agency enforcement proceedings, including those at DOE.[272]

E. *A Residual Problem—Duplication of Judicial Review*

Even if the problems of internal policy fragmentation and procedural duplication are solved, an overarching problem remains: duplication of judicial review of decisions emanating from DOE. There are presently two levels of appellate review as of right.[273] Final orders issued by FERC are appealable to the district court, and then to the Temporary Emergency Court of Appeals. Only one level of appellate review is needed.

Duplication should be eliminated by abolishing district court review of agency remedial order decisions.[274] The present two-

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[270] *See* notes 171-185 and accompanying text *supra*.

[271] In this regard, Congress should also consider abolition of FERC review of various secretarial rules. Though a complete review of these provisions is beyond the scope of this Article, keeping the policymaking functions within one agency is a worthwhile goal. Giving the Secretary the basic responsibility for the EPAA and its progeny and then allowing FERC the opportunity to redirect the executive's policy directions offers not only a check on executive power, but an additional opportunity for conflict and dissension. Even if such dissension does not surface, it may just as well be due to conflict avoidance as general agreement.

[272] For the pros and cons of these proposals, see notes 298-301 and accompanying text *infra*.

[273] In addition, Supreme Court review is available by way of writ of certiorari.

[274] Two levels of appellate judicial review also exist for adjustments decisions. This too, would appear to be unnecessarily duplicative.

tier judicial review provisions established by the Emergency Petroleum Allocation Act resulted from an emergency approach to legislation,[275] rather than from a carefully thought-out legislative program. In its haste to meet the demands of the moment, Congress simply incorporated by reference the judicial framework established under the Economic Stabilization Act of 1970.[276] Two-tier appellate review may have been appropriate for a program applying temporary price controls to virtually all American businesses, large and small. District court review provided a local judicial forum for smaller businesses that needed an inexpensive method of resolving disputes. But this rationale loses much of its force when applied to a relatively long-term oil pricing program.

The advantages of the two-tier approach to judicial review[277] evaporate when the losing party, whether it be the government or a company, decides to appeal. A substantial portion of remedial order decisions from district courts are likely to be appealed, given the enormous amounts of money that often are at stake. In this category of cases, district court review merely duplicates the circuit court's function and delays the issuance of an authoritative and final decision.[278] To the extent that some cases are not ap-

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[275] The House report describes the bill as giving the President "temporary authority" to deal with "existing or imminent shortages and dislocations" in oil distribution, and "to adopt within 10 days of enactment and to implement 15 days thereafter a program providing for the mandatory allocation" of oil and petroleum products. H.R. Rep. No. 531, 93d Cong., 1st Sess. 1, 5, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2582, 2582.

[276] The legislative history of the Emergency Petroleum Allocation Act does not discuss judicial review for the oil regulation program. The Act referred to the judicial review provisions of the Economic Stabilization Act and simply incorporated them by reference. *See* H.R. Rep. No. 531, 93d Cong., 1st Sess. 22, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2582, 2599; H.R. Rep. No. 628, 93d Cong., 1st Sess. 31, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2688, 2707-08.

[277] An additional advantage "of mandatory two tier review [appeal as of right] over single-tier district court review is that it provides a mechanism for the resolution of inconsistencies within and between districts and for the achievement of circuit-wide uniformity." Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 16 (1975).

[278] As Professors Currie and Goodman have noted with regard to two-tier review:

> In every case eventually appealed to the circuit courts, interposition of the district court substantially increases the cost of litigation and delays the resolution of the controversy . . . . The litigant must pay double filing fees and brief reproduction costs, and must transport his attorney to two courts instead of to one. He must also pay for extra work by his lawyers . . . . The indirect costs of the added delay . . . are more elusive. Delay may induce parties to settle on terms less just than would be imposed by a court decision; it may cause deterioration of evidence that must be used if there is a retrial; similar cases may have to be litigated until the disputed point of law is settled; it also increases the

pealed, however, the risk of various conflicting district court decisions increases. Moreover, if a case is not appealed from district court to the Temporary Emergency Court of Appeals, one cannot necessarily assume that the process was acceptable to the parties involved. The cost of two appeals rather than one may have effectively excluded some litigants from the superior forum.[279]

Many of the regulated companies have argued, however, that the primary value of district court review in the oil program is that it allows the parties involved broader discovery rights than those provided by OHA.[280] In many cases, it is contended, discovery has made the difference between victory and defeat.[281] These litigants, however, have focused on a problem wholly unrelated to the primary purpose of appellate district court review of administrative decisions. Moreover, the discovery granted by district courts has been in the context of pre-enforcement actions seeking declaratory and injunctive relief, not in the context of appeals to the district court after a final agency adjudication.[282]

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> harm done by a challenged practice or by its temporary restraint during the period of litigation.

*Id.* at 16-17.

[279] Even if there is no appeal, one cannot assume that the process was necessarily acceptable to the parties. As Professors Currie and Goodman have noted:

> Nor are the disadvantages of two-tier review limited to those cases in which appeals are taken. Perhaps the most unfortunate consequence of adding the district court stage is that it prices the appeals court beyond the reach of many litigants. The party who loses in the district court may stop at that point, not because he is satisfied or even resigned, but because he is exhausted. When that occurs, the objection is not only that the exhausted litigant has been denied access to a superior forum, as under a single-tier district court system, but that he has effectively been excluded from a superior forum that is available to more affluent litigants. Further, if the cost of another appeal is sufficiently great in comparison to the stakes in an entire class of cases, interposing the district court could create substantial disuniformity.

*Id.* at 17.

[280] *See* note 314 *infra*.

[281] *See, e.g.*, Standard Oil Co. v. DOE, 596 F.2d 1029, 1052-56 (Temp. Emer. Ct. App. 1978). *See also* Sun Co., Inc., Tentative Recommendations Regarding Remedial Order Procedures of the Department of Energy 37-41 (Nov. 28, 1979) (pursuant to the testimony of Robert O. Lewers before the Administrative Conference of the United States) (on file at *Cornell Law Review*).

[282] *See, e.g.*, Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913 (E.D. Penn 1979); Standard Oil Co. v. FEA, 440 F. Supp. 328 (N.D. Ohio, 1977); Phillips Petrol. Co. v. FEA, 435 F. Supp. 1239 (D. Del. 1977).

An argument can be made, however, that abolition of appellate district court review could jeopardize the ability of companies to seek pre-enforcement district court review and thus deprive them of an opportunity to engage in discovery under the federal rules. *See, e.g.*, Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979) ("In the absence of a statute

Adequate discovery, however, can and should be made available at the agency level.[283] It simply is unnecessary to add an extra

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prescribing review in a particular court, 'nonstatutory' review may be sought in a district court under any applicable jurisdictional grant. If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies"). The validity of or need for pre-enforcement review is beyond the scope of this Article. The recommendations with regard to judicial review deal solely with appellate district court review after final agency adjudication has occurred.

[283] OHA's regulations provide for discovery (10 C.F.R. § 205.198(a) (1979)), but only under an order issued by OHA. These orders are granted if OHA determines that discovery is "necessary for the party to obtain relevant and material evidence and that discovery will not unduly delay the proceeding." *Id.* § 205.198(e). Oil companies have expressed great dissatisfaction with OHA's rule and its application. They argue that OHA's discovery rules fall short of the Federal Rules of Civil Procedure and that, in any event, OHA has applied its standards far too stringently in the past.

Discovery under OHA's regulations differs from discovery under the Federal Rules of Civil Procedure in at least five ways. First, under the Federal Rules of Civil Procedure, discovery is permissible "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," even though the information immediately sought is not evidence itself. FED. R. CIV. P. 26(b)(1). OHA generally will permit discovery of evidence itself and will not allow discovery which may lead to evidence, because this latter type of discovery "would unduly delay the . . . proceeding." *See, e.g.*, Supreme Petroleum Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,515 (1979).

Second, under the Federal Rules of Civil Procedure the parties, by and large, regulate discovery between themselves. They do not have to apply to the court for permission to engage in discovery. Parties only appear in court if there is a breakdown in discovery and a protective order (FED. R. CIV. P. 26(c)), an order compelling discovery (FED. R. CIV. P. 37(a)), or imposition of sanctions for failure to comply with an order (FED. R. CIV. P. 37(b)) is sought. Under OHA regulations, however, if a person wishes to utilize discovery, he must file a motion to do so with OHA. 10 C.F.R. § 205.198 (1979).

A third difference relates to the timing of discovery. Under the Federal Rules of Civil Procedure discovery may generally be obtained anytime from the filing of the lawsuit until trial actually begins; the only significant exception to this being that plaintiffs may not take depositions upon oral examination "prior to the expiration of 30 days after service of the summons and complaint upon any defendant" without leave of court unless the defendant has sought discovery within the 30 day period. FED. R. CIV. P. 30(a). OHA regulations narrowly limit the time period during which a person may file a motion for discovery. As noted above, ERA begins an enforcement proceeding by filing a NOPV. 10 C.F.R. § 205.191 (1979). After 30 days, ERA may issue a proposed remedial order (PRO). *Id.* § 205.192. Once notice of the PRO is published in the Federal Register, an "aggrieved person" then has 15 days within which to file a Notice of Objection to the PRO. If a Notice of Objection is not filed within that time period, the person "shall be deemed to have admitted the findings of fact and conclusions of law as stated in the PRO . . . [and] the PRO may be issued as a final order." *Id.* § 205.193. A person then has 40 days after he has filed his Notice of Objection to file his Statement of Objections. *Id.* § 205.196. If a person intends to file a motion for discovery, he must file it at the same time he files his Statement of Objections. *Id.* § 205.198. Thus, persons generally are required to request all discovery they may want to employ within 55 days of the publication of the PRO.

layer of appellate judicial review to achieve this result. In short,

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OHA has indicated a strong reluctance to depart from this strict timetable. In Time Oil Co., [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82,542 (1979). OHA denied a motion for discovery which was filed after the time limitation had expired. *Time Oil* claimed that this motion should be granted under the provisions of the regulations which allow for extensions if cause can be shown. *See generally* 10 C.F.R. § 205.199G (1979). OHA stated that, while it is "more concerned with the merits of controversies than with mere procedural niceties and technicalities .... Time has already been given considerable procedural flexibility during the course of this proceeding ...." [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82,542. OHA also indicated that Time had neither indicated that discovery of this material was "critical" to proving its case nor "that the substance of this request differs substantially" from that of a prior request which had been partially granted. *Id.* Also, Time's motion of an evidentiary hearing on similar issues had been partially granted. Finally, Time had requested discovery here as an intervenor in a case brought by DOE against another oil company, and that company had opposed this discovery motion.

OHA has also denied a motion for discovery in a case where the party moving for discovery not only failed to file the motion within the proper time limitations but also failed to specify, as the regulations require (10 C.F.R. § 205.198(c) (1979)), the reasons why discovery was necessary. Mid-Continent Sys., Inc., [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82, 556 (1979). In addition, the Company had previously been granted an evidentiary hearing at which it could present testimony on issues identical to those for which it sought discovery. The company had, however, failed to comply with OHA requirements to identify witnesses and serve documentary evidence in advance on the other parties. Although the tight time requirement imposed by OHA can, in some circumstances, appear to be unreasonable, OHA generally is willing to accede to legitimate requests for extensions but not to allow dilatory motions to delay the proceedings.

A fourth difference relates to the persons to whom discovery is available. Under the Federal Rules of Civil Procedure, discovery is available only to parties. FED. R. CIV. P. 26(a). Under the OHA regulations, motions for discovery may be filed by persons who filed a Notice and Statement of Objections. 10 C.F.R. § 205.198 (1979). These Notices may be filed by any person aggrieved by the issuance of the PRO. 10 C.F.R. § 205.193(a) (1979).

A fifth difference relates to the type of issue for which an admission may be requested. Federal rule 36 permits requests to admit the application of law to facts. The OHA regulations governing discovery state that "[a] motion for discovery may request that ... [a] person admit to the genuineness of any relevant document or the truth of any relevant fact." 10 C.F.R. § 205.198(b)(3) (1979). OHA has interpreted the language "truth of any relevant fact" to include only requests to admit facts, and that requests to admit issues of law or the application of law to facts are impermissible under the regulations. William Herbert Hunt Trust Estate, [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82,525 (1979).

Though there arguably may have been problems with OHA's discovery processes, requiring that OHA adopt the Federal Rules of Civil Procedure for purposes of discovery would be an overreaction to these problems. The federal rules are designed to cover a very wide variety of circumstances, and broad procedures are necessary for the success of the rules in this wide variety of situations. OHA litigation is much narrower in scope and there is substantial similarity among the cases brought before OHA. OHA discovery procedures can and should be tailored to the specific needs of OHA litigation. Moreover, OHA's fear that discovery may be used as a delaying tactic is not unjustified, particularly in enforcement cases where there often may be an incentive on the part of those contesting remedial orders to delay the proceedings. For example, in the discovery sought in the case of Atlantic Richfield Co., No. BRZ-0015 (DOE Jan. 25, 1980), thousands of interrogatories were submitted by the oil companies to Office of Special Counsel. OSC estimates that it would require 60 professional person years to respond to these interrogatives. OSC Brief at 88. The

given a fair administrative adjudicatory process, one level of ap-

oil companies conceded that their requests were extensive, but noted that the amount in dispute in this case exceeds $1.2 billion. They also disputed the accuracy of OSC's estimation of the time required to respond. Reply Brief at 146-49. OHA's procedures give the agency much more flexibility in controlling this process and greatly lessen the likelihood of abuse by the litigants involved. In this regard, the federal rules discovery procedures hardly are models of efficiency. They have long been subject to abuse and a source of unnecessary delay. OHA's approach tries to avoid these pitfalls.

This is not to suggest, however, that in retaining such tight control over its discovery process, OHA has not been subject to intense criticism. This is particularly true with regard to its handling of discovery requests seeking to obtain an agency's contemporaneous construction of arguably vague and improperly applied regulations.

Perhaps the greatest problem throughout the oil pricing program has been the complexity of the oil pricing regulations which is often compounded by imprecision and vagueness. To a large extent, this is due not only to the magnitude of the regulatory task involved, but also to the hasty manner in which these regulations were drafted and the inability of understaffed agencies such as FEO and FEA to clarify these rules promptly and consistently. As a consequence, a good deal of litigation has arisen in attempting to give these regulations a precise meaning through the enforcement process. The meaning of these regulations to the enforcement offices of DOE, however, often is at odds with the way the industry has interpreted the relevant rules. The industry's interpretation, it is contended, was based on a reasonable reading of the regulation involved and often, assurances from various levels of FEA officials, staff and auditors in the field. Discovery of the interpretations given to its regulations by FEA personnel was thus viewed as an extremely significant aspect of these enforcement proceedings. Some district courts have granted such discovery requests.

In Standard Oil Co. v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978), for example, the Temporary Emergency Court of Appeals dealt with, among other things, FEA's rule requiring recovery of nonproduct cost increases. In regulations effective February 1, 1976, FEA announced that producers would be prohibited from recovering nonproduct cost increases before they recovered all product cost increases, as these terms were defined in the regulations. FEA announced that this ruling was implicit in its regulations and applied it both retrospectively and prospectively. Two months later FEA announced that it would not apply the rule prospectively but would continue to apply it retrospectively.

Although FEA claimed that the sequence of cost recovery was implicit in its regulations, it was nowhere explicit and was, in fact, contradicted by advice given by FEA staff to several oil companies. The Court recognized the well established principle "that where administrative regulations are ambiguous on their face, the court should look to the construction which the responsible agency has given to them." *Id.* at 1055. It went on to note, however, that "the weight to be given to an administrative interpretation depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.' " *Id.* at 1056. It thus concluded that evidence of the agency's contemporaneous construction of its own regulations was relevant and in this case the agency's construction showed little consistency or thoroughness. Indeed, the court stated that the usual deference given to administrative interpretations simply could not be given in this case.

> This rule is simply not applicable to the FEA's interpretation first announced on February 1, 1976.... The FEA relies upon an after the fact interpretation in the preamble to the new rule that, "The order specified in the new Section 212.85 is the same as that under the regulations previously in effect." Yet, it is undisputed that during the relevant period the only public pronouncements were made by officials of the Office of Compliance and the FEA auditors and were contrary to the interpretation set forth in the February 1, 1976 rule.

> . . . [W]e find no basis for according deference to the interpretation of the FEA first announced on February 1, 1976.

*Id.*

This case is a prime example of the importance of evidence dealing with the agency's contemporaneous construction of the regulations involved. It was initiated by several oil companies in district court seeking declaratory and injunctive relief against DOE. Thus, the companies were able to take advantage of the discovery procedures set forth in federal rules as well as the Court's inclination to interpret those rules broadly in developing their record. It is this kind of broad discovery which the litigants claim is lacking at OHA.

The office of Special Counsel generally has opposed motions for discovery of documents attempting to establish the agency's contemporaneous construction of its regulations. *See, e.g.,* Tenneco Oil Co. v. DOE, 475 F. Supp. 299, 316 (D. Del. 1979). The usual grounds for objection is that they are predecisional, internal agency memoranda which reflect "the mental processes of administrative decisionmakers" (Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)), and therefore, are not subject to discovery. United States v. Morgan, 313 U.S. 409 (1941). Given, however, the uneven history of the oil pricing program, the complexity of its regulations and the general state of flux that has existed ever since they first went into effect, questions involving the proper interpretation of the regulations can be particularly important in these cases. Though OHA initially has been very stringent in its approach to these questions, there are now signs that it has broadened its approach to this problem.

On January 25, 1980, OHA issued an opinion in Atlantic Richfield Co., No. BRZ-0015 (DOE Jan. 25, 1980), dealing with a variety of discovery motions filed by the companies involved. The thrust of these motions was to obtain discovery of the agency's contemporaneous construction of certain key regulations including those involving the proper interpretation of the "property concept," the stripper well property exemption, its applicability to newly designated properties as well as natural gas wells, and the definition of "posted price." OHA's opinion is significant in that for the first time it recognizes the need for this kind of discovery. The opinion attempts to strike a compromise between the extensive and exhaustive requests of the oil companies regarding contemporaneous construction of all regulations applicable to their case and a position that prohibits such discovery as a general matter. In effect, OHA's rule is as follows: "[C]ontemporaneous construction evidence is warranted if a showing is made that the regulation at issue is susceptible to more than one reasonable interpretation and is not given a more specific meaning through formal agency or congressional documents." *Id.* at 50-51.

In applying this approach to the discovery motions at hand, OHA granted several of the company's motions. For example, with regard to the agency's definition of property, a term whose meaning is absolutely basic to the multi-tier system of pricing adopted by the agency, OHA noted:

> Despite the apparent simplicity of the language used in the property definition, no official guidance was provided as to the application of the definition until the issuance of Ruling 1975-15, 40 Fed. Reg. 40,832 (1975), more than two years after the promulgation of the provision. No detailed guidance and no clear statement of the literal interpretation of the property definition was available until Ruling 1977-1 was first issued as a regulatory preamble in August 1976, three years after the crude oil price rule was put into effect.

*Id.* at 44. It went on to order discovery, concluding:

> Therefore, although we find in the language and history of the property definition and in the overall system for regulating the price of domestic crude oil strong support for a literal interpretation, *we are troubled by the checkered history of this provision.* While this should have been a provision free of doubt, *it is clear that the agency was slow to provide detailed guidance to affected firms despite knowledge that difficulties were being encountered.* We believe, therefore, that in the present proceeding the petitioners *should be afforded every opportunity to demonstrate that the agency's position has been inconsistent and that some meaning other than that described*

pellate judicial review, followed by an opportunity to petition the

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> *in Ruling 1975-15, Ruling 1977-1, and other public pronouncements of the agency is in fact the correct one.* Discovery of contemporaneous agency constructions of the property definition and the applications of the definition contained in the Rulings and the August 20, 1976 Notice will therefore be permitted.

*Id.* at 48 (emphasis added).

At the same time, OHA was careful not to allow discovery it sees as reopening matters already decided by the courts. Thus, it denied discovery requests with regard to certain regulations affecting stripper wells, noting:

> The Temporary Emergency Court of Appeals has explicitly stated that the regulations always limited the well count to wells that directly yield or produce crude oil and rejected the argument that the regulations could lead to a reasonable expectation that injection wells would be counted as "lacking in merit." . . . The Court has thus determined conclusively that the applicable regulations were not susceptible to more than one reasonable construction.

*Id.* at 51 (citation omitted).

OHA's opinion is not likely to quell all criticism of its discovery rules. Though it recognizes the principle of contemporaneous construction, it arguably does not go as far as the courts have gone under the federal rules. OHA limits such discovery by excluding statements made by non-policy makers such as auditors or low level FEA staff. According to OHA: "The agency's position may be stated only by those within the agency who have been given authority to formulate significant agency policy. . . . Therefore, the only relevant inquiry concerns official statements by responsible agency officials." *Id.* at 64. This does not go as far as the Court in *Standard Oil* where the statements of staff and auditors in the field were discoverable and admitted into evidence. OHA has reasoned that not only are such persons unable to speak for the agency, but "a requirement that the Office of Special Counsel search thousands of audit files would impose an unwarranted burden on that office." *Id.* OHA's opinion thus concludes:

> A document is discoverable if it was intended for dissemination within the agency and if, after analyzing the issues, it sets forth the considerations supporting the interpretations proposed. This category would include directives from senior officials or from the national office to regional offices of the agency, and other documents that may be said to reflect the effective law and policy of the agency. A responsible officer whose opinions are discoverable is one who has the authority to explain or formulate policy within the agency.

*Id.* at 65.

Given the relative chaos that marked the beginnings of the oil program, it is arguable how common such reasoned memoranda are. Nevertheless, OHA's recognition of the contemporaneous construction principle is significant. Its desire to draw a line limiting broad requests seeking any and all statements by present and past employees is understandable. The line that it does draw may prevent burdensome discovery requests. But it may also prevent the discovery of the only conflicting interpretations that, in fact, exist. Given that OHA would not accord much or any weight to the statements of those who were not in policymaking positions, drawing such a line may be reasonable. To the extent that a court reviewing OHA's record might give greater deference to the conflicting interpretations of low level staff and auditors, however, prohibition of this kind of discovery could be significant.

On balance, it cannot be said that OHA's position is unreasonable. Arguably, it may be possible to go a bit further so as to ensure a complete record without necessarily being subject to undue delay. In cases where no national level documents of the sort described by OHA exist and the regulations involved are ambiguous, OHA should not rule out completely the possibility of granting further limited discovery of lower level employee state-

Supreme Court for a writ of certiorari, should suffice.[284]

## IV

## Procedural Recommendations

If Congress abolishes FERC and district court reviews, then OHA's enforcement procedures must be assessed in a new light. They alone will protect the interests of the parties involved, short of appellate review by the Temporary Emergency Court of Appeals. This section analyzes the adequacy of OHA's procedures and the reforms they suggest in that light, and in terms of their appropriateness for DOE and for purposes of APA reform in general.

Congress and courts have, of late, virtually ignored the informal rulemaking provisions of the APA.[285] Various forms of hybrid rulemaking have developed on an ad hoc, agency by agency basis. The end result is a crazy quilt of rulemaking provisions;[286] however, there has been relatively general acceptance of the APA's adjudicatory model in contexts that require trial-type proceedings.[287] Congress' decision continually to exempt the agencies involved with the administration of the oil program from the adjudicatory provisions of the APA is, thus, somewhat unusual.[288] Though the initial rationale for this exemption was the

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ments and memoranda, particularly if the requests are reasonably specific and would not necessarily involve a general search of all OSC's files. The weight accorded such evidence may not be substantial, however, and may be more significant in cases alleging willful violations than in the typical civil overcharge proceeding.

[284] At present, the primary appellate reviewing court for oil pricing decisions is the Temporary Emergency Court of Appeals. It is not a completely specialized court in that it consists of judges from various circuits who hear the whole range of cases that come to federal court. Similarly, it can sit in various parts of the country and is not restricted to one geographical location. The primary reasons for establishing a specialized appellate court were speed, expertise, and a uniform national policy on oil pricing decisions. A complete examination of the need for, and efficiency of, such a specialized court of appeals is beyond the scope of this Article; however, the merits of continuing this approach, particularly where the emergency program has turned into a long-term regulatory program, certainly are open to question.

[285] *See* Scalia, *supra* note 14, at 348-56, 386-88.

[286] *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 Calif. L. Rev. 1276, 1313-30 (1972); Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. Chi. L. Rev. 401, 425-36 (1975).

[287] Of course, one of the persistent problems of the administrative process has been the inappropriate use of APA trial procedures to resolve essentially policy issues. *See* Boyer, *supra* note 16, at 111-14; *see generally* Pierce, *The Choice Between Adjudicating and Rulemaking For Formulating and Implementing Energy Policy*, 31 Hastings L.J. 1, 27-31, 65-66 (1979).

[288] *See* note 240 *supra*.

temporary, emergency nature of the oil price controls program, this reasoning could not justify continuing the exemption when Congress created the Department of Energy, over four years after the OPEC embargo.

Congress' decision to extend the exemption and, presumably, thereby to preserve agency flexibility[289] resulted in the procedural alternative to APA adjudication set forth in section 503 of the DOE Act. The procedures required by that provision do not radically depart from the conventional application of the APA model;[290] however, they do provide a basis for comparison with the APA. This section focuses on three questions: (1) Does DOE's application of section 503 in remedial order proceedings differ from conventional APA adjudication in terms of the balance struck among such criteria as efficiency, accuracy and acceptability?[291] (2) If so, is this an appropriate balance for DOE enforcement proceedings? and (3) Can we generalize from DOE's experience and thereby suggest APA reforms? For various reasons, some of which are set forth below, the quest for a generally applicable APA is an elusive, but worthwhile goal.

### A. *A Uniform Approach*

The differences among agencies should not preclude entirely the search for fundamental procedural similarities. Enforcement proceedings are, for example, common to most agencies. Though the substance of these proceedings as well as the available sanctions vary, it is useful to consider whether these differences can be accommodated under a uniform act like the APA, whether the APA should be amended to ensure greater flexibility in such proceedings, or whether change on an agency by agency basis is a more appropriate way of achieving administrative reform.

There are several reasons why attempting to maintain a more uniform approach to procedure by modernizing and revitalizing the APA can have salutary effects on the administrative process. It might produce a statute that Congress generally would rely on when drafting substantive regulatory legislation. A reliable uni-

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[289] *See* text accompanying note 170 *supra*.

[290] *See* Byse, *supra* note 38, at 207-09.

[291] It is important to note that although OHA's procedures are not required by § 503, they are in accord with that section's general provisions and thus can be used in this section as a means of analyzing at least one set of the procedures that are allowed under this statute.

form procedural statute might then stem the present trend toward using procedure as a commodity to be bartered in the political bargaining process.[292] Depoliticizing procedure, thus, might have the effect of encouraging a more productive debate over the substantive complexities of future regulatory programs.[293]

Furthermore, while one might argue that the current spate of hybrid rulemaking procedures[294] is the result of necessary procedural experimentation to update the informal rule-making provisions of the APA,[295] such agency by agency experimentation may not be needed when trial type proceedings are, in fact, appropriate. The APA approach in such cases is sound and far more flexible than conventional interpretations usually allow.[296] It should not be abandoned lightly. This does not, however, mean that it cannot be improved. The following sections will examine OHA's procedures with this goal in mind.

Because the appropriateness of trial-type proceedings in enforcement cases turns, in large part, on the nature of the case and the sanctions sought, analysis should begin with a brief examination of APA enforcement proceedings in general, followed by a more detailed analysis of OHA's approach.

### B. *Conventional APA Enforcement Proceedings*

The primary purpose of agency enforcement proceedings is to determine whether a particular company or individual has violated the law and, if so, to impose an appropriate sanction. The APA defines sanction very broadly. It includes not only proceedings to impose fines or penalties, but a variety of other remedies including damages and restitution.[297] Regardless of the sanction

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[292] *See* Scalia, *supra* note 14, at 400-09 (espousing desirability of uniform procedure, but acknowledging that such a result is very difficult to achieve); *but cf.* 1 K. Davis, *supra* note 207, § 2:19, at 145 (procedural experimentation by courts and legislatures has had desirable effects).

[293] *See* text accompanying note 222 *supra* (substance should be considered prior to procedure).

[294] *See* Hamilton, *supra* note 286, at 1277, 1313-32.

[295] For a discussion of the post-APA changes underlying administrative law and the need for different procedural approaches to accommodate these changes, particularly with regard to informal rulemaking, *see* Scalia, *supra* note 14, at 375-88. *But see* Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 Nw. U.L. Rev. 1, 21-23 (1977); 1 K. Davis, *supra* note 207, §§ 6:1, 6:2.

[296] *See* Verkuil, *supra* note 233, at 313-317; note 301 *infra*.

[297] The APA defines sanction as follows:

involved, however, determining whether it should be applied requires the application of law to facts which already have occurred in an attempt to determine "who did what, where, [and] how."[298] Policy reasons inevitably come into play; but with a retrospective fact-finding process, the primary focus of the proceeding is on the alleged violations of agency regulations by a particular party and, thus, on facts usually within the purview of that party.[299]

APA trial-type proceedings are appropriate for enforcement proceedings. The APA provides an opportunity to develop a relatively complete evidentiary record before an impartial decision-maker.[300] This usually entails an oral evidentiary hearing before an administrative law judge with the burden of proving wrongdoing on the government.[301]

### C. *OHA Enforcement Proceedings*

OHA procedures differ from conventional APA adjudication in two primary ways: (1) an oral evidentiary hearing need not be

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"sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action. . . .

5 U.S.C. § 551(10) (1976). *See* Verkuil, *supra* note 233, at 296. Professor Verkuil notes that this definition is overbroad and recommends omitting (B) (F) and (G) from this definition. *Id.* at 296 n. 188. As will be shown, however, there are good reasons to consider narrowing the term even further or in the alternative, providing for more flexible trial-type procedures when certain kinds of "sanctions" are involved. *See* text accompanying notes 324-330 *infra*.

[298] 2 K. Davis, *supra* note 207, § 12:3, at 413.

[299] *See* Cramton, *supra* note 16, at 585.

[300] 5 U.S.C. §§ 554, 556 & 557 (1976). *See generally* Pedersen, *supra* note 238, at 1002-05.

[301] *See* 5 U.S.C. §§ 554, 557 (1976); 2 K. Davis, *supra* note 207, § 10:7, at 332-33. The APA, however, is far more flexible than conventional interpretations would suggest. For example, cross-examination need not be allowed in every case; further, some cases do not require the presence of an administrative law judge. *See* Verkuil, *supra* note 233, at 313-317. Indeed, as § 556 makes clear, the Commission can preside at the initial hearing. Under § 557(b), the Commission also can require that the record be certified to it prior to an initial decision by the presiding officer.

The practice of using staff members as trial judges, however, generally has been discontinued in favor of using administrative law judges. *See generally* Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 Duke L. Rev. 389, 392-93. *See generally* J. Freedman, *supra* note 209, at 161-71.

granted in some cases even when there are material issues of fact in dispute;[302] (2) OHA does not use administrative law judges.[303] Both of these differences offer a basis for considering changes in conventional APA enforcement proceedings. Analysis of these changes cannot, however, take place in a substantive vacuum.

Procedural reforms often have as their catalyst substantive demands that require new modes of implementation and, perhaps, enforcement as well. The complexity, intricacy and the ambitious nature of the regulations involved quite naturally have an effect on the procedures which implement and enforce them. From OHA's point of view, for example, the financial, engineering, and legal questions involved often require more of a team approach to adjudicating contested remedial orders. The expertise of various OHA members, lawyer and non-lawyer alike, are called upon. The model of an aloof, independent solitary judge thus is rejected in favor of a presiding officer, who may or may not be a lawyer and, in any event, is openly assisted from time to time by a team of experts.

Another salient characteristic of these proceedings is that, in the final analysis, even factually complex cases frequently turn on the legal interpretation of complex and often ambiguous regulations.[304] Though the facts are complicated and difficult to sort out, they often are not in dispute.

Finally, in virtually all of the oil pricing cases pending at or decided by OHA, the sanction sought has been a refund of the amount of alleged overcharges, plus interest.[305] Willfulness is not alleged and criminal sanctions are not invoked. Nor are civil penalties or fines sought.[306] The degree of the alleged violator's

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[302] *See* note 308 *infra*.

[303] Those presiding at hearings are members of the OHA staff, deputy directors of OHA and often, the director himself. Since OHA utilizes a multi-disciplinary staff that includes not only lawyers, but accountants and economists as well, the presiding officer may or may not be a lawyer. A team approach often is employed. The expertise of various staff members may be called upon in the course of a case.

OHA procedures also differ from the APA in that they allow for discovery. The APA neither provides for nor prevents agency discovery procedures. Application of OHA's provisions, however, has generated considerable controversy. *See* note 47 *supra*. A more detailed examination of these procedures than that set forth in note 47 is beyond the scope of this Article.

[304] *See* notes 324-330 *infra*.

[305] Interview with Anthony Miles, Assistant General Counsel, DOE, in Washington, D.C. (Feb. 28, 1980). This article assumes this amount will, to the extent possible, be returned to consumers.

[306] As one commentator has noted:

culpability, thus, is not an issue in the administrative proceeding.[307] The sole question is whether the regulations were violated and restitution is now in order. It is within this substantive and remedial context that OHA's procedures should be assessed.

1. *Beyond Summary Judgment*

*a. Present Procedure.* OHA's procedures reflect a policy against unnecessary oral evidentiary hearings. What is necessary or unnecessary, however, is determined primarily from the agency's point of view. Oral hearings are granted only if the presiding officer "concludes that a genuine dispute exists as to relevant and material issues of fact *and* an evidentiary hearing would substantially assist [OHA] in making findings of fact in an effective manner."[308] In deciding whether or not to grant a motion for an oral evidentiary hearing, the presiding officer in an OHA proceeding possesses considerably more discretion than a federal trial judge ruling on a motion for summary judgment under rule 56.[309] Unlike a federal judge, an OHA presiding officer may, in some cases, conclude that despite the fact that there is a material issue

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> With respect to civil penalties, DOE has recognized that it does not have authority to impose such penalties itself and must instead refer such cases to the Justice Department for prosecution in the federal courts [ERA Enforcement Manual (CCH) ¶¶ 55,000, 55,100 (1979)]. However, DOE does compromise, settle and collect civil penalties whenever deemed advisable. 10 C.F.R. § 205.203(b)(2) (1979). A determination of the propriety of seeking civil penalties requires an examination of whether the violation was the result of an "honest mistake," in which event penalties are inappropriate. [ERA Enforcement Manual (CCH) ¶ 55,051 (1979)]. Criteria for determination of the amount of penalties sought to be assessed and whether to negotiate those penalties focus upon the magnitude of the violation, the reasonableness of the offender's conduct and the necessity for deterrence. See [ERA Enforcement Manual (CCH) ¶¶ 55,052, 55,053].

Trowbridge, *supra* note 136, at 209 n.51.

[307] *Id.*

[308] 10 C.F.R. § 205.199(e) (1979) (emphasis added). Pursuant to 10 C.F.R. § 205.199(b) (1979) a litigant desiring an oral evidentiary hearing, shall with respect to each disputed or alternative finding of fact:

> (1) As specifically as possible, identify the witnesses whose testimony is required;
> (2) State the reasons why the testimony of the witnesses is necessary; and
> (3) State the reasons why the asserted position can be effectively established only through the direct questioning of witnesses at an evidentiary hearing.

*Cf.* 10 C.F.R. § 205.64 (1979) (in exception, rather than enforcement, proceedings the movant must prove that of the several methods of resolving disputed factual issues—submission of written documents, interrogatories, depositions, and evidentiary hearings, in that order of preference—only an evidentiary hearing will be effective in the case at hand).

[309] FED. R. CIV. P. 56. *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2714 (1973).

of fact in dispute, an oral evidentiary hearing is, nevertheless, unnecessary.

Explicitly granting the agency such discretion makes good sense and represents a useful clarification of the present APA.[310] If an accurate decision can be reached in certain cases without oral testimony, efficiency dictates that the agency have that option available. Moreover, OHA's "summary judgment plus" approach makes it more likely that an agency will deny requests for oral hearings it deems unnecessary than if an ordinary summary judgment rule were in effect.

Reversal of trial court summary judgment decisions are common and relatively easily obtained. Courts have long interpreted rule 56 of the FRCP very stringently.[311] Though there are a number of reasons why courts should treat agency summary judgment decisions differently than those of a federal trial court,[312] agency summary judgment rules hold meaning only if

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[310] 5 U.S.C. §§ 553-558 (1976). The APA provides "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d). Presumably, there are cases in which only documentary evidence is required and cross-examination is not necessary for "a full and true disclosure of the facts." This clearly would seem to be the case when no facts are in dispute, but this may not be the case where material issues of fact are in dispute. In any event, § 556(d) of the APA sets forth certain categories of cases in which an oral hearing may be denied, arguably even when there are outstanding factual disputes.

> In rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 556 (1976). OHA's approach would appear to go one step further. It makes clear that even in enforcement cases seeking restitution where issues of material fact may be in dispute, an oral hearing is not necessarily required.

For a general discussion of the summary judgment approach in agency litigation, see Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

[311] *See, e.g.*, C. WRIGHT & A. MILLER, *supra* note 309, § 2716 (appellate court will read record in light most favorable to party opposing motion).

[312] *See generally* Gellhorn & Robinson, *supra* note 310, at 616, 628-31. One major difference is that courts need not worry over depriving a jury of its right to find the facts. In agency adjudication, of course, there are no jury trials.

As Professors Gellhorn and Robinson also point out, however, how a summary judgment rule actually will be applied will differ from agency to agency. *Id.* at 615. Moreover, the presence or absence of agency discovery rules also affects whether or not such a rule can be applied. *Id.* at 617-18. Though there has been a good deal of controversy over OHA's application of its discovery rules in enforcement cases (*see* note 283 *supra*) it would appear that, in most cases, the discovery opportunities authorized by OHA are sufficient to enable a summary judgment approach.

the body exercising them can be assured that its decisions are insulated from mechanical judicial review and consequent reversal on appeal. Given the complexity of OHA enforcement cases and the relative ease of putting at least some issue of fact into dispute, a summary judgment rule tracking federal rule 56 might invite a similarly stringent judicial approach to the agency's summary judgment rule. The Agency would then have little incentive to avoid what it considered an unnecessary hearing: given the likelihood of reversal, the most efficient course would be to hold an oral evidentiary hearing in the first instance.

OHA's "summary judgment plus" approach, however, requires a court to determine not only whether there is a material issue of fact involved, but whether the agency properly concluded that an oral evidentiary hearing would not materially assist it in making its findings of fact. The later part of this standard provides the opportunity for a reviewing court to defer to the agency's judgment when determining whether an oral evidentiary hearing would have been appropriate to resolve that issue. Wording the agency's rule so as to encourage more deferential judicial review makes agency summary judgment a more realistic administrative tool.

b. *Present Practice.* In practice, OHA seldom has gone as far as its regulations authorize. In most cases, it has taken a traditional summary judgment approach. Oral hearings usually have been denied because no material issues of fact were in dispute.[313]

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[313] OHA examines the issues which the party desiring the evidentiary hearing wishes to raise in great detail. If the movant does not supply the detailed information required by the regulations his motion will be denied. Karchmer Pipe and Supply Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,576 (1979), Armstrong Petroleum Corp., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,538 (1979), Eagle Enterprise, Inc., [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,572 (1978).

If OHA finds that there is a genuine factual dispute which is relevant to the issuance of the PRO, the motion for an evidentiary hearing generally will be granted at least as to that particular issue. For example, in Greene's Transport Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,505 (1979), OHA granted an evidentiary hearing on the issue of whether the company had voluntarily lowered its prices to its customers in order to refund a portion of previous overcharges. If the company had done this, the amount of the voluntary rebate would offset liability under the PRO. *See also* Mid-Continent Sys., Inc., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,522 (1979). In Time Oil Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,512 (1979), OHA granted an evidentiary hearing on whether the class of purchasers in which Time was placed in the PRO was in fact the most appropriate class. In Ross Prod. Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,524 (1979), OHA granted an evidentiary hearing to allow the company to introduce factual evidence which was essential to determine whether the company's well was properly classified as not being a stripper well. In J.R. Parten, [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,541 (1979), OHA granted an evidentiary hearing on the geological structure of the tract in dispute. In Boswell Oil Co., [1979

As noted above, this is due to the fact that many of the major battles in recent oil pricing proceedings center on the proper in-

Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,557 (1979), OHA granted a hearing to permit cross-examination of a law professor on the meaning of a disputed term and to develop contemporaneous construction of Cost of Living Council regulations. *But cf.* Champlin Petroleum Co. [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,554 (1978) (party may not elicit testimony from DOE officials).

OHA has denied motions for evidentiary hearings on at least five bases. The first is that, although there may be a factual dispute in the case, the dispute is irrelevant to the PRO. For example, in Howell Drilling Inc., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,540 (1979), Howell wanted to introduce evidence that the posted price which DOE used in the PRO was not the highest price paid for oil from the field. OHA said that this fact was irrelevant because DOE determined the posted price in accordance with its regulations. The regulations and not industry practice determine what the correct posted price is. *See also* Glenn Martin Heller, [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,579 (1979); Karchmer Pipe and Supply Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,576 (1979); HNG Oil Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,511 (1979); Mobil Oil Corp., [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,575 (1978).

The second basis on which OHA has denied a motion for an evidentiary hearing is that the dispute is legal, not factual. For example, in Amerada Hess Corp., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,561 (1979), Hess wanted a hearing to present evidence to dispute the correctness of DOE's position on the types of sales Hess had made and on the burden which complying with the PRO would place on the company. The motion was denied because the dispute over types of sales was one of legal characterization. In addition, Hess offered OHA no alternative, less burdensome means by which to accomplish the enforcement objectives of the PRO. *See also* Glenn Martin Heller, [1980] 6 EN. MNGM'T (CCH) (4 DOE) ¶ 82,579 (June 8, 1979); Monterey Producing Co., [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,576 (1978).

The third basis on which OHA has denied a motion for an evidentiary hearing is that absent a preliminary showing of bad faith, no inquiry may be made into the mental processes by which agency personnel determined that a PRO should be issued. *See, e.g.*, Karchmer Pipe and Supply Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,576 (1979); Corpus Christi Management Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,539 (1979).

The fourth basis upon which OHA has denied a motion for an evidentiary hearing is that there is in fact no factual dispute in the case. In Lindsey & Elliot, [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,520 (1978), Lindsey wanted to hold an evidentiary hearing on the nature of production at its well. DOE stated that it did not dispute any of the factual assertions which Lindsey made. There was, therefore, no need for an evidentiary hearing.

The fifth basis upon which OHA has denied a motion for an evidentiary hearing is that little value is expected to come from holding a hearing. In Special Counsel, [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,519 (1979), the Office of Special Counsel had moved to strike documents from the record as "vague, immaterial, and irrelevant." OHA, while conceding that these documents were of little value, nonetheless denied OSC's motion. It also, however, denied the motion of an intervenor oil company for an evidentiary hearing to cross-examine the authors of the documents. "The time and expense associated with convening an evidentiary hearing for this purpose at this time outweigh the probative value of the evidence that would be adduced." *Id.*

A movant for an evidentiary hearing must demonstrate that evidence of value directly related to the case will come from the hearing. OHA will not grant a motion for an evidentiary hearing if it suspects that delay or a fishing expedition are the prime objectives. "Evidentiary hearings are intended to aid the DOE in deciding demonstrated issues of fact,

terpretation of the regulations involved, not on factual disputes.[314] Nevertheless, the rule should not even theoretically give the agency unfettered discretion to deny requests for oral evidentiary hearings when issues of material fact are in dispute. Clear standards and criteria should circumscribe the authority of the agency in deciding when a hearing would "substantially assist . . . in making findings of fact in an effective manner."

In an attempt to meet this need, OHA's opinions have, over time, developed various criteria. OHA will, for example, grant an oral hearing when an issue of material fact is in dispute and its resolution requires an assessment of the credibility of the witnesses involved[315] or an oral hearing will contribute to a better understanding of the issues involved.[316] With regard to this latter determination, OHA has stated that at least three additional factors may come into play: (1) the probative value of the evidence which the firm intends to establish at the hearing; (2) the time and expense involved in holding the evidentiary hearing; and (3) the probability that the evidence can be satisfactorily presented

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not to provide firms with the opportunity to create such issues." Gas del Oro, Inc. [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,526 (1979).

OHA has generally granted motions for evidentiary hearings in remedial order cases. In 1979, OHA decided 19 remedial order cases which contained motions for evidentiary hearings. Of those cases, the motions were granted in whole or in part in 11 cases. The motions were denied in the remaining 8. Two of those opinions, however, expressly allowed the movant to renew his request if examination of documentary evidence provided under the decision did not give the information he sought. Glenn Martin Heller, [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,579 (1979), Corpus Christi Management Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,539 (1979). Of the other four, only one of these proceedings had what one might arguably characterize as questions of material fact. HNG Oil Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,511 (1979). In the remaining six, the oil companies did not comply with OHA regulations regarding evidentiary hearings. *See, e.g.*, Armstrong Petroleum Corp., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,538 (1979); Karchmer Pipe and Supply Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,576 (1979).

[314] *See, e.g.*, Atlantic Richfield Co., No. BRZ-0015 (DOE Jan. 25, 1980). In deciding whether or not to grant discovery of contemporaneous constructions of agency regulations, OHA set forth, in detail, the history of some of the vague, but nevertheless fundamental regulations involved. As this opinion makes clear, much of the recent litigation revolves around the meaning of certain key regulations. *See also* Standard Oil v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978); Coastal States Gas Corp. v. DOE, No. 79-2181 (D.C. Cir. Feb. 15, 1980).

[315] *See, e.g.*, Petroleum Management, [1978 Transfer Binder] En. Mngm't (CCH) (2 DOE) ¶ 82,555 (1978).

[316] *See, e.g.*, Atlas Gas Co., [1978 Transfer Binder] En. Mngm't (CCH) (2 DOE) ¶ 82,566 (1978).

and considered through a process other than an evidentiary hearing.[317]

c. *Assessing OHA's Approach*. OHA's criteria help to ensure accuracy and efficiency in the decision-making process. When cases turn on the credibility of the witnesses involved, accuracy is enhanced by live testimony. But when resolution of conflicting facts turns, for example, on resolving a dispute over which accounting methods may or may not be appropriate, neither efficiency nor accuracy is always served by oral testimony. OHA, thus, reserves the right to deny an oral hearing in such cases.

The value of an oral evidentiary hearing, however, usually is assessed differently by the litigants involved than by the agency. From the point of view of the alleged violator, an oral evidentiary hearing is not only a means of building a record, but also an opportunity to persuade and educate the decision-maker. Indeed, the opportunity for advocacy provided by an oral hearing often is viewed by litigants as a significant part of the fairness of the decision-making process. During the course of the hearing, the attorneys involved attempt to determine how the presiding officer views the case, what arguments are likely to prevail or encounter difficulty and, consequently, the approaches to the case that are most likely to increase the possibility of success on the merits. In short, hearings play a role that goes beyond simply compiling a record. They provide an opportunity for the attorneys involved to engage in an extended on-the-record dialogue with the decision-maker.

OHA's procedures, however, provide for oral argument as a matter of right. Thus, even if denied an oral evidentiary hearing, the losing party can argue the meaning of the documentary evidence involved, attempt to explain its significance as well as contend why any factual disputes that may exist should be resolved in its favor. This preserves the advocacy elements of an oral hearing without necessarily confusing this purpose of an oral presentation with the record formulation function such hearings provide. OHA's approach to oral evidentiary hearings thus attempts to balance the needs of the agency to reach an accurate decision in an efficient manner with the litigants' perception of the fairness of the process.

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[317] *See* C & H Refinery, Inc., [1977-1978 Transfer Binder] EN. MNGM'T (CCH) (1 DOE) ¶ 82,561 (1978).

The balance struck by OHA seems appropriate, particularly given the context of these enforcement proceedings. The cases before OHA usually involve corporate entities charged with presumably unintentional violations of complex and intricate pricing regulations. The remedy sought is a form of restitution. In such proceedings, fairness, from the point of view of what will fully satisfy the litigants involved, should be strongly tempered by such competing values as accuracy and efficiency. Unlike a decision to terminate an individual's welfare or social security benefits, a determination that a corporate entity has inadvertently charged an unlawful price for its oil does not directly involve the worth or dignity of a particular human being.[318] Nor can such proceedings be closely analogized to criminal cases. The kind of stigma or social opprobrium that attaches to one convicted of a crime is not likely to be associated with a company that unintentionally violates certain pricing regulations.[319] Though such violations, particularly with regard to large oil companies, are widely publicized and may temporarily affect the company's reputation, this is a far cry from the stigma that attaches to an individual convicted of bank robbery or any serious felony. The effects of such a conviction are likely to follow that individual for the rest of his life. An order requiring a company to refund unintentional overcharges to its customers, however, is not likely to tarnish the company's reputation for the indefinite future. This is particularly true when civil penalties are not sought and degrees of culpability are not in-

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[318] *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49 (1976). Professor Mashaw sets forth a number of approaches for determining how much process is due including a dignitary model that is particularly appropriate in welfare or social security proceedings. Of course, individuals within the company who are directly responsible for oil pricing matters may be adversely affected by these determinations in that it may reflect poorly on their performance. Similarly, shareholders and the corporate hierarchy in general may be affected if huge pay back obligations are imposed. This kind of impact, however, substantially differs from welfare or social security cases where a particular person stands to lose the sole or primary basis of his or her livelihood because of an administrative determination.

[319] To some extent, however, the stigma involved will vary with the industry and the violation charged. For example, a charge that an airline has flown unsafe airplanes may have more of an impact on that company's reputation and consequently its future business than a charge that a company has over time unintentionally charged too high a price for its oil. The effects of that violation are dispersed throughout the economy and it is often difficult to identify all or even most of the actual consumers who may have overpaid. In any event, the airline cases are likely to result in a sanction that requires payment of an actual penalty or fine, rather than a form of restitution.

volved in the case. Under such circumstances, these proceedings are somewhat akin to those in which the government claims that a rate charged by the company was, in retrospect, too high and now must be refunded.[320]

This is not to suggest, however, that the charge that a corporate entity, large or small, has violated the law is not serious or that the interests of corporate litigants are unimportant. The law demands respect whether a violation results in criminal or civil penalties or other sanctions. Agency regulations setting forth maximum prices for the sale of crude oil or, for that matter, the maximum amount of air or water pollution that will be tolerated, represent a collective political judgment to establish certain rules aimed at preventing or at least minimizing the likelihood of a perceived societal harm. Violations are serious. But a charge that a company has unintentionally violated the complex regulations that attempt to carry out such goals usually implies that the company has interpreted differently the regulations' applicability or meaning. At worst, the company may have lacked sufficient diligence in carrying out its legal obligations. Trial-type proceedings are appropriate for such cases, but the procedures employed need not play a symbolic or therapeutic role.

d. *Recommendation.* OHA's "summary judgment plus" approach, coupled with an opportunity to present oral argument as a matter of right, enables an agency to avoid unnecessary oral hearings without unduly prejudicing the rights of the regulated companies involved. This approach would appear to be au-

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[320] For an example of such file and suspend laws, see Natural Gas Act, 15 U.S.C. § 717c(e) (1976). Under that Act companies may file and collect a particular rate, subject to refund after a proceeding to determine its justness and reasonableness. Of course, the price controls approach inherent in the EPAA and its regulations represents a different regulatory approach than the cost of service ratemaking approach utilized under the Natural Gas Act. Nevertheless, the vagueness and complexity of the regulations involved introduce a good deal of uncertainty and discretion in setting the appropriate price. Moreover, the similarities to cost of service ratemaking are more striking when one factors in OHA's exceptions process. As one report has noted with regard to the old FEA approach in this area:

> FEA has established the principle of granting relief from lower tier crude oil pricing restrictions where significantly increased production costs leave a firm with little or no economic incentive to produce crude oil from existing wells on a developed property . . . .
>
> The decision thus represents a substantive determination by FEA to modify the crude oil pricing mechanism for a single firm solely to encourage additional production from existing properties . . . . The procedure necessarily involves regulation of the rate of return on new producing investments.

PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 113-15.

thorized if Congress were to make section 503 of the DOE Act applicable to OHA.[321] Arguably, OHA's approach might even be authorized under the adjudicatory provisions of the present APA.[322] Given the value of such an approach, however, Congress should consider amending the APA to make this option explicit for all agencies. In so doing, the APA definition of sanction should be re-evaluated.

e. *Amending the APA.* The present APA's definition of sanction includes not only penalties and fines but a wide variety of other options including "assessment of damages, reimbursement, restitution, compensation costs, and charges in fee." [323] Such sanctions, however, differ in many ways. They differ in terms of their respective degrees of severity as well as the nature of the substantive proceedings necessary to impose them. They also differ in the role the government plays when it seeks to impose them. In a civil proceeding, monetary penalties and fines, for example, generally are viewed as severe, not only because of the dollar amounts that may be involved, but because of the role that the government plays as well as its relationship to private property. The government's role is prosecutorial in nature. Though the long run goal of such cases may be to deter future violations, the primary purpose of the proceeding is punitive in nature. Degrees of culpability, short of willfulness, usually must be determined to assess the appropriate fine.[324] The fine itself represents an authorized taking of private property. In such accusatory cases not only are

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[321] Section 503 states:

> The Commission shall, upon request, afford an opportunity for a hearing, including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination.

42 U.S.C. § 7193(c) (Supp. I 1977). The language "oral or documentary evidence"could be read to allow for documentary evidence even when issues of fact are in dispute. This language is, of course, similar to that used in § 556(d) of the APA, but § 503 provides the opportunity for a new and more liberal interpretation of this phrase. Of course, the language "and oral arguments" would appear to make the opportunity for oral arguments mandatory, as is now the case at OHA.

[322] *See* note 310 *supra*. Conventional APA adjudication in enforcement prodeedings, however, usually would provide a hearing if material issues of fact were in dispute. In any event, it is unlikely that APA formal adjudication would require those seeking an oral hearing to make as elaborate a showing of the need for such a proceeding as is now required by OHA.

[323] 5 U.S.C. § 551(10)(E) (1976).

[324] *See* note 306 *supra*.

trial-type proceedings appropriate,[325] but close procedural questions generally are resolved in favor of the accused.[326]

In a proceeding whose purpose is solely to obtain a refund of alleged overcharges by a particular company, neither willfulness nor degrees of culpability are involved. Though companies involved initially argue that they are in compliance and thus, the government's action similarly can be viewed as an attempted taking of their property, such cases nevertheless differ from penalty or fine proceedings. The underlying premise of these proceedings is that the amount of alleged overcharges in contention arguably belongs to the public, not the company. If the government prevails, what is refunded presumably belonged to the public all along. A taking in the sense of a penalty or fine is not involved, unless one is willing to view the statutes and regulations establishing the maximum prices to be charged as a taking of private property. The income redistribution effects of such statutes and regulations, however, are not particularized in purpose or effect. They are industry-wide in scope and impact and, usually, clearly within Congress' legislative powers.[327]

Furthermore, in restitution proceedings, the government's role is somewhat less prosecutorial in nature and more akin to that of a negotiator or bargaining representative on behalf of the public at large. Overcharge cases represent disputes over the price the public is entitled to pay for crude oil under the law. Due to the complexity and ambiguity of the regulations involved, the resolution of such disputes is by no means a foregone conclusion. Though the aggregate amounts involved can be enormous, the individual amounts often are not significant enough to make private actions asserting overcharges particularly likely or effective.[328] The government's role is primarily to assert and protect the public's interest in resolving such disputes, not necessarily to punish wrongdoing.

In short, restitution, in the context of proceedings involving allegations of unintentional overcharges, can and should be dis-

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[325] *See generally*, Pedersen, *supra* note 238, at 993.

[326] Verkuil, *supra* note 233, at 295. Of course, in cases where penalties are threatened but not imposed, more formal procedures may be necessary even though a lesser sanction ultimately is selected.

[327] The constitutionality of the EPAA was implicitly upheld in Condor Operating Co. v. Sawhill, 514 F.2d 351, 359-62 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975).

[328] *But see* Mode, *supra* note 144, at 102-08. Large purchasers, of course, may have a significant interest in bringing a private action against their suppliers. In general, however, smaller consumers will not.

tinguished from penalties or fines. Congress should amend the APA definition of sanction so as to narrow its scope.[329] In the alternative, different categories of sanctions should be established. For sanctions such as restitution the agency should have the option of utilizing more flexible adjudicatory procedures. These should include, at a minimum, the explicit opportunity to make a decision "on the papers" even when material issues of fact arguably may be in dispute.[330]

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[329] One commentator recommends narrowing the scope of the APA definition of sanction where fairness requires adjudicatory procedures, but would retain penalties and fines as well as restitution in the new definition. Verkuil, *supra* note 233, at 296 & n.189, 321-22.

[330] Various bills now pending in Congress seek to amend the APA. *See, e.g.*, S. 262, 96th Cong. 1st Sess. (1979); S. 755, 96th Cong. 1st Sess. (1979); S. 1291, 96th Cong., 1st Sess. (1979). Of particular importance for purposes of this discussion is the fact that both S. 262 and S. 755 incorporate a summary judgment approach at least somewhat similar to that used by OHA. Section 204(c)(3) of S. 262, for example, would provide for the opportunity for a paper hearing even in cases where formal adjudicatory procedures are appropriate. It would amend section 556(b) of the APA by adding the following:

> The presiding employee may require the submission of evidence in written form, or the conduct of cross-examination in written form, if oral presentation of testimony or oral cross-examination is not required for a full and true disclosure of relevant evidentiary facts and a denial of such opportunity for oral proceedings would not materially prejudice such party. Upon the motion of any party, the presiding employee may, prior to the completion of the hearing, issue a decision in the case when there is no genuine and substantial dispute as to any material fact and the moving party is entitled to a judgment as a matter of law.

The present APA makes the opportunity for a paper hearing explicit in "rulemaking or determining claims for money or benefits or applications for initial licenses." 5 U.S.C. § 556(d) (1976). S. 262's amendment makes clear that hearings need not be oral presumably even in enforcement proceedings where formal adjudicatory proceedings usually are appropriate.

The above provision does not explicitly, however, set forth the "summary judgment plus" approach used by OHA. S. 262, does, however, provide for adjudicatory procedures that are more flexible than its amended formal hearings. Section 202(e) sets forth a "general hearing process." This section applies not only to "rulemaking or licensing" proceedings, but to

> any other agency proceeding subject to subsection (a) of this section which the agency determines should be conducted in accordance with the provisions of this subsection after considering such factors as the extent to which the decision is likely to depend on the resolution of genuine and substantial disputes of facts, the number of persons interested in participating in the proceedings, and whether the conduct of the proceeding solely in accordance with subsection (f) of this section is essential to a full and fair disclosure of all material facts.

S. 262, 96th Cong., 1st Sess. § 202(e)(1) (1979).

Though § 202 (e)(A) explicitly excludes proceedings to withdraw, suspend, revoke or annual a license, arguably a restitution case could qualify as a proceeding subject to this more informal approach. It would seem particularly appropriate given the fact that OHA overcharge cases often do not have significant factual disputes. Assuming restitution proceedings qualify for S. 262's "general hearing" processes, § 202(e)(C)(2) of the bill provides:

2. *Administrative Law Judges*

Another significant difference in OHA's adjudicatory approach to remedial order proceedings from conventional APA adjudication is its decision not to use administrative law judges.[331] At times, the presiding officer will be the director or deputy director of OHA; at other times, a staff member will preside and often a panel of two or three individuals will be involved. The presiding

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> In any proceeding subject to this subsection, the agency shall conduct a hearing to afford parties an opportunity to submit for the record such written data, views, or arguments and such responses to the data, views, or arguments submitted by other parties, as the agency or the presiding employee may specify. At the request of any party in the proceeding, the hearing shall include an opportunity for oral argument with respect to such written submissions . . . .

Section 202(e)(C)(3) then goes on to set forth a similar "summary judgment plus" approach:

> (3) At the conclusion of any hearing held pursuant to paragraph (2) of this subsection, the presiding employee shall designate any disputed question for resolution of a formal hearing conducted in accordance with subsection (f) of this section, only if he determines—
>
> (A) there is a genuine and substantial dispute of fact, including a dispute involving factual assumptions or methodology upon which expert opinion is based, which can only be resolved with sufficient accuracy by the introduction of reliable evidence in formal hearing; and
>
> (B) the decision of the agency in the case is likely to depend in whole or in part on the resolution of such dispute.

It is interesting to note that like OHA's regulations, this bill also seeks to insulate agency decisions from mechanical judicial review. Section 202(e)(C)(3) goes on to provide:

> Upon review no court shall hold unlawful or set aside any agency action, finding, or conclusion on the basis of the choice of procedures made by the agency under this subsection, unless such choice was a clear abuse of discretion which substantially prejudiced the rights of the parties.

Unlike OHA's summary judgment regulations, however, Congress requires the presiding officer to justify holding an oral hearing. The officer must state reasons why an oral hearing should, in fact, be held. Section 202(e)(C)(3) provides:

> In making a determination under this paragraph, the presiding employee shall designate in writing the specific facts which are in genuine and substantial dispute, and the reason why the decision of the agency is likely to depend on the resolution of such facts.

OHA's summary approach lends support to such provisions, though it does not go so far as to place a burden of justification of the agency if it decides to hold a hearing. For similar provisions in another bill see S. 755, 96th Cong., 1st Sess. §§ 202-204 (1979).

[331] This is not surprising, given the present arrangement calls for FERC review of OHA decisions. It is not likely, however, that abolition of FERC review will result in OHA's voluntarily using administrative law judges. OHA's approach is based on an interdisciplinary approach to decision-making that envisions a different model than that set forth in the APA. In any event, to the extent that the presiding officers in these cases are members of OHA, this approach would be in accord with the APA. Section 556(b) allows the agency or members that comprise the agency to preside at the taking of evidence.

officer may or may not be an attorney. Indeed, accountants and economists at times also may preside at hearings.

The use of staff as presiding officers and the interdisciplinary team approach to decision making is well suited for a case in which policy issues predominate.[332] In granting or denying requests for exceptions, for example, OHA's approach is particularly appropriate, given the insights an interdisciplinary approach can provide in making the policy judgments that often are involved.[333] Enforcement cases also have a policy component and they can be exceedingly complex. As noted above, however, the primary focus of the proceeding is the determination of past acts and the application of particular regulations to these facts. Conventional APA adjudication usually provides for an administrative law judge in such cases.[334] An examination of the pros and cons of this approach in the context of OHA litigation is in order.

a. *Arguments for the ALJ Approach.* The history of the oil enforcement process has been characterized by controversy and dissatisfaction on the part of the private litigants involved.[335] This dissatisfaction goes beyond what one might naturally expect from the application of pricing regulations to an industry that views such an approach as an unwise philosophy and a counterproductive energy policy. Rather, dissatisfaction with the program's administration goes deeper and dates back to the very beginnings of the oil program.[336] A variety of factors have undermined the petroleum industry's perception of the process' fairness: the informality of early FEO and FEA procedures, the gradual extension of a temporary emergency program administered under emergency conditions to one that has now been in place

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[332] *See generally* Pedersen, *supra* note 238, at 994-97.

[333] *See* note 15 *supra* (exceptions explained). OHA's exceptions procedures stress flexibility and the expertise of its multi-disciplinary staff. *See* A. Aman, *supra* note 120, at 34. Such an approach seems appropriate, particularly given the policymaking function of the exceptions process. *Id.* at 7-10.

[334] *See* 5 U.S.C., §§ 554, 556, and 557 (1976); Pedersen, *supra* note 238, at 996-1000. For a discussion of the history and functions of administrative law judges, see 2 K. Davis Administrative Law Treatise §§ 10.01-.06 (1958). Of course, even the APA does provide that the agency itself can hear cases in lieu of an initial decision by an ALJ. *See* 5 U.S.C. § 556(b) (1976).

[335] *See* 2 Sporkin Report *supra* note 9, at xxi. *See also* text accompanying notes 156-162 *supra;* Trowbridge, *supra* note 136, at 201-02.

[336] *See* text accompanying note 137 *supra*.

for nearly ten years, the inability of an understaffed agency, particularly in the early days of the oil program, to articulate clear and comprehensible regulations or render prompt authoritative interpretations of these provisions, the consequent perception on the part of the industry, from time to time borne out by the courts, that enforcement proceedings represented the application of new rules on a retroactive basis, and the fact that even after passage of the DOE Act, oil enforcement adjudication initially remains in the hands of the same agency and, to some extent, the same key personnel that were involved in the early days of the program. Despite the enormous improvement in OHA's present procedures, this legacy remains.

Not all of the problems are historical. The present process has problems in its own right. Dissatisfaction presently centers on OHA's handling of requests for discovery.[337] Though OHA's approach to discovery has broadened considerably, it nonetheless depends, in large part, on how OHA's presiding officer chooses to exercise his discretion.[338] A decision-maker whom the industry views as intimately involved in policy-making or susceptible to influence by policy-makers within the Department may not, from their point of view, be sufficiently independent to compile a full and adequate evidentiary record in an impartial manner. Since many of the key decisions in remedial order cases involve pre-trial discovery and hearing motions, this can be a serious problem. If OHA is the only agency involved in the decision-making process, a completely independent decision-maker would not be involved in the enforcement process until the case reached the courts. The court's function is appellate in nature, however, and that would not provide the protection the litigants desire.

Administrative law judges would introduce a modicum of independence to the decision-making process without completely separating judicial and policy-making functions. An ALJ would ensure an initial decision by one who is neither involved with policy formulation nor dependent on a policy-maker for job security. There would thus be complete independence at the crucial fact-finding and record formulation stage of the proceeding. At the same time, providing for an appeal of ALJ decisions to OHA would retain at least the opportunity for a uniform executive policy.

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[337] *See* note 283 *supra*.
[338] *See* note 281 *supra*.

The use of ALJ's thus would constitute a compromise between the complete separation of judicial and policy-making functions that results with de novo FERC review and the lack of independence that exists if OHA is the sole adjudicator in these proceedings. Similarly, it would provide for independence in the agency's decision-making process, while stopping short of the far more drastic measure of making OHA itself independent and thus creating yet another commission within DOE.

Furthermore, the use of administrative law judges may offer litigants more protection than appellate FERC review. OHA presently compiles the record and FERC plays essentially an appellate role at least to the extent that it has rejected the right of the parties involved to seek de novo review. Given this approach, along with FERC's workload and its relative lack of expertise in the area, FERC, as an independent decision-maker, may not offer as much protection as an administrative law judge. Indeed, the use of ALJ's definitely would prevent what FERC review might not: the possibility of any preconceived OHA policy biases affecting pre-trial decisions at the crucial record formulation stage of the process.

Finally, the use of ALJ's need not result in a serious loss of efficiency in the enforcement process. The summary judgment plus rule should be available as well as a variety of other techniques aimed at providing the presiding officer with substantial control over the proceeding.

b. *Arguments against the ALJ Approach.* There are disadvantages with using ALJ's as well. On the one hand, agencies easily can disregard the administrative law judge's findings of fact and conclusions of law and proceed as if an initial hearing had not been held.[339] Assuming that ALJ decisions are appealable to OHA, it is entirely likely, given that agency's expertise, that ALJ decisions and the record on which they are based would be reviewed de novo.[340]

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[339] *See* Pedersen, *supra* note 238, at 1005-07.

[340] This might not always result in the same decision that OHA would have rendered without an ALJ. The ability to develop a full and complete record before an independent fact-finder may result in an entirely different record than would have been compiled by OHA in the first instance. This may particularly be the case in OHA proceedings if certain discovery requests are more likely to be granted by an ALJ than by an OHA presiding officer, and they arguably compel a different interpretation of the regulations involved. Further, a full record arguably will more likely reveal to a court reviewing OHA's final decision whether it treated the judge's findings arbitrarily.

A related drawback to this proposal is that an initial decision followed by an administrative appeal results in two levels of administrative process, rather than one. Given the fact that OHA would, in any event, thoroughly review the record and issue the final orders in most of these cases, the ALJ stage is unnecessary. To the extent that this is a problem, it can be minimized. OHA need not entertain every appeal, just those in which important policy questions are at stake or clear error on the part of the ALJ is involved. Further, decisions turning primarily on the interpretation of a particular regulation involved could be certified to OHA for decision prior to the initial decision by the ALJ.[341]

A more serious disadvantage to the ALJ approach, however, is the loss of OHA staff expertise that would result if initial decisions were made by a person unlikely to be familiar with the complexities of oil pricing regulations. Arguably, however, even this difficulty can be overcome. The model of a federal judge need not apply in the kind of enforcement proceedings heard by OHA. Given the complexity of the record that is compiled, an administrative law judge often may consult with staff members who are not in any way involved with prosecuting, litigating or investigating the case at bar, particularly on difficult technical or policy oriented questions.[342] Yet, if one is willing to go this far, the OHA team approach may, in fact, be a more appropriate and efficient way of adjudicating such complicated cases.

An accurate decision is more likely to be rendered by an official and staff intimately involved in oil pricing and allocation policy and adjudicatory matters on a daily basis. Though a preconceived policy bias may underlie his or her interpretations of the regulations involved, they are likely to be informed judgments about very complex matters. This is arguably superior to the kind of open mindedness that comes with a lack of any knowledge at all and thus, at least initially, the lack of any pre-conceived policy bias.

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[341] *See* text accompanying note 343 *infra*.

[342] As Professor Davis has pointed out, "the APA imposes no restrictions on consultation by members of agencies with non-investigating and non-prosecuting personnel, but forbids presiding officers to consult 'any person or party on any fact in issue' except in public proceedings. 2 K. Davis, *supra* note 334, § 11.08. Arguably, 5 U.S.C. § 554(d)(1) (1976) which prohibits ALJ consultation of "a person or party or a fact in issue" could be interpreted to allow for consultation with agency staff on facts in issue as distinct from outsiders. *See* 2 K. Davis, *supra* note 334, § 11.17. This interpretation generally has not been adopted by most agencies. Pedersen, *supra* note 238, at 1000 n.38.

Furthermore, internal separation of functions within the agency provides substantial and more than adequate independence for the OHA decision-makers. Ex parte rules prevent any contact with the prosecutorial or investigatory wing of this agency. As noted above, the theoretical susceptibility to influence regarding the application of the proper policy need not be viewed as a fundamental flaw in OHA's approach. The opportunity for policy coherence should be viewed as a positive factor in the decision-making process. Though losing parties invariably will argue with the results of the proceeding, the existence of an opportunity to develop a full and fair record, coupled with a decision supported by substantial evidence and reasons, is more important than the degree to which the decision-maker conforms to traditional notions of what a judge should or should not be. Indeed, the more fundamental problem in such cases may not be whether an ALJ should or should not be employed, but an unwillingness to accord legitimacy to alternative models of what an agency judge should be.

c. *Recommendation.* Due particularly to the history of the oil enforcement program, whether or not OHA should use ALJ's in oil enforcement proceedings is, nevertheless, a close question. For many of the regulated companies involved, the use of ALJ's is essential, particularly if FERC review is abolished. On balance, however, introducing a new set of decision-makers at this stage in the oil program is unnecessary and may even be counterproductive in terms of the accuracy and efficiency of the decision-making process. Allowing decisions to be made by OHA in the first instance would enable this agency to maximize its expertise for the remainder of the oil program. Moreover, unless appeals are taken to some agency other than OHA, thus rendering OHA's expertise in these matters essentially useless, it is entirely likely that OHA will closely examine and often substantially change ALJ decisions with which it disagrees. Interjection of an ALJ for substantive decision-making purposes thus may be an unnecessary and counterproductive stage in the administrative process. Finally, an agency judge need not be totally aloof and detached from the policy-making functions of the agency. In complex, technical cases, the presiding officer should have the benefit of staff expertise.

Abolition of FERC review coupled with a statute mandating the basic procedural safeguards OHA must provide, plus OHA regulations making explicit the standards by which it rules on motions for oral evidentiary hearings and discovery, would ensure the

development of a full and fair record. Using OHA personnel does not undermine the development of this record; however, if ALJs are to be used, an alternative approach allowing them to play a role limited to the formulation of the record may be in order. Given the importance in OHA litigation of pre-trial decisions such as how much discovery to allow or whether an oral evidentiary hearing is appropriate, an ALJ could be used to provide an independent, impartial judge to rule on such motions and to supervise the development of the record. The issues presented, however, need not be decided twice, particularly if they ultimately involve the application of regulations to undisputed facts. After such a record has been developed, it could be certified to OHA for a final decision. The ALJ would, in effect, play the role of an administrative magistrate.[343]

d. *Amending the APA.* OHA's experience highlights at least two changes that should be considered in the APA. First, for sanctions such as restitution, the flexibility to utilize more of an interdisciplinary approach, including members of the staff as presiding officers rather than ALJ's should at least be available under the APA. Conventional APA adjudication in such technical proceedings, with primary reliance on an aloof, independent judge may not always be appropriate. Second, Congress should consider amending the APA to encourage broad consultation by ALJ's with agency staff who, of course, are not in any way involved in prosecutorial or investigatory activities with regard to the case at hand.[344]

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[343] The APA presently allows for "the entire record to be certified to it for decision." 5 U.S.C. § 557(b) (1976). Making use of this provision would encourage a prompt final agency decision by omitting the initial decision when it is likely that the agency itself will have the final word. In cases where the ALJ does render a decision, however, review of that decision should not have to be automatic. As S. 262, § 205(c) provides:

> The agency may exercise its discretionary right to review a decision . . . only after determining that—
>
> (A) a finding or conclusion of material fact appears clearly unsupported by the evidence;
>
> (B) the proceeding involves novel or important issues of law or policy;
>
> (C) a necessary legal conclusion appears to be clearly erroneous; or
>
> (D) a clearly prejudicial error of procedure was committed.

*Id.* § 205(c).

[344] As stated in note 342 *supra*, the present APA already allows presiding officers to engage in substantial consultation with agency staff. S. 262, 96th Cong., 1st Sess., however, would explicitly provide that:

> the agency may designate one or more employees to assist the presiding employee by questioning parties at an oral hearing, or otherwise advising the presiding employee.

D. *Summary*

In summary, the problems of administrative and judicial duplication can be dealt with as follows. Administrative duplication should be eliminated by abolishing FERC review. Though this removes a certain degree of independence from the decision-making process, it is questionable whether total separation of judicial and policymaking functions is, indeed, desirable. In any event, the primary reasons for providing for FERC review no longer exist. OHA has improved its procedures considerably and there is adequate separation of functions within the executive wing of DOE.

But in abolishing FERC review, OHA should not be free to return to the minimal statutory guidance that existed under the Federal Energy Administration Act of 1974. At the very least, the procedures mandated by section 503 should now be applicable to OHA and the standards set forth in its recent decisions over whether to grant or deny oral evidentiary hearings as well as discovery requests should be made explicit in its own regulations.[345] Imposing conventional APA adjudicatory procedures on OHA could minimize the effectiveness of some of its procedural innovations and may go farther than is necessary to ensure fair adjudication in such proceedings. Arguably, the APA would not explicitly allow for a paper hearing in an enforcement case when there were material issues of fact in dispute. Moreover, in cases in which the agency or members thereof did not preside, conventional APA adjudication would utilize administrative law judges. OHA's deviations from conventional application of the APA provide a modest increase in procedural flexibility. On balance, this flexibility should be retained and Congress should seriously consider making some of the procedural options exercised by OHA explicit in an amended APA. Ideally, the APA should then be made applicable to all agency enforcement decisions, including those at DOE.

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*Id.* § 202(e). This may sidestep the restriction on presiding employees consulting with agency staff on "facts in issue." In any event such a provision also may encourage greater use of a more interdisciplinary approach in appropriate cases. Based on OHA's experience with the kinds of cases and issues presented in its enforcement proceedings, Congress should seriously consider encouraging such an approach.

[345] A more detailed statute than § 503 can also be considered, but a more detailed provision may be difficult to pass and, in any event, could result in unnecessary procedural rigidity. Section 503 coupled with OHA regulations implementing this provision, along the lines suggested in this Article and to a large extent already developed by OHA would suffice.

Finally, there is no need for two levels of appellate court review, prior to petitioning the Supreme Court for a writ of certiorari. District court appellate review should be abolished.

## Conclusion

The administrative process has entered a new age of regulatory reform, one characterized by proposals that seek to achieve fundamental substantive change. New Deal conceptions of and approaches to problems are increasingly under attack. Regulation of competition in the airline, trucking, and communications industries, for example, no longer can be justified by depression-mentality rationales. Competition in such industries is not an evil to be checked, but a positive force generally to be encouraged. Bills seeking to abolish, phase out, or, at least, transform New Deal agencies and legislation are common and some already have passed.[346] Moreover, the need to devise new regulatory approaches to deal with more recent problems such as energy and the environment also has been increasingly apparent.[347]

Fundamental procedural reform should go hand in hand with substantive reform. But to the extent that the political climate that fuels such reforms reflects an increasing skepticism of the efficacy of government, in general, and bureaucracy, in particular, the underlying motivation for substantive reform risks undercutting proposals for constructive procedural change and can encourage excessive checks on agency initiative and action. For example, procedural reforms that seek to streamline over-judicialized administrative processes may be viewed not only as attempts to increase agency flexibility and efficiency, but as proposals to augment agency autonomy and power. At a time when defining the appropriate regulatory role that government should

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[346] *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 94-504, 92 Stat. 1705 (1978) (amends various sections of Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1551 (1970 & Supp. V 1975)). Various deregulation bills dealing with the trucking and communication industries are now pending in Congress. *See, e.g.*, S. 2245, 96th Cong., 1st Sess.; H.R. 6418, 96th Cong., 1st Sess. (bills to decontrol various aspects of the trucking industry). *See also* H.R. 612, 96th Cong., 1st Sess. (bill to deregulate long-distance communications).

[347] *See, e.g.*, C. Schultze, The Public Use of Private Interest 16-27 (1977) (arguing for regulatory techniques such as taxes that rely on the market mechanism to achieve valid environmental goals). Similarly, the phased decontrol of oil prices can be viewed not necessarily as a philosophic commitment to minimum governmental intervention in a competitive industry, but also as the constructive use of the pricing mechanism as a regulatory device to achieve levels of oil conservation that otherwise might not be possible.

play has become increasingly difficult, proposals viewed in that light may meet with substantial congressional resistance. On the other hand, Congress may be all too eager to adopt reforms that seek to make agencies more accountable and responsive. Such reforms may be laudatory in principle; however, the cumulative effect of legislative vetoes, de novo judicial review of agency rules, sunshine and sunset laws, as well as agency structures that build in checks and balances on administrative action from within agency walls can, if carried too far, result in a modified form of substantive decontrol by procedure. Just as there may be contradictions inherent in a capitalist culture that ultimately may undermine productivity,[348] so too may there be contradictions inherent in a decision-making process that appropriately values public participation and political accountability very highly. Too much participation, or too much political accountability, can undermine essential agency effectiveness.

Professor James O. Freedman recently has written that "[t]he task of devising an effective theory of the legitimacy of the administrative process is one of the most important challenges facing those concerned with American administrative law and institutions."[349] The increasing uncertainty over government's future regulatory role should not, of course, undermine the search for such a theory, nor should it discourage the development of a theory that recognizes the uniqueness of the administrative process as distinct from more familiar legislative and judicial processes. Moreover, as traditional New Deal regulatory approaches become increasingly open to question and reform, the temptation to use procedure as an indirect means of accomplishing essentially substantive ends must be resisted. Substantive issues and conflict should be faced and, hopefully, resolved directly. In this sense, substantive and procedural regulatory reforms should be kept separate and distinct.

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[348] *See generally* D. Bell, The Cultural Contradictions of Capitalism (1976).
[349] J. Freedman, *supra* note 209, at 266.

## Glossary

Throughout this Article various regulatory statutes and administrative agencies are discussed or referred to. Some of these statutes and agencies no longer are in existence, others remain but have new names and still others represent entirely new statutes or administrative agencies. The following is a glossary of agency names and acronyms to assist the reader.

The primary substantive legislation referred to in this Article governing oil pricing and allocation is as follows:

(1) *The Economic Stabilization Act of 1970* (ESA)—This Act established mandatory wage and price controls. These controls, while lifted for the economy in general, were continued on the petroleum industry, in part as a response to the oil embargo and price increases by the Organization of Petroleum Exporting Countries (OPEC).

(2) *The Emergency Petroleum Allocation Act of 1973* (EPAA)—This Act formally authorized the President to establish (and in effect, continue the price controls begun under the ESA) "equitable" prices for domestic crude oil. It has since been amended but is usually referred to in the Article as the EPAA.

The primary organizational statutes that established the agencies discussed are as follows:

(1) *The Federal Energy Administration Act of 1974* (FEA Act)—This Act created the Federal Energy Administration, an executive agency outside the office of the President.

(2) *The Department of Energy Organization Act of 1977*—(DOE Act)—This Act reorganized much of the federal bureaucracy dealing with energy-related problems. It created the new Department of Energy, which consists of a cabinet-level office of Secretary of Energy, various executive units under the Secretary's control or supervision as well as the Federal Energy Regulatory Commission, an independent agency.

The relevant administrative agencies discussed throughout the Article are as follows:

(1) *The Cost of Living Council* (CLC)—the agency that administered the wage and price controls issued under the Economic Stabilization Act or ESA.

(2) *The Federal Energy Office* (FEO)—This was the first executive agency charged with responsibility of implementing and administering the oil price and allocation controls authorized under the 1973 Emergency Petroleum Allocation Act or EPAA. It was established by the President by Executive Order.

(3) *The Federal Energy Administration* (FEA)—Shortly after passage of the Emergency Petroleum Allocation Act or EPAA, the FEO functions were transferred to the Federal Energy Administration (FEA) in 1974. FEA was an executive agency outside the office of the President that continued to administer, implement, and enforce the oil program authorized by the EPAA.

(4) *The Office of Exceptions and Appeals* (OEA)—This was an administrative unit within FEA that was responsible for resolving various adjudicatory matters including contested remedial orders and requests for adjustments or exceptions.

(5) *The Federal Power Commission* (FPC)—This was an independent regulatory commission charged with primary responsibility for the regulation of natural gas and electricity, but, until the energy reorganization required by the 1977 Department of Energy Organization Act took place, it had no authority over oil pricing or allocation.

(6) *The Department of Energy* (DOE)—This is the new department established in 1977 pursuant to the Department of Energy Organization Act (DOE Act). It consists of both an executive wing headed by a cabinet level Secretary and an independent commission that succeeded to the powers of FPC.

(7) *Federal Energy Regulatory Commission*(FERC)—This is the independent commission within DOE which shares power with the Secretary and the executive units under his control or general supervision. FERC essentially replaces the Federal Power Commission. It too consists of 5 commissioners, as did the old FPC, and it retains virtually all of the FPC's authority as well as acquiring some new functions including authority over certain oil pricing and allocation rules made by the Secretary. FERC also reviews adjudications made by the executive.

(8) *The Economic Regulatory Administration* (ERA)—This is an executive unit under the Secretary. In large part, it replaces the FEA. It is charged with oil pricing matters.

(9) *The Office of Hearings and Appeals* (OHA)—This once was a unit within ERA but has since been made an executive agency that reports directly to the Secretary. It, in effect, replaces the Office of Exceptions and Appeals that once was a part of FEA. OHA presently adjudicates contested remedial orders and its procedures are examined in detail in Part IV of this Article.

(10) *Office of Special Counsel* (OSC)—A special enforcement office established to deal with alleged pricing violations by major oil companies. All other enforcement actions of this sort are handled by the Office of General Counsel, also within DOE.