

ADMINISTRATIVE CONFERENCE OF U.S.  
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REPORT IN SUPPORT OF STATEMENT 7  
A REVIEW OF THE DEVELOPMENT OF LAW ON INFORMAL  
RULEMAKING PROCEDURE: REPORT TO THE COMMITTEE ON  
RULEMAKING OF THE ADMINISTRATIVE CONFERENCE OF THE  
UNITED STATES

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I. INTRODUCTION

The procedures employed by federal agencies in informal rulemaking, and the scope of judicial review of final agency rules, have been the subject of extensive study and debate over the last decade.<sup>1</sup> The intensity of the debate over rulemaking procedure reflects, in part, the growth over the same time in the frequency and impact of federal agency rulemaking in our society.<sup>2</sup> Though there is substantial support for revision of the informal rulemaking provisions in the Administrative Procedure Act<sup>3</sup>, it is not clear whether procedural reform will be accomplished through comprehensive amendment of the APA<sup>4</sup> or by a continuation of the "balkanization" of rulemaking procedure.<sup>5</sup>

Over the years the Administrative Conference has supported numerous studies and adopted recommendations to resolve some of the complex and difficult issues which have arisen in connection with informal rulemaking and its review. However, a central theme in the Conference's recommendations has been that Congress ordinarily should not impose procedures beyond those required by §553 of the Administrative Procedure Act, but that agencies, in their discretion, should evaluate the need to employ additional procedures in particular rulemakings.<sup>6</sup> The Conference has taken no position on judicial imposition of additional procedures through the review of agency rules,<sup>7</sup> but the U.S.

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Supreme Court, in its controversial Vermont Yankee decision,<sup>8</sup> stated that "generally speaking [§ 553] of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures [sic]. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them."<sup>9</sup>

Both the latest ACUS statement on the subject of informal rulemaking procedure and the Supreme Court's Vermont Yankee opinion have been criticized for rejecting, wholesale, procedural requirements beyond those required by § 553, without considering the merits of each requirement.<sup>10</sup> Believing this criticism worthy of analysis and response, the Administrative Conference's Committee on Rulemaking instituted a review of the various procedural devices previously suggested or required for use in informal rulemaking, and requested the support of the Office of the Chairman. This report was prepared and submitted to the Committee on Rulemaking to assist it in its deliberations.<sup>11</sup>

A major conclusion reached by the author, after reviewing the literature and cases, is that the amalgamation of a variety of procedural principles or requirements in the term "hybrid rulemaking"<sup>12</sup> has been unfortunate, because use of that term tends to obscure major differences in the nature of the various procedures. Some "hybrid" procedures, though not expressly included in §553, are not in basic conflict with notice-and-comment procedure and may be necessary to meet the current needs of reviewing courts. Other procedures, however, represent a marked departure from notice-and-comment procedure and appear generally undesirable in rulemaking. Before considering these various procedures in detail and whether they should be generally required in informal rulemaking, it is necessary to review the original understanding of § 553's informal rulemaking requirements as well as post-APA administrative law developments which have been the impetus for new concepts of informal rulemaking procedure and review.

## II. SECTION 553 OF THE APA AND THE ORIGINAL UNDERSTANDING OF ITS REQUIREMENTS

Section 553 of the APA requires agency adherence to the following "notice-and-comment" procedure for informal rulemaking:

1. The agency must publish a notice of rulemaking in the Federal Register which contains "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>13</sup>

2. Interested persons must be given an "opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."<sup>14</sup>

3. "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."<sup>15</sup>

4. Publication of the final rule "shall not be made less than 30 days before its effective date . . . ."<sup>16</sup>

The legislative history of the APA indicates that the function of the notice of rulemaking—which, it should be noted, applies to both informal and formal rulemaking—is to "fairly apprise interested parties of the issues included, so that they may present responsive data or argument relating thereto."<sup>17</sup> At the time of the APA's enactment, the description of the subjects and issues in the notice was expected to meet that objective, and it was not contemplated that the agency would submit for public comment any reports or summaries of data supporting the rule which had been generated during its pre-rulemaking investigation.<sup>18</sup>

The agencies were also given great latitude in determining the modes of any public participation beyond the written comment opportunity guaranteed by the statute. However, Congressional committee reports on the APA suggested that "[m]atters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public

procedures."<sup>19</sup>

The most critical aspects of the original understanding of §553's requirements are summarized by Dean Carl Auerbach as follows:

It is thus clear beyond question that the APA "does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule making proceedings." The agency is "free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings." It is not required to disclose the materials in its files or the knowledge and experience on which it based the rule, either prior to its promulgation or in the concise general statement of its basis and purpose. Nor is it required to make the findings of fact and conclusions of law called for in formal rule making. However, it was expected that the statement of "basis and purpose" would "not only relate to the data" presented by interested persons but would "with reasonable fullness explain the actual basis and objective of the rule." The Attorney General saw this requirement as not intended to elicit "an elaborate analysis of rules or of the detailed considerations upon which they are based" but as designed "to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules." He concluded that the statement of basis and purpose would serve "much the same function as the whereas clauses which are now customarily found in the preambles of Executive orders."<sup>20</sup>

It is important to understand that at the time of the APA's enactment, it was expected that judicial review of the validity of rules would take place in a collateral proceeding to enforce or enjoin enforcement of rules.<sup>21</sup> Therefore, a record for review would be developed either by the agency or de novo in the reviewing court when the rule was challenged.<sup>22</sup>

### III. POST-APA ADMINISTRATIVE LAW DEVELOPMENTS WHICH GAVE RISE TO NEW CONCEPTS OF INFORMAL RULEMAKING PROCEDURE AND REVIEW

Commenting on certain language in the Supreme Court's Vermont Yankee opinion, one legal scholar observed—

It may indeed be true, as the Court said (quoting a 1950 case), that the Act "settled 'long-continued and hard-fought contentions, and enacted a formula upon which opposing social and political forces have come to rest.'" But if they have remained at rest since 1946, the landscape has moved beneath them. The APA is of course not remotely a self-contained statute, but assumes an entire underlying jurisprudence and practice—which have in the interim drastically altered, as reflected in the decisions of the

Supreme Court itself.<sup>23</sup>

One change generally noted is the dramatic increase over the last 15 or 20 years in the use of "informal" rulemaking to establish administrative policy. The movement to rulemaking as the preferred means of establishing agency policy was in reaction to perceived inefficiency and unfairness in agency use of adjudicatory proceedings for that purpose. This movement gained the support of lower federal courts,<sup>24</sup> the Supreme Court,<sup>25</sup> the Administrative Conference,<sup>26</sup> and commentators.<sup>27</sup>

A related development was a flood of legislation in the 1970's, containing delegations of rulemaking power, through which Congress sought to remedy health and safety problems which had been largely ignored or subordinated in the marketplace.<sup>28</sup> Not only did the new legislation lead to more agency rulemaking, but it led to rulemaking in which the issues were very complex and the stakes very high.<sup>29</sup>

The rise in the use of informal rulemaking was accompanied by a trend toward preenforcement review of agency rules, and increasingly statutes provided for direct review in the federal courts of appeal. Persuasive policy reasons underlay this development, and the Administrative Conference endorsed it.<sup>30</sup> Though preenforcement review of informal rulemaking rapidly gained acceptance, strong criticisms were voiced.<sup>31</sup> Critics were especially troubled by the concept, advanced by the Supreme Court, that review should take place on the "administrative record" which was before the agency when informal proceedings or actions were decided.<sup>32</sup>

The increased use of rulemaking and the trend toward preenforcement review of agency rules left reviewing courts with a practical problem not foreseen by the drafters of the APA. The problem was how to provide meaningful review of agency rules adopted using informal procedures, where often the rulemaking "record" or file (if any existed) did not clearly present the facts or reasoning supporting the rules. Judge Carl McGowan of the Court of Appeals for the D.C. Circuit recently stated:

Where we are running into trouble these days is in the area of rulemaking, particularly that of an informal nature. Informal

rulemaking is provided for in the Administrative Procedure Act. Under that statute an agency may give public notice of a rule or regulation that it proposes to adopt, invite written comments within a fixed time period, allow oral argument if it chooses to do so, and then promulgate a final rule or regulation having the force of law and not subject to question or relitigation in future cases to which it is applicable. The only requirement for promulgation is that the agency give a "concise general statement" of the "basis and purpose" of the rule in question.

It is obvious that this kind of rulemaking differs vastly from adjudication. The evidence is not sifted by anyone comparable to a trial judge, and no findings of fact are made by reference to that evidence. The evidence itself consists of letters, memoranda—often in direct conflict—of purported experts, magazine articles, newspaper clippings, or any other documentary material that anyone chooses to send in, or that may be contained in the agency's own files. That kind of record resembles nothing so much as the record compiled by a legislative committee holding hearings on a proposed bill. And the final action by the agency in turn resembles nothing so much as the voting by legislators for or against the bill.<sup>33</sup>

The courts, however, did not retreat to a highly deferential concept of review based on superior agency subject-matter "expertise" or analogy to review of legislation.<sup>34</sup> Courts interpreting older statutes calling for a "hearing" or "substantial evidence" review were, while unwilling to apply the full array of adjudicatory procedures, intent on assuring that review was more than a "formal rite of passage."<sup>35</sup> The new statutes conferring rulemaking power also seemed to call for something more than the traditional, deferential review. Occasionally such statutes applied the "substantial evidence" review standard to informal rulemaking, and introduction of such traditionally inapplicable concepts into rulemaking provoked lively debate about their precise meaning.<sup>36</sup> But whatever else they meant, these statutes clearly suggested that reviewing courts should not presume the existence of facts necessary to support a rule.<sup>37</sup>

#### IV. DISCUSSION OF VARIOUS "HYBRID RULEMAKING" PROCEDURES

Professor Kenneth Culp Davis has stated that "hybrid procedure" is what results from adding to the requirements of Section 553 such requirements as:

1. availability of written comments to interested persons,
2. availability of crucial facts developed by the agency,
3. opportunity for interested persons to respond to written comments and to crucial facts developed by the agency,
4. agency response to especially significant comments,
5. opportunity to present oral argument to the agency or to other officers,
6. evidentiary support in the rulemaking record for crucial findings on disputed facts,
7. a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion" (quoted from § 557(c)),
8. agency consultation with an advisory committee,
9. control of ex parte communications, and
10. opportunity to cross-examine with respect to specific facts that are crucial and disputed.<sup>38</sup>

Though there may be disagreement about the "hybrid" nature of these requirements, the list provides a framework for discussing various procedures or requirements which have been included in statutes and court decisions.

These procedures, which can be traced to numerous hybrid rulemaking statutes and cases, appear mainly designed to facilitate public participation in rulemaking or judicial review of rules—though some collateral "spin-off" benefit to the agencies' internal decision-making process may have been intended. In recent years there have been proposals for more direct methods of executive or legislative direction or review of agency rulemaking. Regulatory impact analysis requirements, Presidential coordination of agency rulemaking, and legislative oversight and veto are significant procedures beyond the present requirements of the APA. No attempt is made here to evaluate these procedures, however, because they raise much different issues than the elements of rulemaking procedure listed above.

**A. General Procedural Principles Emerging from the "Hybrid" Rulemaking Judicial Decisions.** There are well-known differences of opinion among appellate court judges about the appropriate scope of procedural and substantive review of agency rulemaking decisions.<sup>39</sup> Nevertheless, recurrent themes appear in the rulemaking review decisions which suggest growing agreement on two general procedural principles. The first principle is that, in informal rulemaking, interested persons must be given an opportunity to submit comment not only on a proposed rule, but also on the significant facts or data relied on to resolve the issues in the rulemaking. The second general principle evolved in these cases is that the agency's statement of basis and purpose must identify the significant issues the agency faced and the reasons for the choices it made in adopting the rule. These principles are reflected in the following statement by Judge J. Skelly Wright of the Court of Appeals for the D. C. Circuit:

Lest I seem too complacent over the potential sufficiency of the informal administrative rulemaking process under Section 4 [5 U.S.C. § 553] of the APA, let me add some final caveats.

First, if rulemaking is to work without cumbersome procedures, the crucial task is to ensure that the written submissions—as well as the informal conferences that occur in many agency rulemaking proceedings—do, in fact, serve to inform and challenge the agencies, and that the statements of basis and purpose do, in fact, reflect careful consideration of the significant policy and factual questions. In other words, the dialogue that the APA's rulemaking section contemplates cannot be a sham. Logically, this means that our agencies should forthrightly disclose the data and policy considerations that inform their own thinking at the initiation of the rulemaking and as the rulemaking proceedings develop. Particularly where the issues underlying a proposed agency rule are, as so many are, highly complex and technical, I believe the logic of Section 4's [5 U.S.C. § 553] notice requirement, by calling for a description of "issues involved," might very easily be read to require such agency action. Only in this fashion can we ensure that the submissions from interested parties will serve their function of probing and informing the agencies. . . .<sup>40</sup>

These principles are "hybrid" procedures if § 553 of the APA is interpreted narrowly; that is, by rejecting all interpretations of that section's requirements which were not

extant at the time of its enactment in 1946. The drafters of the APA did not contemplate that agencies would submit their factual material and reasoning for public probing and challenge.<sup>41</sup> The statement of basis and purpose was not intended to be a detailed "roadmap" of the agency's reasoning and underlying support, for the purpose of enabling courts to judge the rationality of the rule.<sup>42</sup> The original understanding of the purposes of § 553 procedure is accurately stated in the preamble to ACUS Recommendation 77-3, dealing with ex parte communications in informal rulemaking:

The primary purposes of rulemaking procedures under § 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. . . .<sup>43</sup>

This traditional view of notice-and-comment procedure as serving an educational function has been gradually replaced by the belief that the procedure should provide interested persons an opportunity to "challenge the factual assumptions on which [the agency] is proceeding and to show in what respect such assumptions are erroneous."<sup>44</sup> This change in perception of the function of notice-and-comment procedure is an outgrowth of the post APA developments described earlier.

The discussion of specific rulemaking procedures which follows accepts the idea that informal rulemaking procedure should provide interested persons an opportunity to challenge the factual assumptions on which the agency is proceeding and, in addition, that reviewing courts are entitled to an agency explanation or administrative record which will enable them to judge the rationality of final rules.

**B. Specific Rulemaking Procedures.** The following procedures—which collapse the first three procedures listed by Professor Davis—are sufficiently related to be

considered together:

**AVAILABILITY OF WRITTEN COMMENTS  
TO INTERESTED PERSONS, AND THE  
OPPORTUNITY TO RESPOND TO SUCH  
COMMENTS**

**AVAILABILITY OF FACTUAL MATERIAL  
DEVELOPED OR OBTAINED BY THE  
AGENCY, AND THE OPPORTUNITY TO  
RESPOND TO SUCH MATERIAL**

As mentioned in the preceding section, reviewing courts have held that failure to make crucial facts or information available for comment by interested persons constitutes procedural error. However, the courts have given different rationales for their decisions. In U.S. v. Nova Scotia Food Products Corp.,<sup>45</sup> the Second Circuit Court of Appeals concluded that the agency's failure to reveal scientific research it relied on denied interested persons a meaningful comment opportunity:

To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether. For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy of comment in turn leads in the direction of arbitrary decision-making. . . .<sup>46</sup>

Other cases have suggested that failure to disclose crucial information for comment frustrates judicial review of the agency action.<sup>47</sup> Some commentators would base the requirement on constitutional due process.<sup>48</sup>

In any event, courts should, and probably do, have the authority to declare on an ad hoc basis that the comment opportunity provided by the agency was inadequate, and to remand the rule to the agency for further proceedings. A more difficult issue is deciding in advance what information and comments agencies should routinely make available to interested persons for comment during rulemaking. Should all written and oral comments be made available for comment by others during the rulemaking? Which

data developed or obtained by an agency should be made available for comment by interested persons during rulemaking?

The danger to be mindful of in answering these questions is well stated in Dean Auerbach's article on informal rulemaking:

The new concept of on-the-record section 553 proceedings will destroy the relative simplicity, flexibility and efficiency once associated with rules promulgated under section 553. Many factors combine to this end—the multiplicity of parties and issues involved; the agency's obligation to put into the record all the data, inferences and conclusions upon which it will base its rule so that the participants in the proceeding may challenge them and present rebuttal or countervailing data; the agency's obligation to respond to such challenges and data; and its obligation to notify each participant of the comments of every other participant so that each may comment on the comments of every other, etc. Large and diffuse records will be produced that the agencies and reviewing courts will find cumbersome to manage.<sup>49</sup>

The Conference attempted to provide guidance in this area in Recommendation 76-

3. That Recommendation advised agencies to utilize certain procedures "in appropriate circumstances," and the list of procedures included the following:

b. Providing for a second cycle of notice-and-comment or by notice providing an opportunity for additional comment in any proceeding when comments filed in the proceeding, or the agency's response to such comments, present new and important issues or serious conflicts of data. . . .

c. Incorporating in the notice of a notice-and-comment cycle a summation of the agency's current attitudes toward critical issues in the proceeding and a description of the data on which the agency relies, indicating where the data may be inspected.

d. Providing an explanation of the tests and other procedures followed by the agency and the significance the agency has attached to them, and allowing opportunity for comment thereon.<sup>50</sup>

Certainly, use of these procedures should be considered by agencies when conducting rulemaking proceedings. Producing or "flagging" the existence of significant factual

information, and allowing comment on it, will promote more effective participation by interested persons. That, in turn, will give a reviewing court more confidence in the rulemaking "record" which is presented to it. At the same time, rulemaking would become unduly formalized and protracted if interested persons were given an absolute right to rebut all data or submissions presented by the agency or other interested persons. Adversary tactics could dominate the process, and rulemaking would never end. Thus, agencies must retain some authority to decide when these procedures are not practicable or necessary.

On balance, it appears desirable to require that agencies make all information generated by the agency investigation prior to the notice of proposed rulemaking available for comment by interested persons early in the rulemaking, unless it is exempt from disclosure under the Freedom of Information Act.<sup>51</sup> However, when information is submitted in comments filed during the comment period, or obtained by the agency later in the rulemaking, the agency should have the discretion to weigh the potential costs and benefits of "reopening" the record for additional comment. A reasonable standard is suggested in Recommendation 76-3: additional comment should only be required if information is obtained which presents "new and important issues or serious conflicts of data."

The advice in Recommendation 76-3 that agency rulemaking notices contain a summation of the agency's current attitudes toward critical issues and state the significance of tests relied on by the agency may be hard to implement or be inappropriate in some situations. For example, it may be easier to apply such procedures to information marshalled by the agency in preparation for rulemaking than to information submitted by interested persons during the public proceeding. In some cases, the significance of particular information may not be apparent until final deliberations by the agency. Early assignment of significance to information may also increase

adversary behavior or tend to cause the agency to be less open-minded about the issues and evidence. For these reasons, a general requirement that agencies give notice of their intent to rely on specific data would probably do more harm than good in agency rulemaking. As Professor Davis has observed, even in adjudication an agency is not required to indicate which evidence is likely to be relied upon.<sup>52</sup>

This is not to suggest that an agency should not be obliged to maintain an index of the information it makes available by placing in the public file. Indeed, the basic concept of making information "available for comment" in rulemaking needs elaboration and more precise definition. Since the range of interests potentially affected by a rule may be large, and the number of interested persons almost limitless, there are practical limits on the ability of an agency to make information and comments available to interested persons. As a general matter, an agency should be deemed to have fulfilled its obligation to make information "available for comment" if it places the information in a central rulemaking file; notifies interested persons of the location of the file, and, finally, maintains the rulemaking file or "record" in a way which permits timely use by rulemaking participants.

However, there may be situations where groups of interested persons with a substantial stake in the outcome of a proceeding do not have the means to obtain access to the central file. Therefore, agencies should be alert to the existence of such persons and take steps to facilitate their participation in the rulemaking. For example, the agency may be able to provide access to key documents at regional offices or in libraries near such groups. Detailed and current indices of the documents placed in the central rulemaking file would also enable interested persons to make discrete requests for documents, thus relieving the agency of burdensome information requests.

**EVIDENTIARY SUPPORT IN THE RULEMAKING  
RECORD FOR CRUCIAL FINDINGS ON  
DISPUTED FACTS,**

**A STATEMENT OF "FINDINGS AND  
CONCLUSIONS, AND THE REASONS OR BASIS  
THEREFOR, ON ALL THE MATERIAL ISSUES  
OF FACT, LAW, OR DISCRETION"**

Professor Davis suggested these as "hybrid" procedures and stated, with respect to the first, that "everyone is likely to agree that rules that are dependent on challengeable findings should have evidential support,"<sup>53</sup> and with respect to the latter, "I believe the gain from applying the § 557(c) provision to rulemaking would generally outweigh the slight inconvenience to the agency of complying with the requirement."<sup>54</sup>

These two procedures are being treated together because the requirements of the "rulemaking record" and the adequacy of the agency's articulated rationale for its rules are related. The kinds of issues raised by these procedures are stated by Professor Daniel Gifford as follows:

The old paradigms of administrative rulemaking and judicial review no longer seem to fit. Are administrative rules surrounded by a presumption of validity? Who bears the burden of establishing the rationality of an administrative rule (or the lack thereof) and what does that burden entail? What is the relationship between the administrative record, the record for judicial review, and the allocation of the burden on the rationality issue? To what extent does the Vermont Yankee prohibition on reviewing courts ordering more than notice-and-comment procedures affect judicial review for substantive rationality? These questions are currently troubling the courts. And they are intimately related.<sup>55</sup>

Professor Gifford's analysis of the different treatment of judicial review of formal and informal rulemaking in the influential 1941 Final Report of the Attorney General's Committee on Administrative Procedure provides useful background for considering these questions:

The Report's conception of judicial review of regulations promulgated after informal proceedings is further illuminated by the contrast which it drew between the "undetailed" review of informal rulemaking and the "detailed" review which courts were said to perform over formal rulemaking where the "substantial-evidence" standard was generally applicable and where "direct" review took place on the rulemaking record prepared in proceedings before the agency. There—with regard to formal rulemaking—the Report said "a court is required not merely to pass upon the presence of a rational relationship between a regulation and the governing statute but to judge the fundamental soundness of the details of the administrative reasoning process."

That this "detailed" judicial review was accorded to regulations promulgated after formal rulemaking proceedings was not unconnected with the fact that review took place on a record prepared by the agency in those rulemaking proceedings. . . .

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Detailed review was substantial-evidence review because it examined the agency determination for its nexus with a record prepared in an agency rulemaking proceeding. In undetailed review the court merely looked to see whether the possibility of underlying factual support had been disproven. It was a type of review appropriate to an inquiry into whether or not an objector to a regulation could muster sufficient proof to disprove a rational basis for the regulation. The difference between "detailed" and "undetailed" review thus was a function of the underlying procedure. That difference in underlying procedure as it affected the Pacific Box & Basket presumption produced a difference in the degree to which agency reasoning processes were assessed for their "soundness."

The Report's description of rationality review of a regulation as not involving scrutiny of the reasoning processes of the promulgating agency was based on an explicit assumption that only limited evidence would be necessary to defend the challenged regulation. This assumption fit the then-current understanding of the mechanics of judicial review . . . Limited evidence would be sufficient to defend the regulation and detailed scrutiny of the agency reasoning processes could be avoided because the limited evidence would be introduced for the sole purpose of reinforcing the Pacific Box & Basket presumption. The factual base of the regulation did not need to be proved; the agency introduced evidence merely to reinforce a presumption of its existence. . . .<sup>56</sup>

Quite clearly courts and the Congress in passing new legislation have been moving toward "detailed" review of all agency rules. The Chenery cases<sup>57</sup> and the APA

established that courts are to judge agency action by the rationale put forth by the agency on review. Then in the Overton Park case—perhaps the watershed of current administrative law on rulemaking review—the Supreme Court stated that, though agency action is entitled to a presumption of regularity, "that presumption is not to shield [the] action from a thorough, probing, in-depth review."<sup>58</sup> As explained above, reviewing courts have been increasingly immersed in the details of highly-complex agency decisions and records.<sup>59</sup>

Lacking a record developed through an adversary process, courts engaged in preenforcement review of rules have naturally sought to interpret § 553 in a way which meets their needs. Some courts have focused on the "concise statement of basis and purpose" requirement to place the burden on the agency to demonstrate the rationality of its rule. A leading case is Automotive Parts & Accessories Ass'n v. Bovd, wherein the Court of Appeals for the D. C. Circuit stated:

[I]t is appropriate for us . . . to caution against an overly literal reading of the statutory terms "concise" and "general." These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item or opinion included in the submissions made to it in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by Section 4 [now § 553] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.<sup>60</sup>

The legislative history of the APA indicates that the statement of basis and purpose was intended to be an explanation of the rule to the public, not a brief to the court on review.<sup>61</sup> Nevertheless,—at least in the context of preenforcement review of rules—it

makes sense to use the statement of basis and purpose requirement to serve a judicial review function.

However, the suggestion that § 557(c)'s requirement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" be applied to informal rulemaking probably should not be adopted. The language of § 557(c), and, indeed, what the legislative history indicates was intended by it, may be similar to the more stringent "reasons" requirement being imposed by reviewing courts in informal rulemaking.<sup>62</sup> Nevertheless, importing a provision from the APA which applies to adjudication and formal rulemaking is likely to encourage agencies to employ other trial-type procedures in informal rulemaking. For example, § 557(c) also entitles parties to an opportunity to submit proposed findings and conclusions or exceptions to initial decisions by the hearing officer.<sup>63</sup> Furthermore, although the difference between formal and informal rulemaking may be narrowing, especially with regard to judicial review, there remain differences in the evidentiary support needed to sustain the agency action, and in the burden on the agency to prove issues or facts.

Reviewing courts generally have avoided blanket statements regarding the evidentiary support needed for rules adopted through informal rulemaking. Judge Leventhal did state in Portland Cement Ass'n v. Ruckelshaus that "[i]t is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that . . . is known only to the agency."<sup>64</sup> The first part of that statement has not, however, been interpreted in subsequent judicial decisions as enunciating a new, broad principle of administrative law. Rather, the statement that rules cannot be based on inadequate data should probably be read as stating the well-established proposition that courts will not uphold agency action where the record generated by the agency is not adequate for the court to judge the rationality of the rule.

It is one thing for reviewing courts to decide when rules must be supported by facts, and quite another to state, in advance, any general principle about the necessary evidential support for rules. The conundrum was stated well by Professor Davis:

The question of when rules must be supported with facts can be easily answered in vague terms, but at the most profound level the question is beyond present understanding and therefore beyond present law. The vague answer which may suffice for most practical purposes, is that a rule must be supported with facts when a statute so requires, when an issue of fact has arisen in the rulemaking proceeding that needs to be resolved in order to determine the content of the rule, and when the rule would be arbitrary and capricious unless it is supported with facts. Of course, the last part of the vague answer merely changes the form of the question instead of answering it; the crucial question is: When is a rule arbitrary and capricious because of lack of facts supporting it? A framework of an answer, but not an answer, is: When a reviewing court thinks that facts are needed to support the rules.<sup>65</sup>

Given the difficulties which courts face in reviewing rules in specific contexts, it would be unwise to attempt to impose a general requirement with respect to the evidentiary support needed for rules. A far preferable course is for the Congress to condition particular rules or rule provisions on specific factual findings by the agency.

The question of evidentiary support in the rulemaking record raises one final issue which the Conference has addressed in the past: Should administrative rules be reviewed solely on the administrative record or file which was before the agency when it made its rulemaking decisions? ACUS Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, states which administrative materials should be before a court reviewing rules adopted following the notice-and-comment procedures of § 553.<sup>66</sup> That Recommendation did not, however, seek to confine review to the administrative record or file which was before the agency when it made its rulemaking decision. Critics of that position have argued that confining review to such an "exclusive" rulemaking

record would have a salutary disciplining effect on agencies engaged in rulemaking and would aid courts in performing their reviewing function. According to one critic:

A requirement that an agency be judged on a single, comprehensive, detailed justification for its decision, prepared at the time when it promulgates a rule, would have several potentially beneficial effects. It would force the various subunits within the agency to pursue their differences on questions of fact, interpretation or policy until they could be resolved. It would force the agency to choose between alternative data, theories and methodologies and create a coherent case upon which scrutiny by the courts can be focused. Unfortunately, these benefits cannot be completely realized under the present system of historical records and ad hoc judicial review. Under such a system, the statements drafted and published as justifications for rules are not completely binding on the agency. The stated justifications for a rule will be less comprehensive and thoughtful if there is the possibility<sup>67</sup> that they could be supplemented with other material on review . . . .

A requirement that agency rules be reviewed solely on the rulemaking record before the agency when it made its decision should not be confused with a requirement that agencies make certain kinds of information available for public comment by placing it in a public rulemaking file. The latter requirement was discussed and supported earlier in this report.<sup>68</sup> The first—a requirement of an exclusive record for decision—raises somewhat different concerns, which are suggested in the following excerpt from Dean Auerbach's article:

The new concept of on-the-record section 553 proceedings will destroy the relative simplicity, flexibility and efficiency once associated with rules promulgated under section 553 . . . .

Because of the possibility that they will be precluded from raising in a reviewing court any objection to a rule not made during the rule-making proceeding, participants in the proceeding will voice every possible objection and introduce data to support it. Since it cannot know which of these objections will eventually become the basis of a petition for review, the agency will have no choice but to respond—for the record—to each objection with its own data and arguments . . . .

Finally, the agency will be required to conduct on-the-record proceedings under section 553 before issuing any rule, even though it

is probable that only a small percentage of any agency's rules are subjected to judicial review. All of these factors will combine to attach to section 553 proceedings the dissatisfaction previously reserved for proceedings under sections 556 and 557—which is as much the result of the on-the-record requirement as of the trial-type procedural requirements.<sup>69</sup>

In fairness, it should be pointed out that this dire prediction was based on adoption of a combination of procedural requirements, and not merely the exclusive record requirement. Moreover, it is likely that these consequences would not materialize in all agency rulemakings. Conversely, however, it may be that the benefits of an exclusive record requirement realized by some agencies may not outweigh the costs of such a requirement if imposed on all agencies.

Recommendation 74-4 probably went too far in explicitly including in the definition of the record for review "factual information . . . that is proffered by the agency as pertinent to the rule."<sup>70</sup> Courts should continue to view with disfavor—and reject when appropriate—agency proffers of factual material and argument which were not before the agency when it made its decision. On the other hand, it is hard to argue with proposition, also stated in Recommendation 74-4, that courts should not invariably be confined to the administrative materials which the Conference recommended be before the courts on review of rules.<sup>71</sup>

**AGENCY RESPONSE TO  
ESPECIALLY SIGNIFICANT  
COMMENTS**

Nothing in § 553 of the APA requires an agency to respond to comments submitted by interested persons. Reviewing courts have, however, occasionally refused to uphold rules where the agency failed to respond to especially significant comment. For example, in Portland Cement Ass'n v. Ruckelshaus,<sup>72</sup> the E.P.A. failed to respond to an industry critique of the methodology it used in certain tests, even though the D. C. Circuit had

remanded the rulemaking to the agency for the express purpose of receiving the comment. Once again on review, the court held:

The purpose of our prior remand cannot be realized unless we hear EPA's reponse to his comments, and the record must be remanded again, for that purpose.

...This agency, particularly when its decisions can literally mean survival of persons or property, has a continuing duty to take a "hard look" at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the court order remanding for further presentation. Manufacturers' comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. ...<sup>73</sup>

A similar situation was presented in the Nova Scotia case cited earlier.<sup>74</sup> Interested persons had submitted comments on a proposed FDA standard which required all fish to be processed at a certain temperature, in water of a specified salinity level, for a fixed period of time. The commenters had argued that (1) application of the proposed standard to smoked whitefish would destroy the product, (2) the standard's objective could be achieved for smoked whitefish by a less stringent requirement, and (3) the FDA's scientific research supporting the standard was flawed. On review of an enforcement order, white fish processors challenged the adequacy of FDA's statement of basis and purpose because it did not respond in specific terms to these comments. The Second Circuit agreed, stating:

It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered . . . .

\* \* \*

\* \* \*

The Secretary was squarely faced with the question whether it was necessary to formulate a rule with specific parameters that applied to all species of fish, and particularly whether lower temperatures with the addition of nitrite and salt would not be sufficient. Though this

alternative was suggested by an agency of the federal government, its suggestion, though acknowledged, was never answered.

Moreover, the comment that to apply the proposed T-T-S requirements to whitefish would destroy the commercial product was neither discussed nor answered. We think that to sanction silence in the face of such vital questions would be to make the statutory requirement of a "concise general statement" less than an adequate safeguard against arbitrary decision-making.<sup>75</sup>

These cases are distinguishable in that the Nova Scotia decision would require the agency's response to "cogent" comments in the statement of basis and purpose for the final rule. In Portland Cement, the agency's response was requested on remand from the reviewing court.

Sound administrative and judicial practice militate in favor of requiring agencies to respond to significant comments in the statement of basis and purpose accompanying the final rule. It would probably be helpful to express the requirement as a response to significant issues raised in the comments, rather than as a requirement to respond to comments.<sup>76</sup> Substance, not form, should be paramount.

This recommendation will undoubtedly be met with the objection that agencies, unable to predict in advance which issues raised in comments will be significant or "cogent," will act with excessive caution and expend undue amounts of time and resources responding to all comments. The problem would be compounded if interested persons, anticipating such an agency response, "padded" their comments with essentially frivolous arguments against a rule. The chances of this scenario occurring could be decreased if the requirement were accompanied by a statement that an agency need not respond to factual arguments made by commenters, if the arguments are unsupported by factual information. This would prevent use of the response-to-comments requirement to delay and misdirect agency rulemakings.

### AGENCY CONSULTATION WITH AN ADVISORY COMMITTEE

In Recommendation 72-5<sup>77</sup>, the Conference generally opposed Congressional imposition of procedural requirements in rulemaking beyond those required by § 553 of the APA. However, that recommendation was qualified by the statement that when Congress "has special reason to do so, it may appropriately require opportunity for oral argument, agency consultation with an advisory committee, or trial-type hearings on issues of specific fact."<sup>78</sup> The report which was the basis of that recommendation gives examples of statutes which require consultation with advisory committees,<sup>79</sup> and the author of the report suggested that referring factual issues to advisory committees could be used as an alternative to oral hearings for developing such issues.<sup>80</sup> There appears to be no need for the Conference to either change or expand upon the position stated in Recommendation 72-5 with regard to use of advisory committees.

### CONTROL OF EX PARTE COMMUNICATIONS

The Conference addressed the issue of ex parte communications in informal rulemaking in Recommendation 77-3.<sup>81</sup> Of course, the issue, as stated, would have made no sense to drafters of the APA, since there are no "parties" in rulemaking. Nor would it make sense to refer to "off-the-record" communications, since informal rulemaking was not to be reviewed on the basis of a "record" generated during the rulemaking process. Today, however, the notion of a "record" for review purposes is well-established, and the appropriateness of "off-the-record" communications in rulemaking is the subject of continuing debate.<sup>82</sup>

Recommendations of the Conference in recent years have recognized the desirability of establishing a rulemaking file into which is placed documents and factual

information upon which a rule is based.<sup>83</sup> Such a file is an aid to rulemaking participants and reviewing courts, and, in some cases, it may be essential to effective participation and review. The Conference, however, has not joined with those who would convert notice-and-comment rulemaking into an adversary or entirely "on-the-record" process in which ex parte contacts would be prohibited.<sup>84</sup>

In Recommendation 77-3, the Administrative Conference rejected a general prohibition on all ex parte communications in rulemaking because:

[I]t would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would . . . result in procedures that are unduly complicated, slow and expensive, and, at the same time,<sup>85</sup> perhaps not conducive to developing all relevant information.

This efficiency argument, in response to the fairness argument of the ex parte communications ban proponents, is not the strongest argument that can be made for refusing to ban such communications in rulemaking. The loss of efficiency in converting notice-and-comment rulemaking into an adversary process is important. But equally important is the change that might be effected in perceptions of the basic nature of the rulemaking process. These differing perceptions were well stated by a former Chairman of the Administrative Conference as follows:

The imposition of judicial procedures and the application of a "substantial evidence," adjudication-type standard of review spring from a perception that rulemaking is essentially and perhaps exclusively an analytic and rational process, in which the "best" result is reached through collection and examination of all relevant facts by skilled officials aided in their deliberations by the arguments of interested persons. Such procedural developments are, in other words, in principle a repudiation of politically sensitive rulemaking—and in effect may be its destruction. An agency will be operating politically blind if it is not permitted to have frank and informal discussions with members of Congress and the vitally concerned interest groups; and it will often be unable to

fashion a politically acceptable (and therefore enduring) resolution of regulatory problems without some process of negotiation off the record. A politically sensitive agency, moreover, may be able to demonstrate that its rules are not "arbitrary, capricious or an abuse of discretion," but can hardly be expected to meet a strict "substantial evidence" standard of review when the evidence is not the only applicable criterion.<sup>86</sup>

A ban on ex parte communications in rulemaking is likely to stifle useful negotiations with interested persons.

Recommendation 77-3 advises that (1) written communications addressed to the merits of a proposal should be placed in a public file available for inspection, and that (2) agencies should experiment with procedures designed to disclose oral communications from outside sources which contain significant information or argument relevant to the merits of a proposed rule.<sup>87</sup> There may, of course, be rulemakings—especially those involving competing claims to a valuable privilege—in which ex parte communications would raise due process concerns. Recommendation 77-3 addresses this possibility by stating that "[a]gencies or the Congress or the courts might conclude, of course, that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances."<sup>88</sup>

It should be noted that Home Box Office, Inc. v. F.C.C.,<sup>89</sup> which contained language strongly condemning ex parte communications in informal rulemaking and was broad enough to encompass agency staff communications, has not been followed in recent court decisions.<sup>90</sup> On the other hand, these decisions should not be read as giving a "green light" to any kind of ex parte communications in rulemaking. If there is evidence that such communications have subverted the notice-and-comment process—for example, by introducing significant new factual information—then courts may be expected to

remand the rule for additional proceedings.<sup>91</sup>

**OPPORTUNITY TO CROSS-  
EXAMINE WITH RESPECT TO  
SPECIFIC FACTS THAT ARE  
CRUCIAL AND DISPUTED**

The Conference addressed use of cross-examination in informal rulemaking in several of its recommendations. Recommendation 72-5 states that Congress should never require trial-type procedures for resolving questions of policy or "general" fact, but that in special situations it may appropriately require such procedures for resolving issues of specific fact.<sup>92</sup> Cross-examination is, of course, a central element of trial-type procedure. Recommendation 76-3, which was directed to the agencies and not Congress, recommends that in rulemaking "agencies should give interested persons an opportunity to indicate issues of specific fact as to which they contend cross-examination should be considered by the agency to be appropriate."<sup>93</sup> However, the recommendation adds that, if permitted, cross-examination "should be strictly limited as to subject and duration."<sup>94</sup>

The Administrative Conference's position that cross-examination is generally inappropriate in informal rulemaking was buttressed by an intensive, five-year Conference study of the Federal Trade Commission's experience under the Magnuson-Moss FTC Improvements Act of 1974.<sup>95</sup> That Act, while explicitly granting the FTC legislative rulemaking authority to combat unfair or deceptive practices in the marketplace, imposed additional procedural requirements on such rulemaking. The requirements—collectively designed to give interested persons a greater opportunity to challenge the factual basis of proposed rules—included the right to present views orally and to conduct cross-examination and submit rebuttal with respect to "disputed issues of material fact . . . necessary to resolve" in the rulemaking.<sup>96</sup> The FTC adopted rules of practice which were faithful to the statute, but in the rulemakings it later conducted, the FTC was unable to narrowly limit cross-examination in subject matter and duration

as recommended by the Conference in Recommendation 76-3.<sup>97</sup>

The conclusions the Administrative Conference drew from the FTC experience are contained in ACUS Recommendations 79-1<sup>98</sup> and 80-1.<sup>99</sup> Recommendation 79-1 constituted an interim report on the manner in which the FTC had carried out the Act; the Conference's general conclusions regarding the Magnuson-Moss Act procedures are stated in Recommendation 80-1. With respect to the general application of the procedures, the Conference essentially re-affirmed its 1972 position, stating that "Congress should not ordinarily require, for agency rulemaking, procedures in addition to those specified by § 553 of the Administrative Procedure Act, although the agencies should have the discretion to utilize them."<sup>100</sup> The recommendation also faulted the FTC for failing to structure its rulemakings so as to focus and narrow the issues to be developed at the trial-type hearing required by the Act.<sup>101</sup>

The FTC Study did not establish that cross-examination is never appropriate in rulemaking, and the study contains little hard data establishing the costs and benefits of cross-examination in the FTC's rulemaking proceedings. The FTC rulemakings were protracted: Of twenty rulemaking proceedings (16 of which were begun by April 1976), the Commission had completed only three by April of 1979.<sup>102</sup> However, although probably a contributing factor, the long gestation period for Magnuson-Moss rules cannot be attributed solely to cross-examination.<sup>103</sup> The amount of time consumed by cross-examination at oral hearings was not great when compared to the total length of the proceedings.<sup>104</sup> The study also documented instances in which cross-examination revealed flaws in studies or surveys introduced in the proceedings.<sup>105</sup> Unquestionably some benefit was derived from the cross-examination.

On the other hand, the FTC study showed that injecting cross-examination into

rulemaking may produce negative—albeit hard to measure—effects. Cross-examination is just one element of adversary procedure, and once a right of cross-examination is created, participants are likely to argue that the right will be meaningful only if other elements of adversary procedure are provided. For example, participants in FTC rulemaking proceedings were unhappy when presiding officers attempted to limit, or refused to allow, "re-direct" examination of witnesses who had been cross-examined by representatives of other interests.<sup>106</sup> Participants also complained that they were not given adequate time to prepare for cross-examination and that discovery was inadequate.<sup>107</sup> Introducing cross-examination in rulemaking may also lead to demands for an impartial decision-maker to preside at the hearing and a prohibition on ex parte communications with the presiding officer. It is significant to note here that, under pressure from the regulated industries, the Congress imposed just these requirements on FTC rulemaking when it amended the FTC Act in 1980.<sup>108</sup>

A general requirement of cross-examination in rulemaking is likely to raise other theoretical and practical problems. For example, in adjudication, cross-examination is used to develop "evidence" or information that is assumed to be qualitatively better than information not subjected to cross-examination. If an agency allows cross-examination of some information which is included in the rulemaking file, should the value of that information be deemed greater than that of written comments or other agency-generated information? In adjudication cross-examination is conducted by representatives of named parties; by contrast, any "interested person" may participate in rulemaking. Does that mean that all interested persons should be allowed to conduct cross-examination in rulemaking if some are so allowed? Can some interested persons be allowed to conduct cross-examination, while others only be permitted to file comments? These problems may not be insurmountable, and Recommendations 79-1 and 80-1 gave specific advice to the FTC for structuring the rulemaking process so that it would work better.<sup>109</sup>

Perhaps the strongest reason for opposing a general requirement of cross-examination in rulemaking is that its use may tend to polarize the views of participants in the rulemaking proceedings.<sup>110</sup> Cross-examination requires use of intermediaries knowledgeable of adversary procedure, and adversary tactics may prevent genuine dialogue occurring. Without dialogue and consensus-building, or at least accommodation, there is little reason to believe that final rules will be accepted by the public.<sup>111</sup>

In summary, cross-examination is a procedural device which may be useful for developing information in particular rulemakings. However, the decision to use cross-examination probably should be left to agency discretion, and cross-examination should not be singled out—either by requiring or prohibiting its use—in general legislation.

**OPPORTUNITY TO PRESENT  
ORAL ARGUMENT TO THE  
AGENCY OR TO OTHER  
OFFICERS.**

The APA suggests the possibility of allowing an opportunity for oral presentation in informal rulemaking, but it does not require it.<sup>112</sup> In Recommendation 72-5, the Conference recognized that there may be special circumstances in which the Congress or agencies may wish to receive oral comments or argument on proposed rules.<sup>113</sup> In Recommendation 76-3, the Conference advised agencies to consider using in "appropriate circumstances" additional procedures in informal rulemaking, including "[h]earing argument and other oral presentation, when the presiding agency official or officials may ask questions, including questions submitted by interested persons."<sup>114</sup> Therefore, the Conference is on record in opposition to a general (but not specific) requirement of an opportunity for oral presentation of views or data in rulemaking, but in support of its use

by agencies when, in their discretion, they believe it will contribute to particular rulemakings. This is a sensible position, and probably should be adhered to.

Oral, "legislative-type" hearings may be useful, and only minimally-burdensome, in many proceedings. Interested persons may be more satisfied with the rulemaking process if they are given an opportunity to address the final decisionmaker, or high-level agency officials, face-to-face.<sup>115</sup> At least they will know that their views were not lost in a bureaucratic labyrinth. Oral hearing requirements are quite common in specific legislation granting rulemaking authority, and few complaints have been registered regarding their use.<sup>116</sup>

Nevertheless, a mandatory oral presentation or hearing requirement for all informal rulemaking would be either redundant or unnecessarily burdensome in particular proceedings, especially proceedings which make minor changes to existing rules or in which there is known to be basic accord with the rulemaking proposal. If an opportunity for oral presentation is required by statute, it would be desirable for the statute to expressly give the agency authority to limit the number of persons allowed to make presentations if necessary for the orderly conduct of the rulemaking proceeding.<sup>117</sup>

## FOOTNOTES

1/ Following is a selective list of law review articles on the subject: Auerbach, Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review, 72 Nw. L. Rev. 15 (1977); Breyer, Vermont Yankee and the Court's Role in the Nuclear Energy Controversy, 91 Harv.L.Rev. 1833 (1978); Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View, 91 Harv.L.Rev. 1823 (1978); Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum.L.Rev. 1 (1975); Davis, Administrative Common Law and the Vermont Yankee Opinion, Utah L. Rev. 3 (1980); DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257 (1979); Fuchs, Development and Diversification in Administrative Rulemaking, 72 Nw. L. Rev. 83 (1977); Gifford, Rulemaking and Rulemaking Review: Struggling Toward a New Paradigm, 32 Ad. L. Rev. 577 (1980); Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Calif. L. Rev. 1276 (1972); McGowan, Reflections on Rulemaking Review, 53 Tul. L. Rev. 681 (1979); Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the APA and Other Federal Statutes, 75 Colum. L. Rev. 721 (1975); Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. Pa. L. Rev. 485 (1970); Rodgers, A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny, 67 Geo. L.J. 699 (1979); Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, The Sup. Ct. Rev. 345 (1978); Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 Harv. L. Rev. 1805 (1978); Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258 (1978); Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974); Williams "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. Chi. L. Rev. 401 (1975); Wright, New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process, 29 Ad. L. Rev. 59 (1977); Wright, Court of Appeals Review of Federal Regulatory Agency Rulemaking, 26 Ad. L. Rev. 199 (1974).

2/ As Dean Verkuil has pointed out, administrative procedure historically has been fought over by forces having differing views of the need for or wisdom of administrative agency regulation. Verkuil, The Emerging Concept of Administrative Procedure, id. at 261-276.

3/ In the more recent sources cited in note 1, there is a general recognition and acceptance of the fact that the original understanding of the APA's procedural requirements is no longer viable. The discussion predominantly concerns the direction the change is taking, with attempts to evaluate the various developments and suggestions for a preferred model for future rulemaking.

4/ The past several Congresses have considered regulatory reform bills. Comprehensive bills to amend the APA are pending in each house of Congress currently: S. 1080, the Regulatory Reform Act, was passed unanimously by the Senate on March 24, 1982; the House Judiciary Committee reported out H.R. 746, the Regulatory Procedure Act of 1982, on February 25, 1982.

5/ In the foreward to the 1973-1974 Annual Report of the Administrative Conference, Chairman Scalia wrote that a major challenge facing the Conference was to "prevent the balkanization of administrative law, by either re-establishing the validity of the general dispositions made in the Administrative Procedure Act or by achieving such fundamental changes in that Act as may be necessary to satisfy more recent standards of fairness and efficiency. Unless this is done, I fear that repeated Congressional attention to administrative procedure as a mere subsidiary issue in the context of more important substantive controversies will lead to a process that is pointlessly diverse and frequently unsound." Quoted in Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, supra note 1 at 404.

6/ See generally Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 1 C.F.R. § 305.72-5 (1981) (based on Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, supra note 1); Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 1 C.F.R. § 305.76-3 (1981) (based on Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, supra note 1); Recommendation 77-3, Ex Parte Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.77-3 (1981) (based on Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377 (1978); Recommendation 80-4, Decisional Officials' Participation in Rulemaking Proceedings, 1 C.F.R. § 305.80-4 (based on Strauss, Disqualification of Decisional Officials in Rulemaking, 80 Colum. L. Rev. 990 (1980)), and Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.80-6 (1981) (based on Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943 (1980).)

7/ Recommendation 76-3 was prefaced by the following statement:

The Recommendation grows out of a study of decisions, primarily of the Court of Appeals for the District of Columbia Circuit, in which rulemaking proceedings have been remanded to agencies for additional procedures, and of the responses of the affected agencies. The Recommendation implies no view as to whether those decisions were authorized by the Constitution or relevant statutes. The Recommendation is premised, however, on the view that one can learn from the insights of judges, who on the basis of their study of records reflecting "the circumstances of particular proceedings," perceived a need for procedures in addition to notice and the opportunity for comment, and from the experience of agencies required to provide such additional procedures.

8/ Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (discussed by Professors Stewart, Byse, and Breyer, 91 Harv. L. Rev., supra note 1.)

9/ Vermont Yankee Nuclear Power Corp. v. N.R.C., id. at 524.

10/ ACUS Recommendation 80-1, 1 C.F.R. § 305.80-1, contained several general recommendations with respect to the "hybrid" rulemaking procedures required by the Federal Trade Commission Improvement Act of 1975. In a memorandum distributed to members of the Conference on June 2, 1980, Professor Davis interpreted these

recommendations as disapproving mandatory use of any procedure in addition to the minimum requirements of Section 553 of the APA and he stated: "Although the terms 'hybrid procedures' and 'adjudicatory procedures' [referring to language used in the preface to the recommendation] are undefined, they clearly include procedures that the Conference cannot properly disapprove. The broad terms should be broken down into their constituent elements, and each element should be separately considered." Memorandum, Kenneth Culp Davis to Members of the Administrative Conference (June 2, 1980) at 2. See also Separate Statement of Kenneth Culp Davis on Recommendation 80-1, 1980 Recommendations and Reports of the Administrative Conference of the United States 8-9.

In a similar vein, Professor Davis has stated that "[w]hat is unfortunate about the Vermont Yankee opinion is its wholesale ban on addition to § 553 requirements, without consideration of the merits of each requirement." 1980 Supplement to Vol. 1, ADMINISTRATIVE LAW TREATISE (2d ed.) § 6:37-2 at 80. See generally 1 K. Davis, ADMINISTRATIVE LAW TREATISE (2d ed.), §§ 6:35-6:37, at 605-616.

11/ It must be noted here that, although serving as the basis for Committee deliberations, neither the Office of the Chairman nor the Committee on Rulemaking has adopted all of the views contained in the report.

12/ This term appears to have been coined by Stephen Williams in connection with a study done for the Administrative Conference. See Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, supra note 1.

13/ 5 U.S.C. § 553(b) (1976)

14/ 5 U.S.C. § 553(c) (1976)

15/ Id.

16/ 5 U.S.C. § 553(d)(1976)

17/ Senate Comm. on the Judiciary, Report on the Administrative Procedure Act, S. Rep. No. 752, 79th Cong., 1st Sess. (1945), quoted in Auerbach, Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review [hereinafter cited as "Auerbach, Informal Rule Making"], supra note 1 at 18.

18/ Auerbach, Informal Rule Making, supra, note 1 at 18, 22. Of course, a much different interpretation of § 553's notice requirement has been suggested more recently by Judge Skelly Wright, see quote accompanying n. 40, infra.

19/ S. Rep. No. 752, supra note 17, at 201, quoted in Auerbach, Informal Rule Making, id., at 22.

20/ Auerbach, id., at 23 (citations omitted).

21/ Auerbach, supra note 1 at 24-25; Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the APA and Other Federal Statutes [hereinafter "Nathanson, Probing the Mind of the Administrator"], supra note 1 at 755.

22/ Auerbach, id. at 25

23/ Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, supra note 1 at 375 (citation omitted.) See also Stewart, Vermont Yankee and The Evolution of Administrative Procedure, supra note 1, at 1811.

24/ See cases cited in Verkuil, Judicial Review of Informal Rulemaking, supra note 1 at 190, n. 17.

25/ See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); United States v. Florida E. Coast Ry., 410 U.S. 224 (1973).

26/ See ACUS Recommendation 72-5 and the report upon which it is based, Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, supra note 1.

27/ An early influential work was H. Friendly, THE FEDERAL ADMINISTRATIVE AGENCIES (1962). See also 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 6.15 (Supp. 1970). For a critical appraisal of the trend toward rulemaking, see Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure, supra note 1.

28/ See Hamilton, supra note 1, at 1315-28, for a summary of procedural provisions of these statutes.

29/ It is not surprising that many of the "hybrid" cases and statutes involved health and safety regulation, where an erroneous decision might have severe and irreversible impacts on industry or the environment. See generally the authorities cited in Rodgers, A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny, supra note 1. Judge David Bazelon, U.S. Court of Appeals for the D.C. Circuit, gave the following statement to a Congressional committee considering various regulatory reform proposals in mid-1979:

The APA was crafted at a time when most administrative activity centered around economic regulation in the "big seven" independent regulatory agencies (CAB, FCC, FPC, FTC, ICC, NLRB, SEC). These agencies' mission was to assure equitable allocation of the economic pie to compensate for perceived imperfections of the marketplace.

Since the APA was enacted, the "fourth branch" of government has grown explosively. Most of this growth has occurred through the creation of new agencies, such as NRC, OSHA, CPSC, FDA and EPA, that are concerned with human health and safety.

The stakes in an agency proceeding are no longer limited to issues such as the appropriate rate of return for a utility company. Now agencies are asked to make decisions that may cost or save thousands of lives over one or even several generations. At the extreme, decisions before agencies such as NRC or EPA may ultimately determine the fate of mankind.

The issues facing the new agencies differ in other important respects as well. The classic model of regulation

involved conflict among a small number of readily identifiable interests. The new administrative law, by contrast, is typically polycentric . . . .These controversies are characterized by a much wider variety of interests and values, which the agency must weigh and reconcile in reaching its decision.

Perhaps even more important is the change in the nature of the information that forms the core of the new administrative law. The financial and economic data relevant to decisions by agencies such as the ICC have always been relatively intelligible even to a layman willing to study the issues. By contrast, problems such as the technological possibilities for storing hazardous nuclear wastes present scientific questions at or beyond the frontiers of current knowledge. These complex issues are often comprehensible only to a handful of highly trained specialists.

This development — the change from economic to health and safety regulation, accompanied by a widening range of value conflicts and increasingly complex technical issues — has profound implications for the role of Congress, the courts, and especially the agencies themselves.

Hearings on S.262 and Related Regulatory Reform Bills Before the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess., Part 2 at 14-16 (May-June 1979).

30/ See ACUS Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, 1 C.F.R. § 305.74-4 (1980); Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, supra note 1.

31/ See generally Nathanson, Probing the Mind of the Administrator, supra note 1.

32/ Id. at 762-768 (discussion of Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).)

33/ McGowan, Reflections on Rulemaking Review, supra note 1 at 686-87 (1979) (footnotes omitted). See also Verkuil, Judicial Review of Informal Rulemaking, supra note 1 at 205, for a discussion of the dilemma confronted by reviewing courts.

34/ It should be noted that the defect of the legislation-review analogy was recognized by the Attorney General's Committee on Administrative Procedure, and the drafters of the APA referred to the differences between administrative rules and legislation in explaining the minimum notice-and-comment requirement in Section 4 [now § 553] of the APA:

This subsection, which provides for public rule making procedures, applies only to . . . substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, except where Congress has required that rules be issued only upon a hearing. . . . Thus, the provision does not extend present requirements except to require

agencies, in the issuance of substantive rules, to permit at least the submission of written views or suggestions. This minimum requirement is based upon the premise stated as follows by the Attorney General's Committee (Final Report, pp. 101-103): "An administrative agency \* \* \* is not ordinarily a representative body. \* \* \* Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. \* \* \* Its knowledge is rarely complete, and it must always learn the \* \* \* viewpoints of those whom its regulations will affect. \* \* \* [Public] participation \* \* \* in the rule making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings." It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by some other statute required that rules be issued upon hearing.

Senate Judiciary Committee Print, June 1945, at 19-20.

35/ This phrase was used in Public Service Commission v. FPC, 487 F.2d 1043, 1099 (D.C. Cir. 1973) (C.J. Bazelon and J. Richey concurring), vacated and remanded, 417 U.S. 964 (1974).

36/ See, e.g., Verkuil, Judicial Review of Informal Rulemaking, supra note 1 at 214-226; Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1313 (1975).

37/ For a thoughtful commentary on the effects of post-APA administrative law developments on the presumption of facts supporting legislative rules, see generally Gifford, Rulemaking and Rulemaking Review: Struggling Toward A New Paradigm, 32 Ad. L. Rev. 577 (1980).

38/ See Davis Memorandum to Members of the Administrative Conference (June 2, 1980), supra note 10.

39/ See, e.g., the differing views of the judges of the D.C. Circuit Court of Appeals in Ethyl Corp. v. E.P.A., 541 F.2d 1 (1976).

40/ Wright, Court of Appeals Review of Federal Regulatory Agency Rulemaking, 26 Ad. L. Rev. 199, 210-11 (1974).

41/ See text supra accompanying note 20.

42/ Id.

43/ 1 C.F.R. § 305.77-3 (1981).

44/ This language comes from the conference committee report on the Magnuson-Moss FTC Improvement Act of 1974. H. Rep. No. 93-1606, 93d Cong. 2d Sess. 33 (Dec. 16, 1974).

45/ 568 F.2d 240 (2d Cir. 1977).

46/ Id. at 252.

47/ In U.S. Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978), Chief Judge Wright wrote:

Indeed, if the substance or identity of the data upon which the agency has relied is permitted to remain hidden until judicial review, the courts may well find themselves called upon to resolve novel disputes as to the truth of what the agency thought it knew, disputes which should have been resolved either in the initial hearings before the agency or on reconsideration . . . .

This is not to say that an agency may never rely on data in its files, or on public information, in reaching its decision. Rather, we hold only that the agency must either disclose the contents of what it relied upon or in the case of publicly available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review. While such disclosure would ideally appear appropriate at the earliest stage of the agency proceeding, at the very least it is clear that it must come in the final decision so that reconsideration may be sought and judicial review meaningfully afforded . . . .

Id. at 534-35. U.S. Lines involved informal adjudication rather than rulemaking, but Judge Wright has made clear elsewhere that he would apply the same rationale to rulemaking. See Wright, Court of Appeals Review of Federal Regulatory Agency Rulemaking, supra note 1 at 204.

48/ See Auerbach, Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review, supra note 1 at 40 (agreeing with the views of Professor Nathanson).

49/ Id. at 60.

50/ 1 C.F.R. § 305.76-3 (1981).

51/ 5 U.S.C. § 552.

52/ 1 K. Davis, ADMINISTRATIVE LAW TREATISE (2d ed.) § 6:26 at 580-581.

53/ Professor Davis' complete statement was:

Requiring evidential support for crucial findings is often nothing more than requiring rationality; good courts sometimes impose such a requirement as a matter of due process. The requirement can be in a strong or weak form, and how to phrase the requirement can be the subject of differing opinions, but everyone is likely to agree that rules that are

dependent on challengeable findings should have evidential support.

Davis Memorandum, supra note 10 at 4-5.

54/ Professor Davis' complete statement was:

A statement of "basis and purpose" of rules under §553(c) is something less than a statement of "findings and conclusions, and the reasons or basis therefor" under §557(c). The question is debatable, but I believe the gain from applying the §557(c) provision to rulemaking would generally outweigh the slight inconvenience to the agency of complying with the requirement. Findings and reasons are an efficient and effective protection against arbitrariness.

Id. at 5.

55/ Gifford, Rulemaking and Rulemaking Review: Struggling Toward A New Paradigm, supra note 1 at 577-578 (1980).

56/ Id. at 586, 588-89.

57/ S.E.C. v Chenery Corp., 332 U.S. 194, 196 (1947); S.E.C. v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

58/ Citizens to Preserve Overton Park v. Volpe, 491 U.S. 402, 415 (1971).

59/ The following, lengthy excerpt from the Final Report of the Attorney General's Committee on Administrative Procedure suggests that the decision against "detailed" review of legislative rules adopted through informal procedure was probably made by the drafters of the APA with awareness of the problems judges would have reviewing them:

In considering now whether judicial review of a detailed kind is desirable, attention should be paid to the nature and complexity of the questions of fact involved. To take a comparatively simple example, suppose the problem to be that of prescribing regulations specifying the maximum amount of a particular type of poisonous spray residue to be permitted upon raw apples shipped in interstate commerce. The following questions would seem to have a bearing upon the final result: (a) the quantity of the particular poison, consumed within, say, a year, that will have a definitely harmful effect upon ordinary individuals; (b) the proportion of individuals that would be similarly affected by smaller quantities, and what quantities; (c) the quantity of unpeeled apples, and hence of poison upon apples, consumed by individuals in, say, a year; (d) the quantity of the same poison consumed by the same individuals upon other products in the same time; (e) the physical practicability and (f) the cost of reducing the amount of spray residue to various quantities and of eliminating it entirely before the apples are shipped; (g) the probable distribution between consumers and growers of the added cost incident to the removal of spray residue, in the light of (h) the effect of higher

prices upon consumption and (i) the countereffect of knowledge by consumers that apples carry poison.

The evidence relating to these questions would have to be sought in a variety of quarters. Questions (a) and (b) are medical, and information regarding them would have to be derived from observation and experiment. Questions (c) and (d) relate to the habits of people and would have to be obtained by direct inquiry or from statistics regarding the distribution of apples or both. Question (e) presents a question of chemistry, the answer to which depends upon experiment. Question (f) presents a relatively simple economic problem, resolvable in terms of the prices, wages, and the supplies required in the process of removing the residue. Testimony and statistics regarding these could readily be obtained. Questions (g), (h), and (i) involve a complex economic problem which is probably beyond definite solution by means of available knowledge. Suggestive studies might, however, be made, and opinion evidence might be obtained.

If evidence upon all of these questions were duly incorporated into a record and findings were made with respect to each point, the question of whether it would be useful to have a court review the evidence and the findings would depend upon the ability of the court to supply a corrective to possible gross error. Under the statutes, a finding is to be disregarded by the court only if there is no substantial evidence to support it. One crucial point is whether the courts would be willing to regard as substantial the opinion evidence and the possibly somewhat speculative and partial data upon which some of the findings would necessarily rest—especially the economic findings and findings relating, for example, to consumer preferences or reactions to food products and their labels. Those courts mindful of the reasons for entrusting such determinations to administrative agencies of course would regard such evidence as possessing weight. Some experience with judicial review, however, points the other way.

The courts, in any event, in judging such evidence would not be making use of their expertness at weighing judicially admissible evidence and trying the facts in judicial actions; for the facts here involved differ very greatly from those which courts ordinarily try. Like the ultimate conclusions embodied in regulations, they are general, not limited to particular situations. . . .

Undoubtedly, the appraisal of evidence bearing upon such questions and the formulation of findings upon the evidence lie peculiarly within administrative competence. It seems unlikely that advantage will be gained from exposing this process to the scrutiny of judges untrained in the subject matter of regulations. It should be enough that the administrative authorities are required, in case their regulations are called in question before a court, to

demonstrate that they come rationally within the statutory authorization. For these reasons the operation of existing statutes which provide for the detailed type of judicial review upon administrative records should be carefully watched before other similar measures are enacted. The Committee does not recommend the general application or extension of this type of court review of regulations.

Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 118-120 (1941).

60/ 407 F.2d 330, 338 (D.C. Cir. 1968).

61/ See text accompanying note 20, supra. However, the Attorney General's analogy to the "whereas" clauses in preambles of Executive orders appears to understate the stringency of the statement of basis and purpose requirement. Consider the following language from the House Report on the APA:

The first sentence states the minimum requirements of public rulemaking procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings," and the like. Open proceedings may be aided by the submission of reports or summaries of data by agency representatives. Where open proceedings are held, interested persons unable to be present would be entitled to make written submittals. Considerations of practicality, necessity, and public interest as discussed in connection with section 4 (a) will naturally govern the agency's determination of the extent to which public proceedings may be carried. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures. The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.

House Comm. on the Judiciary, Report on the Administrative Procedure Act, H.R. Rep. No. 1980, 79th Cong., 2d Sess. 259 (1946) (emphasis added).

62/ The Senate Report on the APA explains the "findings and conclusions" provision as follows:

The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.

Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material. It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often determine whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions.

Senate Comm. on the Judiciary, Report on the Administrative Procedure Act, S. Rep. No. 752, 79th Cong., 1st Sess. 210-211 (1946).

63/ 5 U.S.C. § 557(c).

64/ 486 F.2d 375, 393 (D.C. Cir. 1973).

65/ 1 K. Davis, ADMINISTRATIVE LAW TREATISE (2d ed.), § 6:13 at 508.

66/ 1 C.F.R. § 305.74-4 (1981).

67/ Pedersen, Formal Records and Informal Rulemaking, 85 Yale L. J. 38, 73 (1975).

68/ See text at \_\_\_.

69/ Auerbach, Informal Rulemaking: A Proposed Relationship Between Administrative Procedures and Judicial Review, supra note 1 at 60-61.

70/ 1 C.F.R. § 305.74-4, ¶ 1 (1981).

71/ Id.

72/ 486 F.2d 375 (D.C. Cir. 1973).

73/ Id. at 393-94.

74/ See note 45 and accompanying text.

75/ 568 F.2d at 252-53.

76/ In Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1171 (D.C. Cir. 1979), cert. denied 449 U.S. 823 (1980), the court characterized the agency's obligation as not requiring the agency "to meet each separate comment head on... [but instead] to identify vital material questions raised during the proceedings and indicate the agency's response to these concerns."

77/ 1 C.F.R. § 305.72-5, ¶ 2 (1981) (emphasis added).

78/ Id.

79/ R. Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, supra note 1 at 1316-1317.

80 Id. at 1335-1336.

81/ 1 C.F.R. § 305.77-3 (1981).

82/ See, e.g., E. Gellhorn and G. Robinson, Rulemaking "Due Process": An Inconclusive Dialogue, 48 U. Chi. L. Rev. 201, 237-258 (1981).

83/ See generally Recommendation 77-3, 1 C.F.R. § 305.77-3 (1981) (ex parte communications in rulemaking); Recommendation 79-1 (FTC hybrid rulemaking procedures).

84/ A leading proponent of banning ex parte communications in rulemaking is Judge J. Skelly Wright of the D. C. Circuit Court of Appeals, who, it should be noted, deplored judicial imposition of adjudicatory methods in agency rulemaking long before Vermont Yankee. See generally Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375 (1974). Judge Wright's views are not inconsistent, however, since the interpretation of § 553 he advocates can best be characterized as an "informal adversary process." Following is a recent statement of Judge Wright's views on the subject of ex parte communications in rulemaking:

[A]nother favorite subject of mine is ex parte contacts in rulemaking. I am strongly opposed to them. If someone honestly wants to make a contribution to rulemaking, let him put it in writing and put it in the rulemaking record so that other interested parties—perhaps adversely interested parties—may respond by comment or countercomment filed in the record. Why should only some parties have private access to the eye or the ear of the decisionmaker during rulemaking? What conceivably acceptable reason can there be for such private access during rulemaking? If there is a reason, can it be strong enough to overcome the damage to the rulemaking proceeding caused by the appearance of preference and prejudice created by the ex parte contacts if disclosed, and the damage to the other interested parties, to the record, and therefore to judicial review, if the ex parte contacts remain undisclosed?

....

I suggest to you that those cozy, one-sided ex parte conferences are not in the public interest. Unless ex parte contacts during rulemaking are avoided, in addition to keeping the public and other parties in the dark, the reviewing court is denied access, not only to the contents of the contacts, but also to whatever response those contacts would have triggered were their contents known. How is a court to make in-depth review of the record when some parts, perhaps some important parts, have been withheld—from it, from the public, and from

other interested parties? How is a court to know—how is anyone to know—whether an undisclosed ex parte contact with the decisionmaker tilted his decision one way or another?

Wright, "Musings on Administrative Law," 33 Ad. L. Rev. 177, 180 (1981).

85/ 1 C.F.R. § 305.77-3, ¶ 1 (1981).

86/ Scalia, "Two Wrongs Make A Right," Regulation (July/August 1977) at page 41. See also quote from Sierra Club v. Costle, infra note 90.

87/ 1 C.F.R. § 305.77-3, ¶¶ 1, 2.

88/ Id., ¶ 5.

89/ Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (1977).

89a/ Id. at 55:

From a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public, as here, and that generated internally in an agency: each may be biased, inaccurate, or incomplete—failings which adversary comment may illuminate . . . .

The issue of the propriety of staff contacts with the decisionmaker, raised in Home Box Office and perpetuated in Hercules, Inc. v. E.P.A., 598 F.2d 91 (D.C. Cir. 1978), was addressed squarely in U.S. Steelworkers of America v. Marshall, 647 F.2d 1189, 1210-1216 (1980). Judge Wright carefully reviewed the APA, the OSH Act, and cases since Home Box Office and found no requirement of separation of functions in the rulemaking. He repeated the invitation in Hercules that Congress address the issue in legislation, but concluded:

Rulemaking is essentially an institutional, not an individual, process, and it is not vulnerable to communication within an agency in the same sense as it is to communication from without. In an enormously complex proceeding like an OSHA standard setting, it may simply be unrealistic to expect an official facing a massive, almost inchoate, record to isolate herself from the people with whom she worked in generating the record . . . . In any event, we rest our decision not on our own theory of agency management, but on the state of the law.

Id. at 1216 (citation omitted).

90/ See Sierra Club v. Costle, 657 F.2d 298, 400-404 (D.C. Cir. 1981). The following statement is especially penetrating:

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated

from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

Id. at 400-401 (footnotes omitted).

91/ The court in Sierra Club v. Costle, citing Professor Davis and ACUS Recommendation 77-3, remarked in a note that:

Many commentators agree that ex parte comments during informal rulemaking should not be restricted; but there is also agreement that at least those communications which produce significant new information should be noted on a public record.

Id., supra note 90 at 402-403, n. 513 (emphasis in original). See also U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 539-540 (D.C. Cir. 1978); Environmental Defense Fund v. Blum, 458 F. Supp. 650, 659-661 (1978).

92/ 1 C.F.R. § 305.72-5, ¶ 3 (1981).

93/ 1 C.F.R. § 305.76-3, ¶ 2 (1981).

94/ Id.

95/ See Preamble to Recommendation 79-1 for the background of the study. 1979 Recommendations and Reports of the Administrative Conference of the United States 3.

96/ Id. at 6.

97/ Id. at 13; see generally, Boyer, Report to the Administrative Conference of the United States by the Special Project for the Study of Rulemaking Procedures Under the Magnuson-Moss Act, Chapters IV and VI (May 1979)(unpublished report).

98/ 1 C.F.R. § 305.79-1 (1981).

99/ 1 C.F.R. § 305.80-1 (1981).

100/ Id. ¶ B.2.

101/ Id., Preamble and ¶ A.

102/ Preamble to Recommendation 79-1, supra note 95, at 8-9.

103/ Pre-Magnuson-Moss Act rulemaking by the FTC also took a long time. 1980 Recommendations and Reports of the Administrative Conference of the United States 122. Also, in Magnuson-Moss rulemaking much of the elapsed time occurred in the pre-hearing and post-hearing stages of the proceedings, rather than the hearing stage. See Boyer Report, supra note 97, Data Appendix, item 13. Finally, the changing political climate probably affected the rate of final Commission action on rulemaking proposals.

104/ See Boyer Report, supra note 97, Data appendix, item 13.

105/ See generally Boyer Report, supra note 97, Chapter VI at 75-89.

106/ Id. at 42-46.

107/ See generally id., Chapter III and Chapter VI at 18-34.

108/ Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252 § 9, amended, 15 U.S.C. § 57a(c) to provide:

(B) The officer who presides over the rulemaking proceedings shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission. The officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence . . . .

(C) Except as required for the disposition of ex parte matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

See also Boyer, Phase II Report on the Trade Regulation Rulemaking Procedures of the Federal Trade Commission, 1980 Recommendations and Reports of the Administrative Conference of the United States 37-53.

109/ 1 C.F.R. § 305.79-1; 80-1, ¶ A.

110/ See Boyer Report, supra note 97, Chapter VI at 7-18 for a discussion of adversariness in Magnuson-Moss rulemakings of the FTC.

111/ See generally Reich, Regulation by Confrontation or Negotiation, Harv. Bus. Rev. (May/June, 1981).

112/ 5 U.S.C. § 553 states:

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation (emphasis added.)"

113/ 1 C.F.R. § 305.72-5, ¶ 2.

114/ 1 C.F.R. § 305.76-3, ¶ f.

115/ For a discussion of the FTC's experience with oral presentations to Commissioners, see Boyer, Phase II Report, supra note 108 at 87-95.

116/ See, e.g., Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, supra note 1 at 1318.

117/ The Magnuson-Moss Act did not expressly grant the FTC authority to limit the number of persons who could present their views orally at hearings required by the Act. In one trade regulation rulemaking proceeding, several hundred persons, most of them opposed to the proposed rule, attempted to testify at oral hearings, and the FTC's presiding officer viewed this (in light of information available to him) as an attempt to overwhelm and delay the proceeding. See Boyer Report, supra note 97, Chapter VI at 20.