

MEMORANDUM IN SUPPORT OF RECOMMENDATION 74-4
PREENFORCEMENT JUDICIAL REVIEW OF RULES OF
GENERAL APPLICABILITY

Supporting Memorandum

Prepared by the Committee on Judicial Review

This Recommendation, offered by the Committee on Judicial Review, seeks to deal in a modest way with some of the perplexing problems arising from the apparent increase in the frequency with which courts review rules of general applicability promulgated as a result of informal proceedings without waiting for enforcement or other application of the rules to a private party.

There are three kinds of cases in which this review takes place. First, Congress in a number of recent statutes has expressly provided for review, typically in the courts of appeals, of rules of general applicability adopted substantially in the manner contemplated by 5 U.S.C. §553.¹ Second, courts of appeals acting under statutes that in traditional terms vest them with power to review "orders" of specific agencies have sometimes treated rules of general applicability as falling within the scope of such provisions.² Third, district courts review directly rules of general applicability in the exercise of their residual power under 5 U.S.C. §§701-06 to review agency actions in the absence of a specific statutory review provision.³

A number of complex questions are posed by this development for the judge, the administrative decision-maker, the practitioner and the scholar. Many of these matters are explored in the attached report of Professor Paul R. Verkuil entitled "Judicial Re-

¹ E.g., Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, 655(f) (1970); Consumer Product Safety Act, 15 U.S.C. §§2051, 2060(c) (1972). See *Associated Industries of New York, Inc. v. United States Department of Labor*, 487 F.2d 342 (2d Cir., 1973).

² E.g., *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912 (D.C. Cir. 1973); *City of Chicago v. FPC*, 458 F.2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972). In the *Deutsche Lufthansa* case the court stated that "it is the availability of a record for review and not the holding of a quasi-judicial hearing which is now the jurisdictional touchstone. In the instant case, an evidentiary record does exist. . . ." 479 F.2d, at 916. The "evidentiary record" referred to was the product of a notice-and-comment rulemaking procedure.

³ E.g., *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 167 (1967); *Angel v. Butz*, 487 F.2d 260 (10th Cir., 1973).

view of Informal Rulemaking,"⁴ from which the Judicial Review Committee's recommendation evolved. Among the matters treated in Professor Verkuil's paper are the growing judicial acceptance of and, indeed, insistence upon rulemaking as a mode of administrative decision-making; the effects that the emphasis on informal rulemaking and the direct review of its product have had upon the content of such traditional administrative law phrases as "hearing," "order," "party" and "record";⁵ and the increasing use, under both statutory and judicial impetus, of hybrid procedures, in which some trial-type procedures are added to the notice-and-comment procedure of Section 553.

The text of the Recommendation itself has received extensive and searching consideration by the Committee, individual members of the Conference, the Council, and about a dozen agencies with broad experience with judicial review of informal rules. A large number of proposals or suggestions have been received from these sources.

The Recommendation is concerned with two kinds of questions that derive from direct review of rules of general applicability. The first relates to the information that should be before the court upon such review. The second relates to the appropriate standard of review in such cases, *i.e.*, the proper scope of the inquiry into the factual basis for and rationality of the rule. This memorandum describes the considerations favoring the adoption of the particular recommendations on these subjects. Fuller treatment of many of the points can be found in Professor Verkuil's report.

In considering this Recommendation, it should be emphasized that it has limited purposes and is not designed to address all the numerous problems of preenforcement judicial review. In particular, it is *not* concerned with the following questions:

(1) Should there be more, less, or the same amount of direct review of rules of general applicability? [The considerations for and against such review are set forth in the majority and dissenting opinions in *Abbott Laboratories, Inc. v. Gardner*.⁶]

(2) Should the courts, as part of its obligation of judicial review, require agencies to provide procedures in addition to the notice-and-comment requirements of 5 U.S.C. §553?

⁴ Hereafter referred to as Verkuil Rep.

⁵ See Verkuil Rep. at 193-205. *FPC v. Texaco Inc.*, 377 U.S. 33, 44-45 (1964), is apparently the first case in which the Supreme Court spoke of a notice-and-written-comment proceeding in which no one is heard, as a "hearing." See also *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), in which the Court held that a statutory requirement of a "hearing" was satisfied by a notice-and-written-comment procedure.

⁶ 387 U.S. 167 (1967).

(3) May courts require agencies to engage in rulemaking where agencies prefer to develop principles on a case-by-case basis?

(4) To what extent should agencies be required to specify the basis of and justification for their decisions and to what extent may they rely on their general expertise? ⁷

(5) May agencies rely on the Freedom of Information Act exemptions, 5 U.S.C. §552, when responding to requests for relevant factual information about the bases of proposed rules? ⁸

(6) Should the court, upon judicial review of rules, be limited to the information before the agency or may it assemble evidence and testimony on its own? ⁹

Several persons and agencies commenting on the proposed Recommendation suggested that the Committee should address itself in this Recommendation to one or more facets of the foregoing questions. The Committee believes, however, that further study is required before a recommendation on these matters can be formulated.

I

Paragraph 1 of the Recommendation deals with the information that should be before the court upon judicial review of rules. These materials have been sometimes referred to by courts as the "administrative record" upon which the rule is based.

Where an agency decision must be based on evidence obtained at a formal evidentiary proceeding, the "record" for purposes of review is more or less self-defining. It consists of the pleadings, the transcript and exhibits, and agency orders and opinions (including rulings and initial decisions of administrative law judges).¹⁰ At any rate, there seems not to have been any particular difficulty in this regard where formal proceedings are involved. However, where, as in informal rulemaking, an agency is not itself confined to information in an evidentiary record in making its decision, it is often unclear as to what information, factual or otherwise, the court should consider in evaluating the agency's decision to promulgate a particular rule. The recommendation suggests that the court should consider the following materials:

⁷ Consult W. Gellhorn and C. Byse, *Administrative Law Cases and Comments* (5th Ed. 1970) 410, 751.

⁸ Cf. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 85-91 (1973).

⁹ Cf. *Camp v. Pitts*, 411 U.S. 138 (1973).

¹⁰ Compare Fed. R. App. P. 16(a): "The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency."

(1) The notice of proposed rulemaking and any documents referred to therein. This is an obvious point and scarcely needs elaboration. If anything beyond what is already the practice is called for by this paragraph, it is the furnishing to the reviewing court of documents referred to in the notice of proposed rulemaking. If such documents are public, inclusion in the record will be a convenience to the reviewing court. If they are not otherwise public, inclusion of them in the record seems a simple matter of fairness if not a necessity.¹¹

(2) The comments and other documents submitted in response to the invitation extended in the notice of proposed rulemaking. These are analogous to an evidentiary record in the formal adjudication or formal rulemaking and ordinarily would constitute the staple of the information reviewed by the court.

(3) Any transcripts of oral presentations. The Recommendation does not suggest that transcripts of presentations should be made, but if they are made it requires them to be produced for the court.

(4) Factual information not elsewhere included in the record that was in fact considered or relied upon by the agency in the promulgation of the rule.¹² The agency may also proffer additional information (becoming available after the decision to promulgate the rule was made) which the agency believes pertinent to its decision. If anything is novel in paragraph 1, it is this part (4). By definition, an agency is not confined to a record in informal rulemaking. Yet, when rules issued by an agency following informal procedures are reviewed, there will usually be an inquiry into the rules' factual underpinning and rationality. Some part of such underpinning may not appear in the agency's own notices and orders or in the comments or other written and oral submissions the agency receives. It seems only proper that all significant and relevant factual information should be made available to the court on review. As indicated earlier, this part of the recom-

¹¹ Conceivably, there may be instances in which reference is made in the notice to inter-agency or intra-agency memoranda. As noted earlier, this Recommendation does not address itself to the question of whether such documents must be made available.

¹² The Environmental Protection Agency, in a long and thoughtful comment on the proposed recommendation, indicated approval of the underlying goal of the Recommendation, but raised questions as to the breadth and scope of the language in paragraph (4). The Committee considered the comments carefully, but concluded that the suggested alternative language suffered from the same defect as the present language: it is not possible, in a general formulation of language, to resolve in advance all the myriad problems that can arise. Rather, the Committee hopes that the language used will not be read by agencies or courts as requiring production of manifestly unreasonable quantities and types of information.

mentation does not address itself to the extent to which agencies may rely on their "expertise" as justification for rules in the absence of specific factual support. The idea is, rather, that, if the agency has actually based its decision on important supposed facts, those supposed facts should be available to the reviewing court and the parties.

(5) Reports of any advisory committees. The intent here is to reach reports of formally designated advisory committees, such as those that are provided for by some statutes.¹³

(6) The agency's concise general statement or order and documents referred to therein. Section 553(c) of Title 5 provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." This is the equivalent of an agency's opinion on the rendition of a decision in a formal proceeding and obviously is an essential part of the documents to be considered by the court.

The Recommendation also recognizes by a footnote reference that in many proceedings the documentation referred to in paragraph 1 may be very bulky. Specific reference is made to the possibility set forth in the Administrative Procedure Act that only portions of the administrative materials cited by the parties will be physically examined by the reviewing court.

II

The rule that agency decisions (or agency findings of fact) are to be set aside unless they are supported by substantial evidence on the record as a whole is a familiar standard of judicial review.¹⁴ The rule is set forth in 5 U.S.C. §706(2) (E) and in a number of specific agency review statutes.¹⁵ Although it is a standard that is often more talked about than properly applied,¹⁶ it does have important applications. However, it is limited by Section 706(2) (E) to cases decided on a record made on a formal evi-

¹³ E.g., Color Additives Amendment of 1960, 21 U.S.C. §346a (1970); Contract Work Hours and Safety Standards Act, 40 U.S.C. §333 (1970).

¹⁴ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

¹⁵ E.g., Federal Aviation Act §1006(e), 49 U.S.C. §1486(e); Natural Gas Act, §19(b), 15 U.S.C. 717r(b); National Labor Relations Act, §10(e), 29 U.S.C. 160(e).

¹⁶ See *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968), where the Supreme Court corrected a court of appeals' treatment of an issue of statutory construction as involving a determination whether an agency's ruling was supported by substantial evidence. In *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659 (6th Cir. 1972), the court spent several pages deciding that the standard of review of the Secretary of Transportation's regulation prescribing the use of airbags in automobiles was "substantial evidence" and not "arbitrary and capricious" and then decided the case against the Secretary on the ground that he had not complied with specific statutory requirements.

dentiary hearing.¹⁷ Nevertheless, in the judicial review provisions of some recent statutes, Congress has unambiguously stated that the substantial evidence standard should be applied to informal rulemaking.¹⁸ Further, courts reviewing rules of general applicability promulgated under statutes of an earlier vintage have also sometimes invoked the substantial evidence standard of such statutes.¹⁹ This has led to confusion, since "evidence," substantial or otherwise, is not a term that lawyers ordinarily use to describe unsworn submissions in informal rulemaking proceedings or undisclosed, unsworn material in agency files. None of such material, of course, has been tested by cross-examination. Moreover, the substantial evidence standard is usually considered applicable to agency findings of fact rather than broadly to "agency decisions."²⁰ However, findings of fact typically are not made in informal rulemaking proceedings.

Despite unfortunate contrary suggestions of the Supreme Court,²¹ the appropriate standard for judging the sufficiency of the factual underpinning of a rule of general applicability and its rationality should not be the substantial evidence standard but instead the standard set forth in 5 U.S.C. §706(2)(A), which directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion [or] otherwise not in accordance with law . . ."²²

Paragraphs 3 and 4 deal with the "substantial evidence" and "arbitrary and capricious" standards and call upon Congress and the courts to adhere to the apparent intention of the Administrative Procedure Act described above that rules of general applicability should be tested against the "arbitrary and capricious" standard. These paragraphs adopt the test as set forth in Supreme

¹⁷ The precise language is "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. §706(2)(E). The phrase "on the record of an agency hearing provided by statute" may be ambiguous today. See Verkuil Rep., at 204. The intent, however, seems clear enough. See, *Boating Industry Association v. Boyd*, 409 F.2d 408, 411 (7th Cir., 1969); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1005-6 (1st Cir., 1973).

¹⁸ These statutes are discussed in Verkuil Rep., at 226-230. At least two courts of appeal have recently struggled with the scope of review under such statutes. *Associated Industries v. Department of Labor*, 487 F.2d 342 (2d Cir. 1973); *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467 (no. 72-1713, D.C. Cir., April 15, 1974).

¹⁹ See *City of Chicago v. FPC*, n. 2, *supra*.

²⁰ Both formulas are used, however. 5 U.S.C. §706(2) literally applies the test to "agency action, findings and conclusions."

²¹ *United States v. Midwest Video Corp.*, 406 U.S. 649, 671 (1972); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971).

²² *Boating Industry Association v. Boyd*, 409 F.2d 408, 411 (7th Cir., 1969); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1005-6 (1st Cir. 1973); *Automotive Parts and Accessories Association v. Boyd* 407 F.2d 330, 337 (D.C. Cir., 1968).

Court decisions that the "arbitrary and capricious" test requires an investigation into whether the agency's conclusion concerning the significance of factual information and its decision to promulgate a particular rule is "rationally supported."²³ This test, it is believed, involves essentially the same standard of review as the "substantial evidence" test. Recent cases which suggest the opposite are not approved.²⁴

Since the standards of "arbitrary and capricious" and "substantial evidence" do largely coincide in their practical impact, the confusion induced when the "substantial evidence" standard is invoked in reviewing rules issued after informal procedures at first glance may appear to have no deleterious effects. However, there is a suggestion in some opinions that when Congress uses the phrase "substantial evidence" in a statutory provision for review of agency action, it thereby implies that whatever action is reviewed must be reviewed on an evidentiary record; therefore, the reasoning proceeds, the agency can act only after a proceeding in which such a record is created.²⁵ Paragraph 2 specifically disapproves of this reasoning and calls for recognition that the mere use by Congress of the words "substantial evidence" in a judicial review statute should not be taken in and of itself to imply anything with respect to the kind of procedures which the agency must follow when taking the action under review.

This Recommendation is addressed to "Congress, the Judicial Conference and the agencies." In effect, it recommends that with respect to future statutes, Congress should adopt a specific standard of review, and that with respect to existing statutes, they should be construed so as to make applicable that same standard. The Conference is accustomed to addressing Congress and the agencies; its business is to recommend changes in law or practice that legislators or administrators should make. To recommend to

²³ See Verkuil Rep., at 206-7. As the Report subsequently notes, however, the court has not consistently followed this standard. See Verkuil Rep., at 210-214.

²⁴ In *Consumers Union of U.S. Inc. v. Consumer Product Safety Comm'n.*, 491 F.2d 810, 812 (2d Cir. 1974), for example, the court said:

"Petitioners challenge the sufficiency of the factual record. The record need not be as complete under the 'arbitrary, capricious' standard as under the 'substantial evidence' standard."

²⁵ *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257-1261 (D.C. Cir. 1973); *Public Service Comm'n. for the State of New York v. FPC*, 487 F.2d 1043, 1069 (D.C. Cir., 1973). The two cases were decided under the Natural Gas Act. Ironically, it was the presence of the requirement for certifying the record and of the substantial evidence standard in the judicial review provision of that statute that led the same court to hold that rules which were the fruit of informal rule-making could not be reviewed directly in a court of appeals under the statute. See *United Gas Pipe Line Co. v. FPC*, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950); see also *Arrow Airways, Inc. v. CAB*, 182 F.2d 105 (D.C. Cir. 1950), *cert. denied* 340 U.S. 828 (1951). These cases have been substantially overruled by the cases cited in note 2 above.

judges how they should construe existing statutory language may be a different matter. It would have been possible, by circumlocution, to cast the Recommendation so that literally it would have been addressed solely to Congress and the agencies. But the idea that the large number of statutes involved are going to be amended in such a way as to carry out the intent of this Recommendation is wholly unrealistic. For that reason, among others, the Committee decided upon a straightforward presentation of its views addressed to all pertinent decision-makers. The Committee was fortified in its adoption of this approach by the advice of Judge Leventhal, our liaison with the Judicial Conference. While offering no assurance that he and his fellow judges would adopt or consider the Recommendation, he did indicate that they would not be offended at receiving it.

