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COMMENT

THE ENVIRONMENT: AN AGENCY-COURT BATTLE

Administrative law has long been preoccupied with the task of striking an appropriate balance between judicial and administrative activities. From the turn of the century, when administrative law was only beginning to acquire an academic and professional identity,[1] through more recent debate concerning the proper function of independent regulatory agencies as agents of the government in America,[2] a recurrent theme of conventional wisdom has been that most administrative law issues can be viewed as the allocation of power between the administrative agencies and the reviewing courts. Questions involving the scope of judicial review of agency action or the doctrines of primary jurisdiction and exhaustion of administrative remedies, may under this approach be viewed as inquiries into whether it is more desirable to have a court or an agency exercise supervisory control over some aspect of American life. Even the language employed by the courts in considering such questions, invariably glossed with such terms of art as "expertise," "administrative discretion," and "substantial evidence," suggests a significant preoccupation with power allocation. A court's deference to the "expert" judgments of an agency can be thought of as an implicit concession of supervisory power; a court's refusal to find that an agency determination has been based on "substantial evidence" can be read as implying suspicion of the agency's supervisory competence. This method of analyzing the interaction between administrative agencies and reviewing courts has been so dominant in administrative law in the last thirty years[3] that any other approach may seem eccentric. Yet the allocative approach reflects concerns that were not the primary interests of the founders of the modern regulatory agency and tends to deemphasize issues which at one time were the major battlefields of administrative law—issues such as the constitutionality of legislative delegations of law making power to

1. *See generally* T. Goodnow, Comparative Administrative Law; T. Goodnow, Principles of Administrative Law of the United States; Schwartz, *The Administrative Agency in Historical Perspective*, 36 Ind. L. R. 260 (1961).

2. Compare Davis, *A New Approach to Delegation*, 36 U. Chi. L. R. 713 (1969), with Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. R. 1183 (1973).

3. T. Cooper, Administrative Agencies and the Courts; R. Jackson, The Struggle for Judicial Supremacy.

the agencies and the worth of uniform national regulatory standards. The contributions of the reviewing courts reoriented the focus of administrative law toward the appropriate allocation of functions and power between the courts and the agencies.

DEVELOPMENT OF THE DOCTRINE OF PRIMARY JURISDICTION

Under the doctrine of primary jurisdiction, agencies, as opposed to the courts, are deemed the appropriate entities to make initial decisions that are in some sense adjudicative. This doctrine was one of the early devices utilized for establishing agency autonomy. An initial justification for the doctrine was uniformity. The uniformity rationale for upholding agency decisions became increasingly inadequate, however, as more ambitious schemes of regulation through the agencies were formulated. The goal of enthusiasts for agency government was to carve out an area of agency supremacy in order to infuse expertise, efficiency, and integrity into the governing process. They were concerned with nothing less than the revitalization and modernization of the American governmental apparatus. The primary jurisdiction doctrine constituted, in their view, a recognition by the courts of the inherent superiority of regulatory agencies in the performance of certain tasks.

The courts in the early part of the Twentieth Century through a series of decisions involving the I.C.C. upheld the doctrine of primary jurisdiction and attempted to develop discerning standards of review. In sum, the court developed four principle criteria to aid in defining administrative functions and in determining whether or not the exercise of primary agency jurisdiction was indicated in a particular context: (1) whether the complexity of the social problem necessitated that it be addressed by a body of experts with specialized training; (2) whether the question presented was one that could be conclusively resolved in one sitting or was one that required the continued involvement over time of the decision making body; (3) whether the controversy presented questions that were by their very nature administrative; and (4) whether particular issues raised were issues of fact or law.[4] The first two criteria served to define the third by providing justifications for why a particular set of issues required the use of techniques that in themselves serve to define the functions and purposes of an administrative agency. The fourth criterion

4. *See* Texas and Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); Northern Pacific Railway Co. v. Solum, 247 U.S. 477 (1918); Great Northern Railway v. Merchants Elevator Co., 259 U.S. 285 (1922); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

defined facts in a special way: evidence that, for reasons suggested in other criteria, an agency was peculiarly suited to assess.[5]

These criteria became the principal devices for allocating power between the courts and the regulatory agencies in modern America and, beyond that, a source of post World War II justifications for the regulatory agency form of government. From them have been derived the standard arguments on behalf of agency control; expertise, public-mindedness, flexibility, and the peculiar ability to gather and analyze factual information. In developing these criteria, the courts went far toward formulating a rationale for the continued presence of regulatory agencies in the American governmental process. As current social problems came to be perceived as complex, the appropriate institutional virtues required for their solution became expertise, efficiency, and flexibility. The courts, however, were not unqualifiedly enthusiastic about the virtues of the agency form of government. They viewed it, rather, as having distinct limitations.

THE SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

If the doctrine of primary jurisdiction may be said to have invited the formulation of a rationale for agency power; questions involving the scope of judicial review of agency activities stimulated discussion of the limits of that power. Whereas the former doctrine determines whether the court or the agency should make a particular decision in the first instance, the scope of review determines those issues which the court may finally resolve after the agency has initially decided them. The literature of judicial review of administrative action suggests that decisions defining the scope of review can be viewed, ultimately, as indications of the extent of public confidence in the agency's governing abilities. Whether an agency or a court is the preferred supervisory unit for a particular area of conflict-generating activity may be determined by the extent to which particular qualities, relevant and desirable in that area, are perceived as characteristic of the one unit or the other. In the early part of the Twentieth Century, while regulatory agencies had become an approved part of the system of American government, the justifications for their power had been only vaguely formulated and the limitations upon that power had yet to be fixed. Thus, there existed a sub-

5. The last criterion implicitly raises the question of whether there were limits on the power of the regulatory agencies to gather facts as opposed to analyzing them. In United States v. Abilene & S. Ry., 265 U.S. 274 (1924), Justice Brandeis considered this question and held, for the Court, that an agency could not rely in making its decisions on evidence that had not been introduced into the record.

stantial interface between the areas of clearly administrative and clearly judicial activity; the extent to which the agencies would come to preempt that area was to be largely determined by the courts' own definition of the proper scope of judicial review of administrative action.

The courts in attempting to clarify the definition of the proper scope of judicial review reached many different outcomes suggesting that there were difficulties with an undifferentiated application of the model of agency government that had been conceived in the context of economic regulation of large industrial enterprises. To the courts effective government in America depended on governmental institutions having a clear sense of their purposes and limitations. Regulatory agencies had been created to meet a special need that courts and legislatures were less capable of fulfilling: the resolution of social problems which, because of their recent origin, complexity, and changing shape, necessitated the continued attention of a body of experts. The experimental and amorphous character of solutions to these types of problems called for flexibility and discretion in the presiding officials; imposition by the courts of too rigid a set of functional limitations on those officials ran counter to the purposes of the regulatory agencies. Thus the court assumed the position that they should be prepared to defer to administrative discretion in the performance of specialized regulatory tasks.

And yet the courts recognized that they would be remiss in the performance of their duties and functions if they failed to provide a forum for review of administrative activity. More specifically, in the process of review the courts had to insure that the discretionary acts of officers or commissions conformed to the specific purposes underlying the administrative regulation, as well as to any constitutional limitations on the reach of the regulatory capacity. Thus the court attempted to establish a flexible continuous agency-court partnership in which the "division of labor" would be made on the basis of the peculiar capabilities and ultimate responsibilities of the respective "partners." The "senior partner," the judiciary, would defer to the specialized competence of the agencies whenever its constitutional responsibilities, coupled with considerations of efficiency and expedition, permitted it to do so. But in matters of ultimate judicial responsibility, such as the custodianship of the protection afforded by the Bill of Rights, the courts would retain full supervisory and reviewing power, regardless of more pragmatic considerations.

The controversy over air quality deterioration illustrates the difficulties of the agency-court partnership involving the Environmental

Protection Agency (EPA). In 1970, Congress enacted a stringent and detailed air pollution control statute, the Clean Air Act.[6] At virtually the same time, the President created a new agency, EPA, to mold and enforce the federal environmental protection program. Increasingly the EPA has used informal rulemaking to regulate many areas and the courts have had to struggle to define exactly what their task is on review. The basic controversy centers on both the appropriate standard and the scope of substantive review and the appropriate scope of review of informal rulemaking. Since the Administrative Procedure Act (APA) does not establish a standard specifically for review of informal rulemaking, there has been some confusion over the appropriate statutory standard to apply to the substantive review of agency rules. Recently, however, the courts have agreed, at least with respect to informal rulemaking under the Clean Air Act, that section 706(2)(A) of the Administrative Procedure Act sets forth the correct standard. This section allows a reviewing court to set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7]

The Supreme Court has employed this standard in reviewing informal rulemaking,[8] but its initial discussion of the "arbitrary and capricious" standard came in a case involving informal agency action other than rulemaking. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Secretary of Transportation had approved a plan to construct a federal highway through a Tennessee park, despite a statutory restriction that he expend federal funds to finance highway construction through public parks only if there were "no feasible and prudent" alternatives.[9] The Court held that under the "feasible and prudent" mandate, the Secretary was entitled to weigh the destruction of parks against the cost of other routes, safety factors, and other interests favoring parkland highways; but he could allow construction in public parks only if the alternative routes presented "unique problems" of cost and community disruption.[10] The Court further held that the informal action would be subject to substantive review by the district court under the arbitrary and capricious standard of review. Explaining this standard, the Court noted that the Secretary's decision was entitled to a presumption of regularity[11]

6. Pub. L. 91-604, 84 Stat. 1676, amending 42 U.S.C. § 1857 *et seq.* (Supp. V, 1965-69) (codified as scattered sections of 42 U.S.C. § 1857 *et seq.* (1970)).
7. 5 U.S.C. § 706(2)(A) (1970).
8. 401 U.S. 402 (1971).
9. *See* 49 U.S.C. § 1653(f) (1970); 23 U.S.C. § 138 (1970).
10. 401 U.S. at 413.
11. *Id.* at 415.

and that the "ultimate standard of review is a narrow one" under which a "court is not empowered to substitute its judgment for that of the agency."[12] But the Court clearly indicated that this standard did not imply mere *pro forma* review.[13]

Although *Overton Park* sets forth the generally accepted standard of review of informal rulemaking, there exists considerable disagreement over the scope of judicial evaluation of agency action permitted or mandated by that decision. By requiring the agency to bring a "full administrative record" before the reviewing court, *Overton Park* appears at a minimum to reject the traditional "rational basis" standard of substantive review. Under that standard the reviewing court accepts at face value the factual assumptions of the agency for which there is a rational basis and refuses to require evidenciary support for the factual premises underlying the rule.[14] The rational basis standard allows judicial review even without a record that includes the factual data and reasons upon which the agency promulgated its rule. In requiring an agency to make available in an administrative record the basis of its action, the Court in *Overton Park* apparently attempted to facilitate a more searching judicial substantive review of informal agency action.

Two recent decisions reviewing EPA regulations promulgated in informal rulemaking under the Clean Air Act are *Ethyl Corp. v. EPA* and *South Terminal Corp. v. EPA*.[15] Both emphasize that *Overton Park* required judicial review of the record not only to ensure that the agency "considered all the relevant factors," but also to discern any "clear errors of judgment."[16] Thus within the "clear error of judgment" scope of review, both courts acknowledged that they are under an obligation not to substitute their judgment for that of EPA. Nevertheless, the courts inquired into the rationality of EPA decisions on factual issues, regulatory objectives and implementing techniques in order to establish "parameters of rationality within which the agency must operate."[17] Thus the *Ethyl Corp.* and *South Terminal* cases indicate that within this searching scope of review, the court will focus on four elements of the agency's decisionmaking power in reviewing for arbitrary and capricious actions.

First, the court will focus on the quality of the factual evidence

12. *Id.* at 416.
13. *Id.* at 415.
14. *Id.* For a pre-Overton Park application of the "rational basis" standard, *see* Superior Oil Co. v. FPC, 322 F.2d 601 (9th Cir. 1963).
15. 478 F.2d 47 (4th Cir. 1973); 504 F.2d 646 (1st Cir. 1974).
16. 478 F.2d at 47-49 (Ethyl Corp.); 504 F.2d at 655 (South Terminal).
17. 504 F.2d at 665.

upon which EPA based its regulatory decisions; these decisions must be based on valid data and methodology. For example, a rule founded on engineering statistics derived through unproved methodology may be held to be "arbitrary and capricious." Second, the reviewing court will scrutinize the agency's decision for a "logical connection" between the raw factual data and the regulatory decisions made. Third, even where the agency can point to valid data and methodology supporting its decisions, the court will examine the record for countervailing evidence, striking down the rule if such evidence is "so overwhelming or so persuasive" that the court must conclude the agency erred in its decisionmaking process. Finally, the reviewing court will assure itself that EPA has thoroughly examined alternative methods of regulation.

Ethyl Corp. and *South Terminal,* the major recent cases reviewing EPA informal rulemaking pursuant to the Clean Air Act, indicated that the nondegradation regulations will be reviewed under a "clear error of judgment" scope of review. In applying the "clear error of judgment" standard to the regulations, the reviewing court will encounter the complicating fact that EPA has engaged in a cost-benefit balancing of social, economic and environmental factors. Some courts have found the National Environmental Policy Act (NEPA) not only to demand agency disclosure and consideration of environmental harm in reaching decisions on proposed action, but also to impose limits on the substance of that action.[18] These courts have held that the NEPA mandate requires agencies to balance the environmental harm against the benefits of a planned project and also requires the courts to review the substance of the balance.[19]

Although review of an agency's balance of enviromental and socioeconomic factors is not new, it is always complicated by the subjective nature of the agency's determination. For example, when an agency is balancing environmental factors it is often confronted with costs and benefits that cannot be objectively quantified. As a result, the review of such a balance becomes essentially untestable subjective good faith. Thus where it is clear that the standard of arbitrary and capricious is the standard of substantive review utilized by the courts, under NEPA the scope of substantive judicial review is somewhat larger than that established by the "clear error of judgment" test.

18. Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

19. Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).

THE CLEAN AIR ACTS AND NEPA

Prior to 1970, federal efforts to regulate and control air pollution were marked by frustration. The Air Quality Act of 1967,[20] though an improvement over earlier legislation,[21] was ineffective in abating air pollution both because it relied on each state to implement its own regulatory program and because it imposed no deadlines for compliance by polluting industries. The Clean Air Amendments of 1970,[22] corrected both of these deficiencies. Although this legislation retained the 1967 Act's declaration that the states are primarily responsible for preventing and controlling air pollution, it substantially increased the federal government's role in pollution control and effectively confined state responsibility to the implementation and enforcement of a national pollution abatement program.

The National Environmental Policy Act of 1969 (NEPA)[23] establishes a national policy of environmental protection[24] and directs that all federal agencies follow certain operation procedures intended to effectuate that policy. The most important of these procedural requirements is that any agency undertaking a "major federal action significantly affecting the quality of the human environment" must prepare an environmental impact statement.[25] That statement must include a detailed discussion of the environmental impact of the proposed action, the unavoidable adverse environmental consequences that would result from the implementation of the proposal, and the possible alternatives to the proposed action.[26] Compliance with these and other mandates of NEPA may impose a substantial burden on an agency, a burden which will often tend to interfere with the agency's traditional functions. Significantly increasing the burden imposed on federal agencies by this requirement of NEPA are the actions of environmentalists and others opposing federal projects who have employed the impact statement requirement as a useful legal weapon by attacking purported agency compliance with the requirement on a variety of grounds. Among these lines of attack have been challenges of the accuracy of an agency determination that an impact statement is not required with respect to a certain agency action, the sufficiency of impact statements which have been prepared, and the validity of an agency's decision to implement a proj-

20. Pub. L. 90-148, 81 Stat. 485 (1967).
21. Air Pollution Act of 1955, Ch. 360, 69 Stat. 322 (1955).
22. Pub. L. 91-604, 84 Stat. 1676, amending 42 U.S.C. § 1857 *et seq.* (Supp. V, 1965-69).
23. 42 U.S.C. § 4321-47 (1970).
24. 42 U.S.C. § 4331 (1970).
25. 42 U.S.C. § 4332(2)(C) (1970).
26. 42 U.S.C. § 4332(2)(C)(i)-(iii) (1970).

ect after the preparation of an impact statement. Resolution of these challenges has required the courts to attempt to balance the often competing interests of environmental protection and administrative efficiency, both of which are recognized in the vague language of the National Environmental Policy Act.

The standard of review under NEPA is somewhat different from the standard of review under the Clean Air Amendments. Under the Clean Air Amendments, the standard is "arbitrary and capricious," but under NEPA the standard is "significant effect." The NEPA "significant effect" standard, however, goes to the threshold question of whether an impact statement is required at all; whereas the "arbitrary and capricious" standard is directed toward a determination of whether an entire action by the EPA is in compliance.

Thus the legislative enactments tend to establish preliminary guidelines for judicial review of administrative actions. The case law serves to elaborate upon these broad guidelines, seeking to delineate the scope and standards of the reviewing court's power. The standard of "significant effect" set out by the NEPA is the standard which it utilized in determining all initial and threshold issues. The standard of "arbitrary and capricious," outlined in section 706(2)(A) of the Administrative Procedure Act is utilized in the determination of the issue of whether the action of the agency falls within the permissible limits. Thus it is clear that the scope of substantive judicial review of administrative actions with regard to the environment and the governmental policies surrounding that area is exceedingly broad. Further, since agencies seem to have entered the era of rulemaking, this broad judicial review has become particularly amenable to adopting quasi-judicial procedures—formal hearings, oral arguments, cross-examination and the like—which are clearly not required by the Administrative Procedure Act (APA).[27]

THE ADMINISTRATIVE PROCEDURE ACT

> That the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded.
>
> —Lord Shaw in Local Government Board v. Arlidge (1915) A.C. 120.

Congress has fastened the courts and agencies into an intimate partnership, the success of which requires a precarious balance between judicial deference and self-assertion. In passing on administra-

27. 5 U.S.C. § 551-706 (1970).

tive adjudications, the courts over the years have learned to maintain that balance, but judicial review of rulemaking is presenting a new and troublesome problem. Some courts have recently shown an inclination to force rulemakers to adopt quasi-judicial procedures. As this tendency becomes general, rulemaking loses most of its peculiar advantages as a tool of administrative policymaking. The trend in agencies toward over proceduralization arose largely because of reviewing courts and their hostility toward regulations and their fondness of resolving social controversies through adjudicatory methods. From these tendencies a general paralysis of the administration has resulted.

While procedures for rulemaking, like those for adjudication, should no doubt promote fairness, that slippery term has very different meanings in the two contexts. An adjudication applies a preexisting legal standard to a small set of controverted facts to determine whether a particular individual should receive a benefit or a penalty. An adjudication is fair to the individual only if the facts are accurately found, and Anglo-American jurisprudence assumes that accuracy is best served by traditional adversary proceedings. But it makes no sense to speak of a rule as being fair or unfair to an individual in this objective sense of accuracy. A rule allocates benefits and penalties among large classes of individuals according to a specific normative standard, and the fairness of such an allocation is ultimately a political or philosophical question.[28] Thus, in the rulemaking context, fairness is not identified with accuracy, and procedures designed to maximize accuracy at the cost of all other values are simply inappropriate.

Although a rulemaker's decisions cannot be accurate in the conventional sense and regulated parties have no fundamental right to participate in rulemaking, the administrator owes a duty to the public to give serious consideration to all reasonable contentions and evidence pertinent to the rules he is considering. The APA provides rulemaking procedures which directly enforce this duty. Section 553 imposes a three-fold obligation on the rulemaker. First, the rulemaker must give the public notice of the "legal authority under which the rule is proposed" and of "either the terms of substance of the proposed rule or a description of the subjects and issues involved," at least thirty days before its effective date. Second, he

28. Although a rulemaker may make use of empirical conclusions, these are so dependent on predictions, and on inherently uncertain estimates, that objective terms such as "accurate" and "inaccurate" will typically have little application. Further, because a rulemaker must make and coordinate many empirical and normative judgments, the ultimate shape of the rule seldom "follows the facts."

must "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." Finally, "after consideration of the relevant matter presented," the rulemaker must "incorporate in the rules adopted a concise and general statement of their basis and purpose."[29]

If accorded a properly expansive reading, section 553 provides a fully adequate scope for procedural judicial review of rulemaking. Section 553 contemplates that rules will be made through a genuine dialogue between agency experts and concerned members of the public. In policing the procedure, the reviewing court must satisfy itself that the requisite dialogue occurred and that it was not a sham.

There is an important difference between interpreting section 553 creatively and simply disregarding it. That section mandates a dialogue, not a trial. Nothing in section 553 says that a rulemaker must give individual answers to critical interrogatories, allow for oral hearings or provide for the cross-examination of experts. Some recent lower court decisions, however, have urged upon rulemaking agencies a variety of procedures not found either in section 553 or in the particular agency statutes under review. In *International Harvester Co. v. Ruckelshaus,*[30] the EPA had decided not to suspend for one year the Clean Air Act's 1975 standards for auto emission control. The Act permitted a suspension only if the EPA Administrator determined that the technology necessary to meet the 1975 standards was not "available."[31] Because the Administrator had determined the availability of such technology by means of complex "prediction methodology" never revealed to the auto companies, the court remanded the case to the EPA to give "the parties an opportunity to address themselves to matters not previously put before them."[32] Arguably, this conclusion followed directly from the notice requirement in section 553 of the APA, for the methodology itself was an important issue which the EPA should have publicized for comment and criticism before announcing its final decision. The court further held, however, that "in the remand proceeding . . . we require reasonable cross-examination as to new lines of testimony, and as to submissions previously made to EPA in the hearing on a proffer that critical questions could not be satisfactorily pursued by procedures previously in effect."[33] It is true that the opinion permits the EPA

29. 5 U.S.C. § 553 (1970).
30. 478 F.2d 615 (D.C. Cir. 1973).
31. 42 U.S.C. § 1857f-1(b)(5)(D)(iii) (1970).
32. 478 F.2d at 649.
33. *Id.* at 649.

to "confine cross-examination to the essentials, avoiding discursive or repetitive questioning."[34] But the fact remains that neither section 553 nor the Clean Air Act requires any cross-examination procedure for rulemaking.

Although *International Harvester* departs from the APA somewhat, the distinctions between informal rulemaking procedures[35] and full adjudicatory procedures[36] have been discarded as criteria for determining the type of hearing to which the parties affected by the administrative action are entitled.[37] Courts devise mandatory procedures according to the kind or the importance of the issues in the proceeding. Hearings, for instance, are deemed necessary whenever a genuine and substantial issue of fact has been raised by means of an offer of proof, or at least when the issue presented is one which possesses great substantive importance, or one which is unusually complex or difficult to resolve on the basis of pleadings and argument. This curious *ad hoc* approach to procedural review is not authorized by the APA or by any other statute; nor should it become law by judicial fiat.

The *ad hoc* approach contravenes recent, authoritative interpretations of the APA. These interpretations make it clear that an agency does not "abuse its discretion" by declining to utilize procedures more formal than those set out in section 553. If the APA precludes the *ad hoc* approach, then that approach can survive only if the Constitution requires it; there is not even a colorable claim to this effect. Of course, the due process clause often confers quasi-judicial procedural rights on an individual who becomes the focus of a government action.[38] However, all governmental actions must be surrounded by procedures representing a reasonable balance between fairness and efficiency. For rulemaking purposes, however, the fairness is owed to the public generally, not to particular individuals. Thus there is no reason to doubt that the procedures of section 553 strike other than a reasonable balance.

CONCLUSIONS

In this "new era"[39] of environmental, economic and energy regulation, there is a great attraction to any approach which genuinely

34. *Id.* at 649.
35. 5 U.S.C. § 553 (1970).
36. *Id.* at § 556.
37. Appalachian Power Co. v. EPA, 477 F.2d 495, 500 (4th Cir. 1973).
38. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
39. Environmental Defense Fund, Inc. v. Rucklshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

facilitates substantive review of agency rules. But how do the difficulties of substantive review justify adopting the *ad hoc* approach to procedural review? One suggestion made by Judge Bazelon in *International Harvester Co. v. Ruckelshaus*[40] argued that the *ad hoc* approach could and should virtually replace substantive review; reasoning that agency use of adjudicatory procedure would guarantee the substantive adequacy of agency rules. Judge Bazelon expressed the fear that in many new areas of rulemaking, the exercise of substantive review dangerously taxes the court's competence, converting them into superagencies charged with second guessing the technological, scientific, and economic judgments of rulemakers. Another suggestion accepts the need for a wide ranging substantive review and argues that rulemakers must be forced to embrace adjudicatory procedures so that an adequate record will be developed for such review.[41]

To both of these suggestions, there is a threshold objection: each tries to facilitate substantive review at the cost of paralyzing agencies with procedures otherwise irrelevant to sound rulemaking. Surely the court's task can be made tolerable without rendering rulemaking a practical impossibility. Furthermore, both suggestions misconceive the role of substantive review. Since the APA not only disallows the *ad hoc* approach to procedural review, but also requires substantive review, Judge Bazelon's proposal is doubly doubtful and unnecessary. Substantive review under the APA does not convert the reviewing court into a superagency. The APA standard of review is a singularly undemanding one and it allows adequate play to Judge Bazelon's perception that courts can often better assess the way rules are made than the merits of the rules themselves. Furthermore, courts do not need an adjudicatory record to undertake the necessary task of substantive review. Rather, they can and should review the legally sanctioned record of rulemaking which must be generated as a matter of course by section 553 procedures.

Under section 706 of the APA, the reviewing court must strike down not only those agency rules which are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," but also those actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42] Presumably, the first standard means that an agency rule must conform to the Constitution. However, the "arbitrary and capricious" standard goes beyond this. It applies to the factfinding, fact predicting, and factual

40. 478 F.2d at 650-53.
41. *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1259-60 (D.C. Cir. 1973).
42. 5 U.S.C. § 706(2)(C) (1970).

reasoning processes which led the agency to adopt the rule. Although, in the *Overton Park* case, the Secretary of Transportation's actions was not a "rule" in the APA sense, the Court nevertheless applied the "arbitrary and capricious" standard of section 706 of the APA. After *Overton Park* it is doubtful that courts can simply avoid substantive review of rulemaking, no matter how many "procedures" are imposed on the rulemaking agency. Thus, *Overton Park* requires that agency action be "based on a consideration of the relevant factors,"[43] and therefore it seems to require not an evaluation of the rulemaker's empirical conclusions but rather an inquiry into the basic orderliness of the process by which evidence and alternative rulings are considered.

This analysis of substantive judicial review undermines Judge Bazelon's proposal that substantive review be replaced by the *ad hoc* approach to procedural review. Judge Bazelon's perception that the courts can more competently assess the rationality of the rulemaking process than the merits of the resultant rules is correct. The problem with the *ad hoc* approach to procedural review is that it goes well beyond this sound perception. The *ad hoc* approach mandates that the courts prescribe precise and formal methods for bureaucratic policy making. This mandate presumes an expertise in administrative science which duty on the bench simply does not confer. By contrast, the "arbitrary and capricious" standard of substantive review authorizes the courts merely to scrutinize the actual making of the rule for signs of blind prejudice or of inattention to crucial evidence; a task of straight forward detective work which is well within the capacities of generalist judges. Replacing substantive review with the *ad hoc* approach to procedural review would make sense only if adjudicatory formalities constituted both a necessary and a sufficient condition for the rulemaking process to be rational. Neither branch of this proposition is sound. Rulemaking is adequately rational, under the APA, so long as the administrator is presented with all relevant evidenciary factors, gives serious consideration to those factors, and uses reason rather than whim to progress from initial assumptions to final conclusions.

When based on a proper administrative record, the mechanics of review are quite straightforward. If the subject matter of a rule falls within an agency's delegated authority, there are only two grounds for a court upsetting it. First, the basis and purpose statement given by the agency may include no reasons, or merely conclusory reasons, for adopting the rule or for rejecting evidence, criticisms, or alter-

43. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

natives submitted by outsiders. In this instance, the agency has violated the third procedural step of section 553 and simultaneously has violated the "substantive" standard of review by failing to show good faith consideration "to all relevant factors." No matter how the agency's default is labeled, however, the remedy is of course to remand the rule. But such remand is only to allow the agency, through fuller explanation, to show that the rulemaking process was actually animated by reason rather than blind instinct. Since the "basis and purpose" statement is part of the "record," as well as "procedure," this is in essence a remand for a fuller record. But it should be noted that there are no suggestions that adjudicatory procedures are required.

Compare this with the *ad hoc* approach to procedural review which assigns to the judiciary a relentlessly activist role. But the *ad hoc* approach to administrative review lacks those foundations in law and reason which an activist posture requires. The approach has no statutory underpinnings; indeed, it flies in the face of the APA. It can claim no constitutional mandate, and it certainly protects no minority interests which the political system would otherwise ignore. Furthermore, the *ad hoc* approach draws on no talents peculiar to the judiciary. Although judges may have a professional attachment to cross-examination and oral argument, they have no special expertise in the procedure appropriate to bureaucratic policy making.

What reviewing courts can realistically do to improve rulemaking is what the APA asks them to do—open the agencies to outside information, challenge and scrutiny; sections 553 and 706 of the APA provide the court with the powerful tools necessary to attack these abuses of substantive judicial review.

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