

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 118

FEBRUARY 1970

No. 4

THE MAKING OF ADMINISTRATIVE POLICY: ANOTHER LOOK AT RULEMAKING AND ADJUDICATION AND ADMINISTRATIVE PROCEDURE REFORM

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Few complaints about administrative law are pressed more insistently than the charge that the administrative process is "over-judicialized."¹ Although discordant notes to the contrary are sometimes heard,² the dominant chord of criticism has long been that administrative agencies have become too attached to judicial forms of proceeding, particularly when formulating policy rules and standards. The suggestion has been made that to improve agency performance, policy-making and judicial functions should be separated and allocated to different agencies.³ However, institutional separation has thus far won few supporters.⁴ Nevertheless, there continues to be widespread concern that agencies tend to subordinate broad policy planning to

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¹ See, e.g., J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 16-17 (1960); E. REDFORD, NATIONAL REGULATORY COMMISSIONS, NEED FOR A NEW LOOK 14-15 (1959); Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A.J. 243 (1962).

² See, e.g., COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE 45-93 (1955).

³ See, e.g., N. MINOW, EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST 277-304 (1964); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960).

⁴ E.g., W. CARY, POLITICS AND THE REGULATORY AGENCIES 133-34 (1967); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04(5), at 17-19 (Supp. 1965); H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 161-62 (1962); Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 WIS. L. REV. 183. For a somewhat different criticism of such separation, pointing out the cost and inefficiency the Hector-Minow scheme might engender, see Loevinger, Book Review, 68 COLUM. L. REV. 371, 377-79 (1968).

adjudication of particular controversies. In lieu of a complete institutional separation, agencies have been urged to reform their procedures to make greater use of rulemaking procedures in resolving policy issues and to establish regulatory standards without the restrictions of adjudicatory procedures.⁵

Though there is already a considerable body of literature on the subject,⁶ current judicial and administrative trends in this area warrant yet another look at the uses of rulemaking and adjudication, as well as a comment or two on administrative procedure in general.

I. THE RULEMAKING POWER

A. *The Basic Issue: The Storer and Texaco Cases*

The point of departure for any discussion of the power of agencies to employ rulemaking to formulate policies and thereby to delimit consideration of issues in subsequent adjudicatory proceedings is the *Storer Broadcasting* case.⁷ In *Storer*, the Federal Communications Commission issued a notice of proposed rulemaking to amend its rules which had previously limited the number of radio and television stations that could be held under common ownership or control.⁸ Long after the receipt of the initial notice, but before the amendment was adopted, *Storer* applied for an additional station, although it held the maximum

⁵ The discussion of rulemaking throughout this Article is focused on procedures characteristic of proceedings under § 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (Supp. IV, 1969) [the Administrative Procedure Act is hereinafter cited as APA], rather than rulemaking for which a trial-type hearing is required either by statute, e.g., Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(e) (1964), or by an agency's interpretation of a statute, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.06, at 379-81 (1959) (discussing ICC practice in promulgating various motor carrier rules)—and which is conducted pursuant to §§ 7 and 8 of the APA, 5 U.S.C. §§ 556-57. (Supp. IV, 1969). In the latter type of "rulemaking" the procedures mandated are identical to those prescribed for "adjudication" except that internal separation of functions is required for "adjudication" under § 5 of the APA, 5 U.S.C. § 554 (Supp. IV, 1969), but not for "rulemaking." See *Wilson & Co. v. United States*, 335 F.2d 788, 796 n.3 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965); *American Tel. & Tel. Co.*, 6 P & F RADIO REG. 2d 535 (1965). Although some agencies often use hearing procedures to promulgate rules and standards, it is the non-hearing procedure under § 4 that is normally the frame of reference for those urging greater use of "rulemaking" procedures in formulating agency policy.

⁶ For a representative sampling, see Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) [hereinafter cited as Shapiro]; FTC Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8365-68 (1964) [hereinafter cited as FTC Statement of Basis]; Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROB. 658 (1957); Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781 (1965); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

⁷ *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

⁸ The amended multiple ownership rules prohibited common ownership or control of more than 7 AM and 5 FM radio stations and 5 television stations. The rules currently prohibit common ownership or control of, or interest in, more than 7 AM and FM radio stations and 7 television stations, no more than 5 of which television stations may be VHF. 47 C.F.R. §§ 73.35, 73.240, 73.636 (1969).

number allowable by the new rules. Storer participated in the rule-making proceedings by filing a statement opposing the amendments, but the Commission entered an order amending its rules as proposed and simultaneously dismissed Storer's application for an additional station as not conforming to the new rules. Seeking judicial review of the agency action, Storer argued principally that the new rules deprived it of the right to have the "full hearing" which the Communications Act makes a prerequisite to the denial of any application.⁹ Reversing the court of appeals, the Supreme Court upheld the Commission's rule-making procedure. The Court seemingly had little difficulty in rejecting Storer's argument that the Commission could not, by general rule, set limitations on licensing and then summarily reject license applications not conforming to those limitations. Having noted what Storer itself conceded—that the Commission need not hold a hearing before denying a license to operate a station in ways contrary to the statute—the Court concluded that specific statutory terms did not define the outer limit of the FCC's power, and that the agency has general authority to promulgate rules not inconsistent with the Communications Act or other law. Because the power to promulgate rules was regarded, in essence, as tantamount to the power to add to the conditions of the statute, any application inconsistent with the general rules promulgated could be dismissed without a hearing, just as if it were inconsistent with the statute itself. Notwithstanding its willingness to accord expansive powers to the FCC to promulgate "legislative" orders, the Court did emphasize one limitation. Citing dicta from its earlier opinion in the *NBC* case,¹⁰ it cautioned that there must be provision for some "flexibility" in the implementation of the rules to insure that they will always conform to possible variations or changes in what the "public interest" requires. However, in *Storer*, it found adequate provision for such flexibility in the Commission's general procedural regulations which permitted applicants to seek amendments or waivers of its rules.¹¹

Storer did not represent a sharp break in FCC practice, for the FCC had long relied on rulemaking in a number of areas, particularly in allocations matters, and its rules had been sustained on the merits,

⁹ 47 U.S.C. § 309(a), (e) (1964).

¹⁰ *NBC v. United States*, 319 U.S. 190, 225 (1943).

¹¹ Despite *Storer's* emphasis on an explicit provision for waiver, the fact that the power to promulgate and administer rules necessarily includes the power to grant exceptions or waivers where justified suggests that a specific provision for waiver is not a prerequisite to seeking waiver or judicial review of a denial of waiver. If the agency applies the rule in a wooden fashion, judicial review is available, as indicated by the Court, 351 U.S. at 205, and by a recent decision of the D.C. Circuit reversing an agency's refusal to give "serious consideration" to a waiver request, *WAIT Radio v. FCC*, 16 P & F RADIO REG. 2d 2107 (D.C. Cir. 1969).

though the hearing issue had not been determined.¹² But a reasonable expectation following *Storer* would have been that other major federal agencies, with similar but largely neglected rulemaking powers, would have found in *Storer* an invitation to implement rulemaking powers in the manner of the FCC. It is surprising, therefore, that agencies have been rather slow to respond to the invitation. More recently, several of the major agencies have increased their use of rulemaking procedures,¹³ but any trend towards rulemaking still appears to be slow. Although various explanations for the reluctance of agencies to follow the lead of the FCC have been offered,¹⁴ they are less than fully convincing.¹⁵ Yet this is a tangential matter. It is sufficient simply to

¹² *NBC v. United States*, 319 U.S. 190 (1943) (sustaining "chain broadcasting" rule); *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954) (sustaining *Sixth Report*); *General Mobile Radio Serv.*, 13 F.C.C. 1190 (1949) (interservice allocation); *Sixth Report on Television Allocations*, 1 P & F RADIO REG. (pt. 3) 91:601 (1952).

¹³ See, e.g., 18 C.F.R. § 154.93 (1969) (FPC rules governing price changing clauses in natural gas sales contracts); 14 C.F.R. § 207.6(b) (1969) (CAB rule restricting off-route charters of all-cargo carriers); 49 C.F.R. § 1090 (1969) (ICC "piggyback" regulations); 16 C.F.R. §§ 401-14 (1969) (FTC trade regulation rules).

¹⁴ See Shapiro *passim*.

¹⁵ For example, it is suggested that policy declared in adjudicative proceedings is more likely to withstand review than policy declared by rulemaking. *Id.* 941, 944-45. I am inclined to doubt this. Certainly, as a routine matter, judicial review of legislative rulemaking under § 4 of the APA seems less rigorous than for adjudicative proceedings, see note 92 *infra* & accompanying text, as Shapiro appears to concede. Shapiro 947.

Another explanation offered is that the agency has greater freedom to disregard prior adjudication than to disregard rules. *Id.* 947-52. In support of this conclusion, Shapiro notes that the CAB and FCC have been granted considerable latitude in applying the factors of competition and public interest in certification and licensing hearings, and contrasts this freedom with cases reversing agency departures from regulations. *Id.* 951 & n.113. Nevertheless, even Shapiro seems reluctant to conclude from these examples that judicial treatment of agency departure from precedent differs from such treatment of departure from regulations. See *id.* 949-50. Nor do his examples demonstrate any difference. In fact, the courts have allowed the FCC and CAB considerable freedom in applying standards in licensing adjudication, but they have not been completely permissive. See, e.g., *City of Lawrence v. CAB*, 343 F.2d 583, 588-89 (1st Cir. 1965) (CAB reversed for failure to articulate standards for decision and inconsistency with prior decisions); cases cited, Shapiro 950. If the courts have tolerated departure from prior adjudicatory decisions, they have also allowed agencies to be inconsistent in the application of substantive policies promulgated in rulemaking proceedings. See *Transcontinent Television Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962); cases cited note 67 *infra* & accompanying text.

Shapiro further suggests that agencies may prefer adjudication because it allows them greater freedom to apply policy retroactively. Shapiro 944-45. Although he concedes that courts have allowed retroactive application of regulations in a number of cases, he concludes, nevertheless, that courts have been "a good deal more pragmatic" in allowing retroactive application of rules declared in adjudication. *Id.* 955. But an examination of the authorities, including those cited by Shapiro, does not yield any significant distinction. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), might suggest such a distinction, but it can be interpreted otherwise, and any distinction drawn in that case may be of limited application. If an *Arizona Grocery* distinction exists, it did not, for example, prevent retroactive regulation in the cases cited in Shapiro 955, or the more recent case of *Atlas Tack Corp. v. New York Stock Exchange*, 246 F.2d 311 (1st Cir. 1957), where the court upheld the action of the SEC in delisting a corporation because its condition in 1953, 1954, and 1955 did not conform to standards contained in exchange rules promulgated in 1955. The court, although not convinced the rule was retroactive, relied on *SEC v. Chenery*

note that the reluctance to invoke substantive rulemaking powers in varied situations meant that until quite recently there has been little occasion to consider the limit of the range and scope of the rulemaking authority under *Storer*.

In 1964, in *FPC v. Texaco, Inc.*,¹⁶ the issue of an agency's power to foreclose by rulemaking, issues normally demanding adjudicatory procedures was again before the Supreme Court, and again the agency's use of rulemaking was sustained.¹⁷ Adding nothing of significance to what had been said in *Storer, Texaco*, at most, made it perfectly clear that the *Storer* holding was not confined to the FCC. However, it did not resolve important questions, left unanswered by *Storer*, concerning the extent of the rulemaking authority and what, if any, limitations surround its exercise: To what extent do agencies without a specific statutory grant of power to promulgate "legislative" regulations have power, nevertheless, to promulgate such regulations as a necessary incident of their regulatory or quasi-judicial powers? Is any distinction to be drawn between the alteration of existing rights or privileges and the prospective alteration of the status of persons who may appear before the agency in the future? Under what circumstances can the rulemaking power be used to alter rights or privileges in individual cases?¹⁸

Corp., 332 U.S. 194 (1947), in holding that retroactivity would not invalidate its application. In *Optical Workers' Union v. NLRB*, 227 F.2d 687, 691 (5th Cir. 1955), the court, in dictum, rejects any distinction based on *Arizona Grocery*:

[T]he Board has authority to adopt and reverse policy, either in the form of an individual decision or as rulemaking for the future . . . without regard to whether such action strictly conforms to the rules applicable to courts or legislative bodies.

It seems more plausible that agency reluctance to use rulemaking is due to simple reluctance to engage in broad policy planning efforts than to any perceived advantages in one form of procedure. Shapiro does not ignore this point but he appears to give it slight weight. Shapiro 944.

¹⁶ 377 U.S. 33 (1964).

¹⁷ The FPC promulgated regulations providing that only certain price changing provisions in the contracts of independent natural gas producers were permissible and that any producer's application for a certificate of public convenience and necessity under §7 of the Natural Gas Act would be rejected if the contract submitted in support of the certificate contained any of the forbidden provisions. Thereafter two producers, both of whom had participated in the prior rulemaking proceedings, filed certificate applications containing forbidden provisions. The Commission rejected the applications summarily and was reversed by the court of appeals on the ground that §7 required the applications to be set for a hearing. The Supreme Court in turn reversed, holding that §7 did not preclude the Commission from particularizing statutory standards through rulemaking and "barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *Id.* at 39.

¹⁸ One issue raised in *Texaco* but not in *Storer* was the problem of review of the validity of an underlying regulation on the basis of a limited record. The record in *Texaco* contained only the orders summarily rejecting contracts for noncompliance with FPC regulations. It did not include any statement on the basis of the regulations or facts on which their validity could be judged. This inability of the court to review the regulations themselves was a major factor in the court of appeals holding that the FPC was required to grant a full evidentiary hearing before it could reject the con-

B. *Specific Statutory Authority as a Prerequisite of the
Rulemaking Power: The Case of the
Federal Trade Commission*

In contrast to other major federal regulatory agencies which exercise licensing and extensive regulatory authority, the Federal Trade Commission has traditionally been viewed as a prosecuting and adjudicating agency. Except in those few isolated instances in which specific legislative rulemaking authority has been conferred on the agency,¹⁹ there are serious doubts whether the Commission has any authority to promulgate binding rules on substantive matters. Although section 6(g) of the Federal Trade Commission Act does grant the power "to make rules and regulations for the purpose of carrying out the provisions [of the Act],"²⁰ legislative history suggests that this grant was intended to be no more than a routine grant of authority to promulgate procedural rules and did not confer any authority on the agency to use rulemaking to formulate and implement substantive policy.²¹

It is not surprising that the FTC disputes,²² as do a number of commentators,²³ an interpretation of the Act that denies the agency

tracts, 317 F.2d 796, 804-5 (10th Cir. 1963), and it was the basis of Justice Stewart's dissent, 377 U.S. at 45. In reversing the Tenth Circuit, the Supreme Court left open the problem which troubled the court of appeals. It has been suggested that this problem can be resolved by transfer of proceedings to a district court for factual determination. L. JAFFE & N. NATHANSON, *CASES ON ADMINISTRATIVE LAW* 788 (3d ed. 1968). A simpler solution is to remand to the agency with orders to inform the court of the reasons for the rule and to provide such data as would be in the record if the appeal were taken from the rule itself, *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 336 (D.C. Cir. 1968). Of course, the problem of a limited record does not arise if the review is of the regulations themselves. Such review is likely to be available in most cases; see *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

¹⁹ The Commission has specific authority to promulgate rules, enforceable by criminal penalty, under the Textile Fiber Products Identification Act, 15 U.S.C. §§ 70a(a)-(c), 70e(c), 70i (1964); the Wool Products Labeling Act, 15 U.S.C. §§ 68d(a), 68h (1964); the Fur Products Labeling Act, 15 U.S.C. §§ 69f(b), 69i (1964). It has similar authority to promulgate rules, not enforceable by a criminal sanction, under the Flammable Fabrics Act, 15 U.S.C. § 1194(c) (1964), and it has authority to promulgate quantity-limits rules under § 2a of the Clayton Act, 38 Stat. 730 (1964), as amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(a) (1964).

²⁰ 15 U.S.C. § 46(g) (1964).

²¹ See 51 Cong. Rec. 14931-32 (1914) (statement of Congressman Covington); *id.* 14938.

²² See FTC Statement of Basis 8369. Although the FTC relies in part on § 6(g) of the Act, the Commission builds its case principally on "inherent powers." See *id.* 8365-69.

²³ In accord with the view that power to promulgate trade regulation rules is inherent in the Commission's adjudicatory powers is Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 457 (1964) [hereinafter cited as Auerbach]. See also Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678, 740-50 (1966) (supporting the Commission's authority on the basis of § 6(g) and general policy considerations). Other comments, pro and con, are collected in Wegman, *supra* at 740 n.280.

substantive rulemaking power. Nevertheless, until 1962 the Commission made no claim to such a general power under section 6(g). Such efforts as were made to promulgate general standards, and particularly to secure industry-wide compliance, were confined to "traditional" enforcement procedures: for example, industry-wide investigations followed by the issuance of form complaints against a large number of violators accompanied by a proposed consent agreement and order,²⁴ and the issuance of trade practice rules, guides (practice rules and guides are treated together as "industry guides"), and advisory opinions.²⁵ Whether or not these and other procedures might have been employed with greater vigor to effect uniform standards and industry-wide compliance, there has been dissatisfaction with the record of their effectiveness in achieving industry-wide enforcement.²⁶

As a partial response to what it felt were inadequacies in existing adjudicatory procedures, the Commission in 1962 adopted its trade regulation rules procedure providing for the issuance of rules to express the "experience and judgment of the Commission" concerning the substantive requirements of the statutes which it administers.²⁷ Though somewhat similar to the Commission's industry guides, which are advisory interpretations of relevant legal requirements, trade regulation rules are apparently intended to have greater finality and effect—that is, to be binding "legislative" rules. The rules provide that in any subsequent proceeding in which the rule is relevant to the adjudication of any issue, the Commission "may rely upon the rule to resolve such issue, provided respondent is given a hearing on legality and propriety of applying the rule in the particular case."²⁸ There is some uncertainty about the meaning of the phrase "rely upon," and the Commission to date has had no occasion to clarify its precise meaning, or to indicate just how, if at all, the trade regulation rules differ in

²⁴ See Auerbach 449-51.

²⁵ 16 C.F.R. §§ 1.1-1.12 (1968). See generally Auerbach 452-55, 461-65.

²⁶ *Id.* 449.

²⁷ 16 C.F.R. § 1.12 (1968). The first application of the trade regulation rule procedure occurred in 1964, when the FTC promulgated several general rules, the most notable of which was the cigarette advertising rule that it was an unfair or deceptive practice to fail to disclose clearly and prominently on all cigarette containers—boxes, cartons, and packs—that cigarette smoking "is dangerous to health and may cause death from cancer and other diseases." 29 Fed. Reg. 8325 (1964). However, before the cigarette rule was implemented, Congress passed the Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-39 (Supp. III, 1968), which suspended the affirmative disclosure requirements until July 1, 1969. The moratorium having expired, the Commission has pending a proceeding to reinstate the 1964 rule, with slight modifications. See 34 Fed. Reg. 7917 (1969), corrected 34 Fed. Reg. 8125 (1969). Since the cigarette rule, the Commission has promulgated a number of other trade regulation rules, all but one dealing with unfair or deceptive trade practices. See, e.g., 16 C.F.R. § 403 (1968) (prohibiting the use of words such as "leakproof" or "guaranteed leakproof" in the advertisement and sale of dry cell batteries).

²⁸ 16 C.F.R. § 1.12(c) (1968).

effect from industry guidelines (they would seem to serve little purpose if they did not have some different effect). But the intent of the Commission appears to be to make the rules dispositive of those issues to which it speaks, in effect, foreclosing such issues from future contest in subsequent proceedings unless the party against whom they are implemented can prove that its situation is (1) not covered by the rule or (2) is so unique that an exception to the rule is justified. If this interpretation of the effect of the rules is correct,²⁹ its practical effect is to substitute a rule for adjudication (as in the *Storer* and *Texaco* cases) since, even though a respondent has a right to a hearing on the issue of the applicability of the rule, he is presumably denied an opportunity to challenge it on the merits.

The Commission's authority to promulgate its trade regulation rules must be regarded as still an open and debatable issue.³⁰ Whether the FTC has specific statutory authority under section 6(g) of the Act has received extensive comment elsewhere,³¹ and it would be pointless to reiterate the arguments pro and con, which are based largely on the legislative history. Despite the attention it has received, however, the question of specific statutory authority does not go to the heart of the Commission's case for rulemaking power: that the power to promulgate such rules is inherent in its adjudicative functions. The Commission argues:

Every tribunal that decides cases—even a Federal court established under Article III of the Constitution—is perforce engaged in substantive rule-making. The common law is a body of judge-made substantive rules, principles, and prescribed standards of conduct. . . . Needless to say, there is no statute which permits judges to make rules in this fashion.

²⁹ Others have come to similar conclusions regarding the effect of the rules. See Shapiro 965-67; Symposium, *Reflections on the Conduct of an Administrative Hearing*, 20 Ad. L. Rev. 101, 126 (1967) (remarks of Rufus Wilson, Chief of FTC Division of General Trade Restraints). Professor Davis, however, takes the view that "reliance" does not give preclusive effect to the rules. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.04, at 123-28 (Supp. 1965). He supports this view on the basis that the FTC's case for rulemaking authority relies on its power to take official notice, which is, of course, rebuttable. *Id.* § 5.04, at 128. But the FTC appears to believe that if the kinds of issues resolved by trade regulations were handled by official notice, rebuttal would not be necessary. See Statement of Basis 8372; note 37 *infra* and accompanying text. It is perhaps noteworthy that in a recently issued complaint charging respondents with unfair and deceptive practices the Commission has not only alleged a violation of the statute but has also specified that the acts violated a trade regulation rule covering the practice in question. See *Shell Oil Co.*, 3 TRADE REG. REP. ¶ 19,014 at 21,267 (FTC 1969). This seems to hint that the Commission intends to treat the rules as conclusive, and perhaps even directly binding.

³⁰ In *Bristol-Myers Co. v. FTC*, 284 F. Supp. 745 (1968) (D.D.C. 1968), *appeal docketed*, No. 22,277, D.C. Cir., 1969, it was sought to enjoin institution of a rule proceeding, but the suit was dismissed for lack of ripeness. To the author's knowledge this is the only case to date in which the Commission's power has been challenged in court.

³¹ See Wegman, *supra* note 23, at 740 n.280, 745-46; Shapiro 960-61.

None is necessary. The laying down of substantive principles in the course of adjudication is inherent in the adjudication process.

If the courts may and do make rules in the course of adjudicating, a fortiori the Commission may—and indeed is under a positive obligation to—engage in substantive rule-making in its adjudications.³²

The Commission presses its “inherent authority” argument to the point of contending that even if 6(g) were not in the Act, it would have substantive rulemaking authority,³³ at least with respect to the type of “rule” which it promulgates through its trade regulation procedures.

Given this approach, the particular interpretation of section 6(g) is immaterial, since the search for rulemaking authority becomes not a matter of finding a specific statutory grant of authority, but rather a search to see if for some reason Congress has specifically withheld rulemaking authority, intending that the agency proceed only by traditional adjudicatory methods. This is the heart of the Commission’s case for rulemaking authority and the point which is of crucial significance for other administrative agencies.³⁴ The FTC’s argument is provocative, but it is not completely persuasive. The Commission’s assertion that even article III courts engage in a kind of rulemaking is unassailable;³⁵ it will not therefore be denied that an administrative agency, like a court, can go beyond the immediate task of deciding a particular case in order to create a general rule that binds parties coming before it in the future. But this is not dispositive of challenges to the validity of the rulemaking power, because the question is not whether an agency or a court can formulate rules in the process of adjudicating cases, but to what extent they can do so independent of adjudication and the constraint of adjudicatory procedures.

The Commission’s argument on this point is very involved and somewhat unclear. Any attempt to summarize it runs the risk of distortion. Essentially the argument is grounded on an analogy to the use of official notice and extra-record reliance on “accumulated knowl-

³² FTC Statement of Basis 8365-66.

³³ *Id.* 8369.

³⁴ The question of the FTC’s authority to promulgate legislative regulations would seem to have particular pertinence to the Food & Drug Administration in connection with its recent promulgation of “Good Manufacturing Practice” food regulations. See 21 C.F.R. pt. 128 (1969); Cody, *Authoritative Effect of FDA Regulations*, 24 *FOOD DRUG COSM.* L.J. 195 (1969); Forte, *The GMP Regulations and the Proper Scope of FDA Rulemaking Authority*, 56 *Geo. L.J.* 688 (1968). If the FTC is found to have “inherent” rulemaking authority would this not be true of the FDA as well, thereby mooting the question whether Congress gave it such authority in §701(a) of the Food Drug and Cosmetic Act, 21 U.S.C. § 371(a) (1964)?

³⁵ See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 145 (1962).

edge and experience," and other matters "traditionally regarded as background or legislative facts or matters of law, policy or discretion." A determination that a particular course of conduct is unlawful, it argues, rests not only on evidentiary facts developed in adjudication, but also on "legislative" or "nonevidentiary" facts which "are not required to be determined adjudicatively," but may be determined by official notice or simply by reliance on extra-record knowledge. And if the Commission can use these methods for determining "legislative facts" in individual cases, then, the Commission argues, it may also determine these facts in a rulemaking proceeding and it "should not be required that they be redetermined de novo in a subsequent adjudicative proceeding."³⁶

Despite a superficial attractiveness, the Commission's argument that the establishment of an uncertain rulemaking power is based on an undefined power to take official notice or rely on extra-record "knowledge and experience" rests on a very weak foundation. The Commission nowhere examines in depth the threshold question of the proper use of official notice or extra-record facts, but rests instead on abstract generalizations about such concepts as "legislative facts,"³⁷ "nonevidentiary facts," and "accumulated knowledge,"³⁸ which are left undefined. However, to explore these arcane matters here would only result in an unnecessary distraction. Even if the Commission's

³⁶ FTC Statement of Basis, 8371-72.

³⁷ The Commission's argument is advanced in connection with the cigarette advertising case in which it identifies the following general fact issues: (1) the health hazards of smoking, (2) cigarette sales and advertising expenditures, and (3) consumer reactions and the probable impact of cigarette advertising on consumers. FTC Statement of Basis 8371-72. As to the first, the Commission simply accepted the determination of the Surgeon General that smoking was a serious health hazard. The Commission evidently regards this issue as involving "legislative facts," which need not be litigated in any future adjudication. The second area comprises general "background facts" which it states need not be litigated because they are not in controversy. Facts in the third area are also regarded as "legislative" on the basis of the Commission's argument that it is not concerned with particular advertisements, but is drawing on its "specialized knowledge and experience of marketing practices and consumer reaction." *Id.* 8372.

No real difficulty results from such a treatment of the second class of facts, which is not a matter of controversy—nor of particular importance. But the classification of both of the other issues as "legislative" seems rather arbitrary. It is not at all clear what makes these facts "legislative" and subject to determination by nonadjudicative methods such as official notice, other than the fact that, as the Commission describes them, they appear to have a generality extending beyond the particular case. This does not necessarily provide a sufficient basis for official notice, or other nonadjudicative determination. On the official notice issue generally, see *Dayco Corp. v. FTC*, 362 F.2d 180 (6th Cir. 1966); 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.03 (1958).

³⁸ On the use of "accumulated knowledge" the Commission relies in part on *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962). One cannot contest the proposition that an agency may rely on experience and knowledge gained through repeated, past determinations, *see Brite Mfg. Co. v. FTC*, 347 F.2d 477 (D.C. Cir. 1965); *cf. Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), but it is questionable whether this is quite as broad a license as the FTC seems to believe. *See Dayco Corp. v. FTC*, 362 F.2d 180 (6th Cir. 1966).

conclusion that in all these cases it could take official notice or otherwise rely on extra-record information is correct, it still would not validate the promulgation of conclusive, irrebuttable rules. Yet, as earlier noted,³⁹ it appears to be the Commission's intent to make its trade regulation rules final and conclusive. Of course, the rules expressly allow any person subject to the rule an opportunity to show either that conditions have so changed or that special circumstances now exist to justify waiver of the rule,⁴⁰ but this is not the same as permitting a challenge to the rule itself. For example, the Commission's proposed cigarette advertising rule⁴¹ would require all cigarette advertising to be accompanied by a warning of the health hazards of smoking. Presumably the Commission would permit a particular cigarette manufacturer in a cease and desist proceeding to show that its cigarettes are unique and not a health hazard. But, if this interpretation of the effect of trade regulation rules is correct, the Commission would not allow evidence to be introduced for the purpose of challenging the basic findings of the Surgeon General that smoking generally is a health hazard. And if it does not, the rule would establish a degree of finality beyond that which could be achieved by official notice, since section 7 of the Administrative Procedure Act (APA)⁴² specifically requires, in accordance with previous decisions of the Supreme Court,⁴³ that when an agency decision rests on official notice, the parties be given an opportunity to contradict the facts officially noticed. Attempting to avoid this requirement, the validity of which its own decisions recognize,⁴⁴ the Commission states that it "makes little sense" in cases involving "non-evidentiary facts" (a term it uses interchangeably with "legislative facts").⁴⁵ But neither the APA nor Supreme Court decisions support any such proposition. Indeed, since it is generally said that only "legislative" facts can be noticed,⁴⁶ the Commission's argument is tantamount to saying that rebuttal is never necessary. Some have argued for refusing to allow rebuttal in the case of more limited judicial notice,⁴⁷ but even this suggestion has been justly criticized.⁴⁸

³⁹ See text accompanying notes 27-29 *supra*.

⁴⁰ 29 Fed. Reg. 8325 (1964). See also FTC Statement of Basis 8372-73; 16 C.F.R. § 1.12(c) (1969).

⁴¹ See note 27 *supra*.

⁴² 5 U.S.C. § 556(e) (Supp. IV 1969).

⁴³ *E.g.*, *Ohio Bell Tel. Co. v. Public Util. Comm'n.*, 301 U.S. 292, 301-02 (1937).

⁴⁴ See *Manco Watch Strap Co.*, 60 F.T.C. 495, 510-15 (1962); *Beatrice Foods Co.*, Ad. L. Dec. 2d 85, 89 (FTC 1966).

⁴⁵ FTC Statement of Basis 8372.

⁴⁶ *E.g.*, *Dayco Corp. v. FTC*, 362 F.2d 180, 186-87 (6th Cir. 1966). See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958).

⁴⁷ See *McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961).

⁴⁸ See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.09 (Supp. 1965).

In any event, the rule concerning official notice by agencies is quite clearly to the contrary.⁴⁹ The only tenable basis for disallowing rebuttal of official notice which is consistent with present law is that in certain cases the facts noticed are so irrefutable that attempted rebuttal would be frivolous. However, this could surely not be said of the trade regulation rules.

In summary, the Commission's effort to establish that substantive rulemaking authority is inherent in its adjudicatory functions and authority falls short of the mark. Adjudication may, as the Commission points out, involve formulation of policy standards and "rules," but it does not follow that because the agency must perforce make such "rules" in the course of adjudication that it can legislate them outside of the adjudicatory process. The Commission's argument in support of rulemaking is based less on a solid case of actual authority than on an implicit conclusion that rulemaking procedures are inherently a preferable mode of policy formulation.⁵⁰ The soundness of the Commission's appraisal of the virtues of rulemaking is discussed later.⁵¹ Here it need only be noted that the mere fact that the agency deems certain procedures desirable does not mean that it possesses the authority to employ them.⁵² Congress may well have its reasons for insisting that the FTC formulate policy only in the form of essentially judicial, as opposed to legislative, procedures, regardless of the powers given to other agencies endowed with broader regulatory mandates.

C. *The Limits of Rulemaking: The Blocked Space Case and Beyond*

On January 23, 1964, the Civil Aeronautics Board published a notice of proposed rulemaking dealing principally with certain amendments to regulations governing airline charter trips. Included in the notice was an unrelated proposal to amend the Board's Statements of General Policy to state that the Board would permit all-cargo carriers to sell blocked space at wholesale rates to combination carriers.⁵³

⁴⁹ *E.g.*, Administrative Procedure Act §7, 5 U.S.C. § 556(e) (Supp. IV 1969); Ohio Bell Tel. Co. v. Public Util. Comm'n., 301 U.S. 292, 301-02 (1937).

⁵⁰ In this regard it is noteworthy that over a third of the Commission's argument in support of the "lawfulness of the trade regulation procedure" is devoted to a highly abstract discussion of the general advantages of rulemaking procedure over adjudication in the formulation of agency policy. FTC Statement of Basis 8365-73.

⁵¹ Text accompanying notes 89-94 *infra*.

⁵² See *CAB v. Delta Air Lines*, 367 U.S. 316, 322 (1961), in which the Court, invalidating the CAB's modification of an airline certificate without a hearing, noted:

[P]etitioners have argued at length that the Board's present procedure is a happy resolution of conflicting interests. However, the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.

⁵³ 14 C.F.R. §§ 207, 399 (1964); 29 Fed. Reg. 1476 (1964).

Although the original proposal was ostensibly intended merely to encourage combination carriers to make use of all-cargo carriers, the Board subsequently stated that it would hear argument on whether the all-cargo carriers should be permitted to sell blocked space to air freight forwarders and other large volume shippers in addition to combination carriers.⁵⁴

In the interim, between notice of the argument and the final decision of the Board, Slick Airlines, one of the all-cargo carriers, filed a blocked space tariff. Thereafter, a competing all cargo-carrier and three combination carriers filed complaints asking that Slick's tariff be suspended. At the same time, each of the three combination carriers filed defensive tariffs. The initial reaction of the Board was to suspend all of the blocked space tariffs.⁵⁵ Shortly thereafter, the Board not only adopted its prior proposals to authorize sale of blocked space by all-cargo carriers, but also made this an exclusive right, thereby foreclosing combination carriers from selling blocked space.⁵⁶ As a result of the rulemaking, Slick's tariff became effective and the Board summarily rejected the tariffs filed by the combination carriers.⁵⁷

On appeal, the combination carriers challenged the Board's action on the ground that adoption of the blocked space rules amounted to a modification of their rights under existing route certificates and was unlawful absent the full adjudicatory hearing required by section 401(g) of the Federal Aviation Act.⁵⁸ The Court of Appeals for the District of Columbia Circuit at first sustained the challenge by a vote of 2 to 1,⁵⁹ but on rehearing en banc the court sustained the Board 5 to 3.⁶⁰

It seems quite clear that the Board's action granting to all-cargo carriers exclusive rights to blocked space service did effect a modification of their certificates, and the court's opinion concedes as much.⁶¹ Since on its face, section 401(g) of the Act requires a full hearing before certificate modification, the question was whether the Board, on the strength of the *Storer* "doctrine," could avoid this requirement by promulgating rules under section 4 of the APA.⁶² Answering in the

⁵⁴ 14 C.F.R. §§ 207, 399 (1964).

⁵⁵ See Comment, *The Rulemaking Procedure of the Civil Aeronautics Board: The Blocked Space Service Problem*, 8 B.C. IND. & COM. L. REV. 133, 134 (1966).

⁵⁶ 14 C.F.R. § 399 (1964).

⁵⁷ 29 Fed. Reg. 11729 (1964).

⁵⁸ 49 U.S.C. § 1371(g) (1964).

⁵⁹ *American Airlines, Inc. v. CAB*, 17 Ad. L. Dec. 2d 161 (D.C. Cir. 1965).

⁶⁰ 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966). Throughout this Article, *American Airlines, Inc. v. CAB* will be referred to as the *Blocked Space* case.

⁶¹ See 359 F.2d at 628.

⁶² 5 U.S.C. § 553 (Supp. III, 1968). In light of the fact that neither the Board's notice of proposed rulemaking nor its notice of oral argument gave notice of the policy

affirmative, the court rejected the argument that both *Storer* and *Texaco* were restricted to regulations affecting future applications for new licenses, whereas the blocked space regulations modified existing rights under existing certificates.⁶³ To sustain the Board, the court relied on the Supreme Court's *NBC* decision⁶⁴ and three lower court decisions.⁶⁵

The court's reliance on *NBC* seems misplaced since the question before the Court in that case involved the substantive power of the FCC to adopt the rules (by any procedure) and the validity of the rules themselves,⁶⁶ rather than whether the statute required a hearing. Though the lower court decisions are relevant precedent, the circuit court's opinion went beyond them in affirming the power of the CAB to alter or affect rights and privileges by promulgating regulations in lieu of adjudication,⁶⁷ and established itself in the forefront of decisions

of restricting blocked space to all-cargo carriers, it is questionable whether the Board did, in fact, comply with the requirements of § 4. See *Chicago B. & Q.R.R. v. United States*, 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966). The court evidently did not regard the adequacy of notice under § 4 as being contested by the parties, since it states that "the procedure followed by the Board *admittedly* complies fully with the requirements . . . in Section 4." 359 F.2d at 626 (emphasis added). However, appellants did at one point in their briefs on rehearing challenge the adequacy of notice. Brief for Petitioner at 11-12, *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966). This point may have been subsequently abandoned, although the same issue was raised again and argued at some length in the petition for certiorari. Petitioner's Brief for Certiorari at 32-36, *American Airlines v. CAB*, 385 U.S. 843 (1966).

⁶³ *American Airlines v. CAB*, 359 F.2d 624, 628-29 (D.C. Cir. 1966).

⁶⁴ *NBC v. United States*, 319 U.S. 190 (1943).

⁶⁵ *Transcontinent Television Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962); *Capitol Airways, Inc. v. CAB*, 292 F.2d 755 (D.C. Cir. 1961); *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).

⁶⁶ The Court in *NBC* indicates that the rules were promulgated after public hearings and that there was no ground for procedural challenge. 319 U.S. at 194-95, 225. In *American Airlines* the Court states that these hearings were not the hearings required in adjudication, but were "legislative hearings," and therefore, the Supreme Court's statement that there was no basis for claim that the Commission there failed to observe procedural claims is pertinent to the CAB's procedure. 359 F.2d at 628 n.12. But it is not clear how the court reaches this conclusion about the hearings in *NBC*. Though it was argued in *NBC* that the hearings conducted did not satisfy the requirement of a "full hearing," Brief for Appellant CBS at 97-103; Brief for Appellant NBC at 88-89, *NBC v. United States*, 319 U.S. 190 (1943), the Government demonstrated that virtually all of the prerequisites of an adjudicatory hearing were in fact, if not in name, accorded the parties. See Brief for Appellees at 121-37, *NBC v. United States*, 319 U.S. 190 (1943). This appears to be the conclusion of the district court, see *NBC v. United States*, 47 F. Supp. 940, 945, 947 (S.D.N.Y. 1942), and that of the Supreme Court. 319 U.S. at 225.

⁶⁷ That these cases in some manner affirmed agency use of rulemaking in somewhat similar circumstances cannot be disputed. Several of the cases are so similar that it may seem mere cavil to indulge in an extensive discussion to point out the features of these cases which distinguish them from the *Blocked Space* case. However, in order to dispel any impression that the *Blocked Space* case is nothing more than another application of well-established precedent, some distinguishing factors should be noted. In *Transcontinent Television Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1963), the FCC changed the frequency (and thereby a condition or "right") of an existing station, but made the change effective only upon the expiration of its current license term, thereby making the changed frequency a condition of the grant of a future renewal

in this area.⁶⁸

The full extent of the rulemaking power confirmed by the *Blocked Space* opinion is not clear. What, if any, are the limitations on the use of rulemaking proceedings to foreclose issues from future contest in adjudicatory proceedings? The court suggests some limit on the use of rulemaking by observing that:

license to the station. This would appear to fall within the parameters of *Storer*: laying down conditions for future licensing, rather than modifications of an existing license. Another distinction can be drawn on the basis of the renewable broadcast licenses under the Communications Act and the "permanent" nature of air carrier certificates under the Federal Aviation Act. The very concept of renewable rights suggests a "right" or "privilege" which is less fixed than the air carrier certificate and one more subject to the vicissitudes of changed conditions. The court made it clear in *Transcontinent* that a licensee is not on the same footing as a certificate holder.

In *Capitol Airways, Inc. v. CAB*, 292 F.2d 755 (D.C. Cir. 1961), the Board had promulgated regulations authorizing air carriers, including "supplemental" carriers, to perform certain services for the military, whether or not these services were included within their preexisting operating authority. This authorization, effected by exempting the carriers from the certification procedures of the Act, contained an expiration date of September 30, 1960. Prior to the expiration date the Board instituted a rulemaking proceeding looking towards terminating the "blanket exemption" previously given and replacing it with a procedure for individual exemptions. Petitioners, supplemental air carriers, opposed the repeal of the blanket exemption regulations and at the same time sought renewal of their exemption. Taking no action on their renewal requests, the Board allowed the licenses to lapse on the termination date. The petitioners argued in vain that they had been denied a right to a hearing on the ground that the original regulations had given them, in effect, a license to engage in operations for the military which the Board could not suspend or modify without a hearing. The court's rejection of this argument in *Capitol Airways* does not seem particularly surprising, since the supplemental carriers were clearly attempting to build their procedural castle out of sand. The first step in their argument—that they had license rights—is tenuous to begin with, but the second step—that given a license with all its attendant privileges, the license could not be allowed to expire by its own terms—is much less persuasive than the argument for a hearing in *Transcontinent* where the renewal of licenses was accepted as a routine part of the procedural framework.

The Second Circuit in *Air Line Pilots Ass'n, Int'l* 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961), upheld the promulgation of an FAA regulation barring individuals sixty years old from serving as pilots, the effect of which was to modify or terminate existing pilot licenses without a hearing. However, the pilot licenses as originally issued provided that their duration was as set out in current regulations. Thus the license rights were conditioned at the outset by being subject to future rulemaking. Moreover, in view of the large number of persons involved, a full evidentiary hearing was not a practical possibility, as the court emphasized. 276 F.2d at 896. The same factor is prominent in many (though not all) of the more recent cases affirming a broad use of rulemaking power. See, e.g., *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967) (rules affecting over 800,000 citizens band radio licensees); *Conley Electronics Corp. v. FCC*, 394 F.2d 620 (10th Cir. 1968) (several thousand CATV systems). This could hardly be said of the blocked space rules, because the total number of certificated airlines is very limited, and the number of carriers affected by the blocked space rules is even more limited. See *Regular Common Carrier Conf. v. United States*, 26 Ad. L. Dec. 2d 45, 50 (D.D.C. 1969); 1968 CAB ANN. REP. 18 (listing only 18 carriers with cargo ratings).

⁶⁸ Many other recent cases have affirmed the use of rulemaking, but no new principles have been developed since *American Airlines*. See cases cited note 67 *supra*. See also *Pacific Coast European Conf. v. Federal Maritime Comm'n.*, 376 F.2d 785 (D.C. Cir. 1967); *Borden Co. v. Freeman*, 256 F. Supp. 592 (D.N.J. 1966), *aff'd.*, 369 F.2d 404 (3rd Cir. 1966), *cert. denied*, 386 U.S. 992 (1967). On the strength of *Storer*, *Texaco*, and subsequent lower court decisions, Professor Fuchs concludes that "past zealotness to guard a licensee from having his license modified by rules when the statute required a hearing has only a lingering force." Fuchs, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 216, 227 (1969).

We are not here concerned with a proceeding that in form is couched as rule making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose. The proceeding before us is rule making both in form and effect. There is no individual action here masquerading as a general rule. We have no basis for supposing that the Board's regulation was based on a sham rather than a genuine classification. The classes of carriers were analyzed both functionally and in terms of capacity for furthering the promotional purposes of the Act.⁶⁹

This implies that rulemaking would be improper if it were "individual in impact and condemnatory in purpose," or if it were based on a "sham" classification. A very literal interpretation suggests that only those proceedings in which the Board (1) intended to single out individual carriers for the imposition of some sanction, or (2) created phony classifications with no valid regulatory purpose, lie outside the proper sphere of rulemaking. The first limitation seems nearly meaningless, since the only types of proceedings which would be clearly outside the proper sphere of rulemaking would be insignificant cases involving the specific imposition of penalties or enforcement of sanctions for violation of the Act or the Board's rules. It is hard to believe that the court intended that the limitation be read quite so literally, though the opinion elsewhere suggests that this may have been its intent.⁷⁰ Approached more realistically, the significant criterion is not whether a proceeding involves some condemnation or enforcement of the statute or rules, but simply whether a proceeding is "individual in impact." But even this more restrictive interpretation raises questions. What kinds of proceedings are "individual in impact"? Is this simply a question of the number of parties affected or must the rule have a unique impact on each affected individual? In *Flying Tiger Line, Inc. v. Boyd*,⁷¹ decided just before the *Blocked Space* case, the district court upheld CAB rules

⁶⁹ 359 F.2d at 631.

⁷⁰ The court's reliance on *Capitol Airways, Inc. v. CAB*, 292 F.2d 755, 758 (D.C. Cir. 1961), in which the court distinguished a prior decision requiring a hearing on the ground that "the impact of the Board's decision is on an entire class, rather than on particular members of the class who are singled out as law violators or labeled for some reason as unfit or unworthy," suggests that the narrower reading of the language may be correct. Judge Burger notes in his dissent "great difficulty in understanding why licensees not accused of violating the law are not as much entitled to an adjudicatory hearing as licensees who are so accused, when the two are subjected to equivalent Board action," 359 F.2d at 636.

⁷¹ 244 F. Supp. 889 (D.D.C. 1965). See also *Gart v. Cole*, 263 F.2d 244, 251 (2d Cir.), cert. denied, 359 U.S. 978 (1959) (upholding administrative action where the "impact of the determination is upon the group, not upon individuals"); *Regular Common Carrier Conf. v. United States*, 26 Ad. L. Dec. 2d 45, 49 (D.D.C. 1969). The leading constitutional decision, drawing this distinction, is, of course, *BiMetallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

limiting the off-route charter operations of all-cargo air carriers. Rejecting the contention that the absence of an adjudicatory hearing made the rulemaking improper, the court held that rulemaking was proper "if the impact of a ruling or decision of the Board affects an entire class, rather than particular members of a group."⁷² No mention was made of the fact that the "entire class" in this case numbered only five carriers,⁷³ a fact which could not have escaped notice. This suggests that the size of the class is not itself significant if the rule does not on its face discriminate among the individual members. The second limitation, that the classification not be a "sham," seems as a practical matter unimportant, since an agency seemingly would have almost unlimited discretion to define the relevant "class." Conceivably it might even promulgate a "rule" directed at a "class" comprised of only one party if the designation of the class was made without a discriminatory purpose. Suppose, for example, that instead of attempting to refuse to renew Northeast Airline's New York-Miami certificate by adjudication,⁷⁴ the CAB had promulgated a policy "rule" to the effect that in this market no more than two carriers should be certificated and, because of the need to have a carrier with a strong seasonal market, no carrier without other substantial long-haul routes (which Northeast did not have) should be authorized to serve or continue service in the market.

We might expect that in this situation where the rule promulgated is so obviously directed at an individual, in fact if not in name, that the court would draw a line between valid and invalid rulemaking procedures, similar to that drawn in *Philadelphia Co. v. SEC*.⁷⁵ In *Philadelphia Co.*, the SEC had promulgated rules under the Public Utility Holding Act exempting certain subsidiaries of registered holding companies from specific provisions of the Act. Subsequently, the Commission promulgated, without an "adequate" adjudicatory hearing, an amendment to the exemption rule which had the effect of revoking the exemption of the Philadelphia Company's subsidiaries. Although the amendment was couched in general form, the Commission acknowledged that the basis for the rule concerned "primarily the situation which has been presented by the Philadelphia Company and its subsidiaries."⁷⁶ The court held the revocation of the Philadelphia Company's exemption invalid on the ground that the fifth amendment, the

⁷² 244 F. Supp. at 892.

⁷³ See 1965 CAB ANN. REP., at app., Chart of Certified Cargo Carriers.

⁷⁴ See *Northeast Airlines v. CAB*, 331 F.2d 579 (1st Cir. 1964); 345 F.2d 484 (1st Cir.), cert. denied, 382 U.S. 845 (1965); *Reopened New York-Florida Renewal Case*, 2 CCH, Av. L. REP. ¶21700 (CAB 1967).

⁷⁵ 175 F.2d 808 (D.C. Cir. 1948), vacated as moot, 337 U.S. 901 (1949).

⁷⁶ 175 F.2d at 813.

Act, and the Commission's own rules required a "quasi-judicial hearing" for "adjudicatory action," a label which the court applied to the Commission's action on the ground that it was "particular and immediate, rather than, as in the case of legislative or rulemaking action general and future in effect."⁷⁷ Whether *Philadelphia Co.* still remains a viable precedent for declaring rulemaking which is focused specifically on a particular individual to be invalid is uncertain. The case involved a rule which was "individual in impact," but it does not seem to meet the criterion stated in the *Blocked Space* opinion, "condemnatory in purpose," and it is hard to say that the classification there was a "sham."

*Transcontinent Television Corp. v. FCC*⁷⁸ also raises some doubt about the continued vitality of *Philadelphia Co.* The deintermixture controversy involved in *Transcontinent* will be explored in detail later.⁷⁹ It is sufficient here to note that in 1956 the Federal Communications Commission proposed a long range policy designed to shift all television channels eventually to the UHF band. To effectuate its long range goal, the Commission formulated and adopted an interim policy which proposed immediate "deintermixture" of VHF and UHF in certain markets, generally by making the particular markets all-UHF. Several of these markets were subsequently made all-UHF, and in 1960 the Commission proposed deintermixture of Bakersfield, California. Following rulemaking proceedings, the deintermixture of Bakersfield was ordered by substituting two UHF channels for the existing VHF channel.⁸⁰ Without an adjudicatory hearing on the issue of deintermixture, the Commission ordered the licensee of the only VHF station in the market to convert its operation to a UHF channel. The order was not made effective, however, until the expiration of the licensee's existing license. On appeal the licensee objected that the order deprived it of the adjudicatory hearing required by two different sections of the Communications Act.⁸¹ Conceding that the Commission might employ rulemaking proceedings to allocate frequencies generally,⁸² the licensee contended it could not do so where the allocation changed the frequency of an existing station. The licensee also argued that even if the Commission could change existing frequencies pursuant to a

⁷⁷ 175 F.2d at 816; *cf.*, *American Export Isbrandtsen Lines v. FMC*, 389 F.2d 962, 968 (D.C. Cir. 1968).

⁷⁸ 308 F.2d 339 (D.C. Cir. 1962).

⁷⁹ Text accompanying notes 180-96 *infra*.

⁸⁰ Deintermixture of Bakersfield Area, 21 P & F RADIO REG. ¶ 55:606 (1961), *aff'd sub nom.*, *Transcontinent Television Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962).

⁸¹ 47 U.S.C. § 303(f) (1964) (provides for hearing when Commission desires to change a station's frequencies, power, or hours of operation); *id.* § 316(a) (provides for hearing as a prerequisite to modification of a station license).

⁸² *E.g.*, *Peoples Broadcasting Co. v. United States*, 209 F.2d 286 (D.C. Cir. 1953).

general deintermixture proceeding involving numerous stations, it could not do so here where the proceeding was specifically directed at a single licensee.⁸³ The court did not squarely meet this argument, but upheld the Commission on the ground that the order was made effective only at the expiration of the current license period and was therefore not a modification of a license or a change in the station's frequency to which the hearing provisions of the Act applied since, as of the effective date of the order, no license was outstanding.⁸⁴ *Trans-continent* illustrates the extent to which rulemaking has been employed to resolve very particularized controversies. At the same time, since the court in these circumstances avoided stating any conclusion regarding the legal limits on the use of legislative type proceedings in disposing of individual cases, it is not possible to predict what limits, if any, there might be.

In contrast to the approach suggested by the above cases of attempting to determine whether a proceeding is essentially legislative or adjudicative in character, Professor Davis has articulated an approach based on whether or not the particular issues in the case involve "legislative facts," which may be determined on the basis of the agency's general knowledge or through nonadjudicative methods, or "adjudicative facts," which require a trial-type hearing.⁸⁵ This distinction parallels that which he draws for the purpose of defining the permissible use of official notice, and which in turn was used by the FTC to support its rulemaking authority. Of course, this formulation leaves open the difficult question how to determine what is an adjudicative fact and what is a legislative fact. Davis describes the former as facts about the "parties and their activities, businesses, and properties" whereas the latter "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."⁸⁶ Though this distinction may be helpful in some cases, as a general guide it is, as Professor Nathanson has put it,⁸⁷ "as elusive as all the other magic keys which have been offered" to solve the right to hearing issue. It is at least susceptible to semantic manipulation to achieve the result desired in any particular case. Consider, for example, the deintermixture issue involved in *Transcontinent*. On the one hand, the issue could be stated broadly—

⁸³ Brief for Appellant at 39-48, *Trancontinent Television Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962).

⁸⁴ 308 F.2d at 344. See also *WBEN, Inc. v. United States*, 396 F.2d 601, 619 (2d Cir. 1968) (Friendly, J.); *Goodwill Stations v. FCC*, 325 F.2d 637 (D.C. Cir. 1963).

⁸⁵ 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.02 (1958).

⁸⁶ *Id.*

⁸⁷ Nathanson, Book Review, 70 *YALE L.J.* 1210, 1211 (1961).

whether deintermixture is a sound policy, which might be characterized as involving "general facts" and could thus justify the Commission's refusal to accord an evidentiary hearing on the wisdom of deintermixture. On the other hand, it is equally simple and logical to characterize the issues more specifically—whether the presence of a VHF station in the Bakersfield market is an impediment to the vitality and growth of UHF stations in this market; whether the substitution of a UHF channel for a VHF channel would eliminate this impediment; and whether a UHF channel in lieu of a VHF channel would provide adequate service or would lead to reduction of service. If the broad issue is broken down into such narrow questions, the general "legislative" issue of deintermixture dissolves into a series of discrete inquiries involving the "immediate parties" and their particular "activities, businesses and properties."⁸⁸

In light of the difficulty of definition in such cases one wonders whether it is worthwhile to attempt to resolve the problem satisfactorily in terms of general characterization. Would it not be more realistic to rest the choice of procedure issue on a pragmatic determination whether, and to what extent, particular procedures—be they "adjudicatory" or "rulemaking" procedures—are appropriate to the resolution of the issue in a particular type of case, both in terms of effective resolution of the policy issues and of fairness to the parties?

There is language in the *Blocked Space* opinion which suggests an endorsement of a pragmatic and flexible approach to the problem of determining the appropriate procedure. At one point the court emphasizes that upon a showing of specific need it might have considered "additional procedural safeguards" as part of a rulemaking proceeding (as opposed to requiring a full adjudicatory hearing).⁸⁹ However, it concluded:

We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kinds of facts they proposed to adduce, and by what witnesses, etc. Nor was there any specific proffer as to particular lines of cross-examination which required exploration at an oral hearing.⁹⁰

⁸⁸ Nathanson offers a somewhat similar illustration of the ambiguity of the distinction. *See id.*

⁸⁹ 359 F.2d at 632.

⁹⁰ *Id.* at 632-33.

The court's rejection of "conceptual demands" for adjudicatory proceeding and its insistence on some showing of need for adjudicatory processes evidences a wisely pragmatic approach which must be warmly endorsed. Yet, the opinion when read in its entirety raises doubts whether the court is as fully committed to an open, pragmatic approach as the statement quoted above indicates, or whether its rejection of petitioners' "conceptual demands" is not based in significant part on its own doctrinal commitment to the concept of rulemaking procedures as the preferred technique of policy formulation. Though the court invites the parties to show in what respects they require additional procedural safeguards, it assumes that the overall framework of the proceeding should be rulemaking because of its "flexibility" and because of the general conclusion drawn by the court that the issues were not suitable for adjudication.

The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls "legislative" rather than "adjudicative" facts. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.⁹¹

This is painting with a rather broad brush. Even if it were possible to define "legislative fact" adequately, it seems conceptualistic to conclude flatly that such facts cannot be "decisively resolved by testimony" (as if almost any fact could be) and that adjudication is not, therefore, a suitable vehicle for their determination, whereas rulemaking is. The preoccupation of the court with the "unique value" of rulemaking procedures is evident throughout its opinion.⁹² It is ironic that in this attachment to abstract generalization, the court chose to characterize petitioners' demands for a hearing as too "conceptual."⁹³

There are, of course, advantages in promulgating general regulatory policies in rulemaking proceedings. Certainly agencies should

⁹¹ *Id.*

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Rulemaking has a unique value and importance as an administrative technique for evolution of general policy, notwithstanding, or perhaps indeed because of, the freedom from the procedures carefully prescribed to assure fairness in individual adjudication.

359 F.2d at 630.

⁹³ Mr. Howard Westwood, counsel for American Airlines in its unsuccessful attempt to seek Supreme Court review by certiorari has observed of the court's opinion: "[I]t becomes preoccupied with the concept of rule-making, and a distinction between rule-making and adjudication, and . . . gets all bogged down in semantics." Symposium, *Reflections on the Conduct of an Administrative Hearing*, 20 AD. L. REV. 101, 139 (1967).

attempt to articulate some general policies and standards to provide guidance for interested persons and to establish a framework for their own actions.⁹⁴ Rulemaking procedures are often the most appropriate vehicle for the formulation of such policies. But these modest propositions are far removed from the sweeping generalizations for which the *Blocked Space* court showed such a penchant. It is unfortunate that the court there was not content with holding that in that case the parties had not shown a substantial need for, or prejudice in being denied, the full panoply of hearing prerequisites. Limited to this narrow but solid rationale the court's decision provides a valuable precedent for approaching this problem in future cases, but the court's gratuitous pronouncements on the "unique virtues" of rulemaking and its inherent superiority as a tool of policy-making should be viewed with a sharply critical and skeptical eye.

II. THE PROCEDURAL PARADIGM FOR ADMINISTRATIVE PLANNING

In his widely heralded memorandum on the Civil Aeronautics Board, Louis Hector passed harsh judgment on the manner in which the Board performed its policy-making functions.⁹⁵ A chief cause of the Board's "appalling inefficiency" in policy-making, according to his analysis, lies in the use of formalized procedures to accomplish functions for which they are ill-suited. The Board's use of such cumbersome methods is in marked contrast to Mr. Hector's idea of how "a well-run Government agency or military command or business" would handle such tasks.⁹⁶ Whatever may be said of Hector's criticism of the particular procedures and performance of the CAB, it is difficult to accept his contrasting examples of the military command and business management as obvious models for the Board or any agency to emulate.

Hector's commendation of the military as an example for the CAB and others is particularly arresting. If one is to judge by the end result, it is not the CAB which suffers in comparison with the military. In terms of efficiency, the shortcomings of the Board which Hector identifies in the area of route planning, for example, seem fully matched by the many dismal results of military procurement policies.⁹⁷ In terms of efficiency or responsiveness to the interests and needs of the

⁹⁴ See generally, H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962)

⁹⁵ Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *YALE L. J.* 931 (1960).

⁹⁶ *Id.* 932-34.

⁹⁷ The Cheyenne Helicopter, the Shillelagh Missile System, and C5A Transport illustrate the point. All are reviewed briefly in *Hearings Before a Subcommittee of the House Committee on Government Operations on H.R. 474*, pt. 5, 91st Cong., 1st Sess. (1969).

general public, even Mr. Hector would, I think, be hard pressed to show that the operations of the Army Corps of Engineers inspire greater confidence than those of the CAB.⁹⁸

Hector's business model is a somewhat more plausible alternative. Others too have urged that where—in the case of the CAB, for example—economic planning is involved, policy problems ought to be approached in the same way that business executives make policy.⁹⁹ It is hard to appraise this view analytically since it is invariably offered more as an abstract, undefined ideal than as a specific program for action. On an abstract level, about all that can be said about it is that it is far from self-evident why it should be regarded as ideal. Again, judging by results, there is little to justify implicit faith in the efficacy of executive planning. Even a casual view of the business world, with its recurrent insolvencies and lesser failures, raises doubts about this model. The CAB might, as Hector asserts,¹⁰⁰ have devised more efficient and expeditious procedures for formulating regulatory policy for local service carriers than it did in the *Seven States Area Investigation*.¹⁰¹ But looking at the performance of some of the carriers themselves up to that time, it is hard to chide the Board for not modeling its own planning methods—involving policies far more complex than those confronting any airline management—after theirs. Nor has the adoption of executive methods by government demonstrated obvious superiority over other methods, as the questionable handling to date of the SST program suggests.¹⁰²

These doubts about the choice of executive management methods as a model for administrative planning do not imply that many planning functions now given to administrative agencies might not be better performed if they were returned to private management. On the contrary, persuasive reasons are evident in many areas now under administrative regulation for shifting responsibility for planning to the

⁹⁸ The reference here is to the civil functions of the Corps. For a very critical study, see A. MAASS, *MUDDY WATERS, THE ARMY ENGINEERS AND THE NATION'S RIVERS* (1951). The foreword by former Secretary of the Interior Harold Ickes is especially devastating.

It must be admitted that the Corps is a rather distinctive kind of military agency since the civil functions of the Corps are only nominally controlled by the Secretary of Defense or the Army. Congress and the Corps itself have long regarded the Corps as more an arm of Congress. *Id.* 132-33.

⁹⁹ *E.g.*, J. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 17* (1960).

¹⁰⁰ Hector, *supra* note 95, at 932-34.

¹⁰¹ 28 C.A.B. 680, *amended*, 28 C.A.B. 955 (1959), *aff'd sub nom.* North Central Airlines, Inc. v. CAB, 281 F.2d 18 (D.C. Cir. 1960).

¹⁰² On the program generally, see *Hearings Before a Subcommittee of the House Committee on Appropriations, Department of Transportation and Related Agencies 1970*, pt. 3, 91st Cong., 1st Sess. (1969). A critical, and generally unfavorable, appraisal of the program and its putative justifications, is given in the report of President Nixon's Ad Hoc Review Committee, *id.* 318-48.

private sector.¹⁰³ However, this suggestion is based on a belief that, in such areas, the operation of the market as a whole would work better than government planning; it does not in any way signify that the methods of individual management decision-making are in themselves uniquely efficacious, or particularly suited to the tasks of broad social and economic planning. Nevertheless, all this is of little relevance to the present commentary in which it is assumed that administrative planning has been instituted to take account of public interests for which it is presumed (though not necessarily by this author) that neither private decision-making nor unregulated market forces generally are adequate. On this premise, the search for appropriate forms for administrative planning is not notably advanced by simplistic reliance on the methods employed in the private sector. In the last analysis, then, we return to Mr. Hector's first alternative, the "well-run Government agency," to see what, if any, generalizations can be made about this mythical beast and its policy-making tasks.

A. Agency Discretion in the Choice of Procedure

Despite widespread dissatisfaction with the manner in which most agencies have performed (or not performed) their policy-making functions, it has been accepted that the choice of procedures is nevertheless one primarily for the agency itself to make. As stated in the second *Chenery* case,¹⁰⁴ "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Such limits as were placed by the courts on the agency's discretion primarily limited the use of rulemaking in particular controversies where an adjudicative hearing was mandated. As noted earlier, these limits have become almost useless as the rulemaking power has been expanded. At the same time, limits on the use of adjudication have been virtually non-existent. Despite constant exhortation by courts and commentators to employ rulemaking procedures,¹⁰⁵ and despite occasional warnings¹⁰⁶

¹⁰³ This, of course, is an ancient sentiment, though it appears to be experiencing a rejuvenescence in recent years. See, e.g., M. FRIEDMAN, CAPITALISM AND FREEDOM (1962). For a very broad, general perspective on such matters, see R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS AND WELFARE (1953), especially pts. IV and V.

¹⁰⁴ SEC v. *Chenery Corp.*, 332 U.S. 194, 203 (1947).

¹⁰⁵ See, e.g., *id.* at 202; NLRB v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.); authorities cited note 6 *supra*. In 1963 the American Bar Association Section on Administrative Law adopted a resolution urging that agencies should "(1) 'as fixed' policy prefer and use rule making to reduce case-by-case adjudication, (2) codify established precedent, and (3) promulgate as rules or statements of policy any general principles enumerated in specific cases." Fisher, *Rulemaking Activities in Federal Administrative Agencies*, 17 AD. L. REV. 252 (1965).

¹⁰⁶ See, e.g., Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 754-55 (1961); 1 DAVIS, ADMINISTRATIVE LAW § 6.13 (Supp. 1967).

that the formulation of general policy rules by adjudication might violate the notice and participation requirements of section 4 of the APA,¹⁰⁷ nothing compelled the agencies to proceed in the manner prescribed by section 4 where the agency chose to make its rules as an incident to adjudication of individual cases.

However, this situation may now be changed by *NLRB v. Wyman-Gordon Co.*,¹⁰⁸ in which a majority of the Supreme Court disapproved the practice of the NLRB of promulgating rules through individual case adjudications without complying with the provisions of section 4 of the APA. *Wyman-Gordon* arose out of an effort by the Board to enforce an order based on its so-called "*Excelsior* rule" which required employers, prior to representation elections, to furnish unions with a list of the names and addresses of all employees eligible to vote in the election. The rule had been laid down in a prior decision in *Excelsior Underwear Inc.*,¹⁰⁹ in which unions who lost representation elections in two companies sought to have the elections set aside on the ground that the companies had denied to the unions a list of names and addresses of eligible employee voters. In the course of the *Excelsior* proceeding, the Board invited various employer groups and trade unions to file amici curiae briefs and participate in oral argument. After these proceedings the Board laid down a general rule that such a list be provided, but it declined to apply this new rule to the companies involved in the *Excelsior* case. In *Wyman-Gordon*, the Board, relying on its *Excelsior* rule, ordered respondent company to furnish a list of eligible employee voters prior to an election in which two unions were competing for representation of the respondent's employees.

The Board then invalidated the election because of the employer's refusal to furnish the list and again ordered that it be provided. In a subsequent proceeding to enforce production of the list, the district court directed compliance with the Board's order.¹¹⁰ The United States Court of Appeals for the First Circuit reversed,¹¹¹ holding the order invalid because it was based on a rule which had not been promulgated in accordance with the Administrative Procedure Act. The Supreme Court in turn reversed, holding that the order was valid. At the same time, however, Justice Fortas' opinion for a plurality of the Court expressly disapproved the Board's practice in promulgating the *Excelsior* rule as an incident of an individual adjudication without

¹⁰⁷ 5 U.S.C. § 553 (Supp. III, 1965-67).

¹⁰⁸ 394 U.S. 759 (1969).

¹⁰⁹ 156 N.L.R.B. 1236 (1966).

¹¹⁰ 270 F. Supp. 280 (D. Mass. 1967).

¹¹¹ 397 F.2d 394 (1st Cir. 1968).

compliance with the requirements of section 4 of the APA, even though it concluded that the order itself was separable and valid irrespective of the invalidity of the rule on which it was based.¹¹² In a concurring opinion, Justice Black, joined by Justices Brennan and Marshall, agreed that the order was valid but disagreed with the conclusion that the rule involved and the Board's practice of promulgating rules in the process of adjudicating cases were improper.¹¹³ In two separate dissents Justices Harlan and Douglas thought that both the order and the rule were invalid.¹¹⁴ Thus, although the Board's order was upheld, six Justices regarded the Board's practice of promulgating general rules in individual adjudicated cases as improper. Indeed, even Justice Black's opinion intimates that the Board's procedure might be improper under some circumstances.¹¹⁵ The basis for identifying the *Excelsior* case as rulemaking rather than adjudication is not fully developed. However, the opinions of Justices Fortas, Harlan, and Douglas all give very large importance to the fact that the Board applied the *Excelsior* requirement prospectively.

Whether there are any other criteria for identifying a proceeding as "rulemaking" is not indicated. In this regard it is interesting to note the parallel between *Wyman-Gordon* and the *Storer-Blocked Space* line of cases discussed earlier. In the latter cases the central issue was, of course, whether the proceeding (or the issues involved) was of such a character that an agency may proceed by rulemaking notwithstanding the impact on individuals. In *Wyman-Gordon* a parallel issue exists—whether the proceeding (or the issues involved) is of such a character that the agency must proceed by rulemaking. The question which at once arises is whether these two issues are two sides of the same coin: Is every proceeding or issue which, by virtue of its general character, is appropriate for rulemaking under *Storer* and its progeny also one for which rulemaking is mandatory under *Wyman-Gordon*? An affirmative answer would, of course, virtually overrule the principle of administrative discretion established in the second *Chenery* case.¹¹⁶ However, none of the opinions in *Wyman-Gordon* can be read to support such a drastic curtailment of agency discretion.

Appropriate use of adjudication is clearly recognized in Justice Fortas' opinion:

¹¹² 394 U.S. at 766.

¹¹³ *Id.* at 769.

¹¹⁴ *Id.* at 775, 780.

¹¹⁵ Justice Black concedes that the Board would not be free to promulgate policy rules in adjudication where they were not adopted as an "incident" to the decision of a case before the agency, but he viewed the rule here as a "legitimate incident" of the Board's decision in the case. *Id.* at 770.

¹¹⁶ *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. . . . They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents. But this is far from saying . . . that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public.¹¹⁷

Justice Fortas, at least, thought that agencies would continue to have discretion to develop policy through adjudication, at least where the policy is "applied . . . therein." But, apart from the element of prospective application, he offers no clear guide for when a judgment of principle is to be deemed a rule and when it is not. The suggestion that the principles established in a particular decision are not normally "rules," because they are not obligatory on the general public, if taken literally, is a strange criterion. When the Supreme Court laid down its guidelines for police interrogation in *Miranda*,¹¹⁸ were these not to be "obeyed" in other cases falling within the guidelines but not yet before the Court? The very term "obeyed," while perhaps appropriate in the context of this particular NLRB rule, is a confusing, if not misleading, qualification for agency decisions in other contexts. With many administrative decisions, particularly in the area of economic regulation, it is not so much a matter of obeying a decision or agency pronouncement in the sense that one obeys a specific command as it is a matter of relying on or adjusting one's business or conduct in accordance with it. For example, the CAB might decide that it will reject all tariffs for blocked space service filed by combination air carriers. To say that this is a judgment which is to be "obeyed" by both combination carriers and all-cargo carriers is only confusing. Similarly, the FCC may adopt a policy that in a comparative licensing proceeding between two or more broadcast license applicants, the applicant having no ownership interest in other communications media shall be entitled to a preference over any applicant having such interests. Again, it is not very useful to treat the action as a command to be "obeyed" by all present and future license applicants. On the other hand, it would not make much sense to exclude the policies adopted in these situations from consideration in defining what constitutes a "rule." To make the definition of a "rule" turn on whether the policy is one which must be "obeyed" in a literal sense would create a senseless distinction.

¹¹⁷ 394 U.S. at 765-66.

¹¹⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Justice Fortas's opinion need not be read so literally to compel such distinctions. *Wyman-Gordon* can and should be analyzed and understood primarily with reference to the particular practice of the NLRB involved. The vice of the practice lies not in the fact that the Board has used adjudication to develop labor relations policy; nor in the fact that in particular cases principles have developed which go beyond the immediate case and must in some sense be "obeyed" by other parties. The real trouble, rather, lies in the fact that the Board has not even purported to develop its policy rules as an incident to its litigation of cases, but has virtually singled out individual cases as vehicles in which to consider and promulgate general policy rules which are largely independent of the facts and issues of the particular case. In some instances, it may not be unfair to say that individual cases have been manipulated or at least distorted for the ulterior ends of rulemaking.¹¹⁹

On this premise the Court's disapproval of NLRB practice might sensibly be interpreted to mean that general administrative policy can be promulgated through adjudication (that is, without conforming to the requirements of section 4) only if it is developed incidentally out of the course of litigating particular cases. Such a holding would be reasonably sound in principle. Even Justice Black, who would give the agency very broad discretion, acknowledges that for an agency to formulate policy rules by adjudication, the relationship between the particular case and the rule being announced must be such that the latter can be said to be "a legitimate incident to the adjudication of a specific case before it."¹²⁰ However, it is to be noted that his definition of a "legitimate incident" to adjudication seems far more permissive than that of Justices Fortas, Douglas, or Harlan.

Nevertheless, though this rather narrow interpretation of *Wyman-Gordon* is defensible, it is undermined by the rather formalistic approach of the Fortas, Douglas, and Harlan opinions, particularly in the strong, if not conclusive, weight placed on the element of prospective application as the earmark of a "rule" which must be formulated in conformity with section 4 of the APA.¹²¹ Such a rigid and formalistic approach is somewhat at odds with the Supreme Court's own practice of applying

¹¹⁹ See Peck, *supra* note 106. See also Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule Making*, 117 U. PA. L. REV. 254 (1968).

¹²⁰ 394 U.S. at 770.

¹²¹ *Id.* at 763-64 (Fortas, J.), at 776-77 (Douglas, J.), and at 780-81 (Harlan, J.). Justice Black interprets Justice Fortas's opinion to give controlling weight to the Board's making the rule prospective. *Id.* at 773. Compare *City of Chicago v. FPC*, 385 F.2d 629, 641-42 (D.C. Cir. 1967) upholding an FPC policy change which was prospectively applied from the date when the change was first announced.

decisions prospectively.¹²² The failure to apply a rule to the adjudication in which it is formulated might be evidence of the fact that it was not a "legitimate incident to the adjudication," but to treat it as controlling would, as Justice Black points out, in effect require an agency to proceed by adjudication "only when it could decide, *prior* to adjudicating a particular case, that any new practice to be adopted would be applied retroactively."¹²³ If an agency, after evaluating the arguments and evidence, decides that it would be fairer to apply its decisional policy prospectively, "it would be faced with the unpleasant choice of either starting all over again . . . in a 'rule making' proceeding, or overriding the considerations of fairness and applying its order retroactively anyway" ¹²⁴

Even apart from distinctions based on whether a policy is prospective or retroactive, *Wyman-Gordon* still may enhance formalistic precepts in administrative law if it is understood, as it is likely to be, as a general affirmation of rulemaking as the norm of administrative policy formulation. This will not advance the cause of common sense in administrative law. Too much preoccupation with the general forms of agency proceedings already exists. It would be unfortunate if *Wyman-Gordon* were to reinforce this preoccupation by forcing courts to determine in every case in which they review an agency's decision whether that decision has the earmarks of rulemaking or of adjudication.

In light of the ever increasing variety of administrative tasks, problems, and correspondingly different interests and needs, courts should be reluctant to focus too quickly on generalized precepts of administrative procedure which may often be inapplicable to the individual situations confronting particular agencies. The comments which follow are an effort to reappraise some of the general pronouncements on the uses of the rulemaking and adjudicative procedures in the making of agency policy.¹²⁵

B. Rulemaking and Adjudication: Some Critical Comments

It is not intended in this section to provide a detailed enumeration and full examination of all of the respective virtues and vices of rule-

¹²² *E.g.*, *Johnson v. New Jersey*, 384 U.S. 719 (1966). The practice of prospective overruling is not confined to the Supreme Court. *See, e.g.*, *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Graham v. Rolandson*, 435 P.2d 263, 274 (Mont. 1967). The situations of the courts and agencies are not, of course, completely identical, insofar as the latter are given specific rulemaking power and the former are not.

¹²³ 394 U.S. at 774.

¹²⁴ *Id.* at 774-75.

¹²⁵ Note 6 *supra*. The discussion of the respective advantages appearing herein closely parallels that of Shapiro and builds in part on many of the excellent points developed by him.

making and adjudication. Indeed, this author is largely indifferent whether, on the balance of some particular aspect of comparison, rule-making or adjudication emerges as the superior technique. The purpose is rather to expose some of the unsound assumptions and indigestible generalizations which have been put forward in the literature to support exaggerated claims on behalf of rulemaking as a "unique" instrument for the making of administrative policy, and to show the need for a more careful analysis of the choice of procedure issue and its significance.

1. Notice and Participation

The primary fault in the NLRB's procedure in *Wyman-Gordon* was the failure to comply with the APA requirements that notice of the proposed promulgation of the rule appear in the *Federal Register*, and that an opportunity be given to interested parties to participate in the rulemaking.¹²⁶ Notice and opportunity to participate are commonly regarded as among the foremost advantages of rulemaking proceedings. Although the compulsory nature of the requirements does distinguish rulemaking from adjudication in theory, it is erroneous to conclude that the difference between the procedures is simply the difference between notice and no notice, participation and no participation. The difference is one of degree. In *Wyman-Gordon*, for example, the Court points out that notice of the proposed rule was given to certain organizations, which were also given an opportunity to participate. Because the notice was not published in the *Federal Register*, it was not sufficiently "general" and the opportunity to participate was correspondingly limited to those who received selective notice. That this did not comply with section 4 of the APA is undeniable, but since it still appears to be an open question when it is appropriate to apply section 4, one may still ask what, if any, injury was caused by the failure to give general notice and issue a general invitation for participation by all interested parties? The Court understandably did not find it necessary to ask this question; there was no way of accurately measuring it in the particular case, nor perhaps in any particular case. But in assessing the virtues of rulemaking versus adjudication in general terms, one may ask whether the notice and participation functions are necessarily better fulfilled by strict compliance with section 4 than by adjudicatory procedures.

Consider first the requirement for notice. Insofar as it is necessary to insure essential participation by substantially interested parties, some

¹²⁶ An additional requirement, that the rule itself be published in the *Federal Register*, was also violated, but this seems to be of lesser importance than notice of and participation in the proposed rulemaking. Compare 394 U.S. at 764-65 (Fortas, J.), *with id.* at 775 (Douglas, J., dissenting).

form of notice of proposed rulemaking is, of course, necessary. In the case of some administrative agencies and of some proceedings, publication in the *Federal Register* may be the only way of giving notice to all interested persons, but this is not true of all agencies or all proceedings. In some instances those most interested in an agency's activities are more likely to rely on either the agency's own public notice releases, trade journals, or reporting services other than the *Register*. Where this is the case and where notice of proposed policy action is given through these alternate means, it is hard to make a strong policy argument for declaring the action invalid simply because of failure to give notice in the *Register*.¹²⁷

Similar caution must be taken with regard to participation. There is little, if any, dissent from the general proposition that an agency should make every effort when formulating administrative policies to see that the full spectrum of views is represented before it. This is not merely a matter of democratic ideology, although that is certainly a significant part, but is a matter also of ensuring that the agency has the broadest perspective on the issues being probed. Once again, however, it is not true that full and adequate participation by interested parties uniformly requires the proceeding to be cast in the form of rulemaking. Agencies commonly provide for participation in adjudication by a variety of means ranging from informal filing of statements or amicus briefs, to full intervention as parties.¹²⁸ When the alternative means of participation allowed by agencies is combined with a judicial trend towards liberalizing rules of intervention,¹²⁹ it is apparent that the scope of industry and general public participation in adjudication has been greatly expanded.

Of course, the nature of the adjudicatory hearing does place limits on effective participation by broad segments of the public, making intervention less viable practically than it might seem theoretically. Yet, whatever the form of proceeding, the number of persons or groups who can make a significant contribution to the shaping of any particular administrative policy is typically quite circumscribed. To expand par-

¹²⁷ Cf. *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179, 183-4 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

¹²⁸ See, e.g., 14 C.F.R. §§ 302.14.15 (1968) (CAB rules regarding informal participation by nonparties and formal intervention); 49 C.F.R. §§ 1100.72, 1100.73 (1968) (ICC rules on formal intervention and informal participation); 47 C.F.R. §§ 1.223, 1.225 (1968) (FCC rules on formal intervention and informal participation). On the practice of the NLRB in inviting amicus briefs, see Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 737, 739 (1961).

¹²⁹ E.g., *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (permitting intervention by representative "listeners" in FCC license renewal proceeding). Cf., *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (standing to appeal).

ticipation appreciably beyond those who have a distinctive interest or those who can make a significant contribution may add to the democratic character of the process, but this may not be worth what it costs in efficiency to review the volumes of irrelevant, or marginally useful commentary that sometimes descends upon the agency from such an invitation. However, it is not the burden of sifting through vast amounts of information that invokes the strongest caution. The controversy that arises over public participation is often less a question of the opportunity to participate than of the degree of involvement which will be permitted. What is often sought, and what is very often needed, is more than some procedure for the airing of general views; it is rather the full and deep involvement by interested persons in the shaping of agency judgment. The very facet of rulemaking procedures which is applauded for permitting broad participation may serve as well to keep the depth of involvement and the treatment of specific, complex issues shallow. Participation in rulemaking procedures is not, of course, inevitably superficial; nor is it certain that adjudicatory procedures will produce analytical depth. It is not unreasonable though to expect that adjudication would provide opportunity for more meaningful involvement. This must be—in part at least—the assumption of those persons interested in agency policy who press for an opportunity to do more than file written comments with the agency.

2. Efficiency and Uniformity in Enforcement

The goal of efficiency needs no explanation or defense. If it cannot be considered an ultimate concern of administrative law that tasks be accomplished with the minimum expenditure of time and resources, it is nevertheless a matter of large importance. Rulemaking may be very efficient in eliminating the burden of individual case-by-case adjudications. As the FTC, in defense of its trade regulation rules, has stressed, rulemaking through case-by-case adjudication may be a “prohibitively time-consuming, costly, and inefficient method of dealing with a problem common to an entire industry.”¹³⁰ The FTC also emphasizes the advantage of uniformity which it refers to as “fair and evenhanded” treatment of persons who, if the agency were to rely entirely on the case-by-case method, might fall victim to discrimination.¹³¹

¹³⁰ FTC, Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8324, 8368 (1964) [hereinafter cited as FTC Statement of Basis].

¹³¹ *Id.* 8367. See also *City of Chicago v. FPC*, 385 F.2d 629, 644 (D.C. Cir. 1967) (Leventhal, J.) (cautioning that the court will review the development of policy

But though it may be true that, in general, rulemaking is likely to be more efficient and uniform than adjudication, the generality is not as widely applicable as it sometimes is asserted to be. The FTC's elaboration of these propositions is a case in point. The agency's argument for rulemaking is plainly inapplicable to the very case in which it was advanced, the cigarette advertising case. Adjudication of industry-wide standards appears to be no problem here since the total industry involved is comprised of a bare handful of companies which could have been handily joined in a single proceeding. No doubt the problem cannot always be so simply solved; in many cases the number of members in the industry renders consolidation impractical, if not impossible. Even here, however, if the Commission is concerned about the problem, one wonders why it has only rarely made use of the class action.¹³² While the problems of showing an identity of interest and of ensuring fair and adequate representation place limitations on this device,¹³³ to the extent rulemaking is substituted for adjudication, the same limitations would exist for that procedure as well.¹³⁴

3. Prospective Application

It is often said that, in contrast to adjudication, rulemaking acts prospectively and thus eliminates the hardship that may result from retroactive application of policy. But the distinction between rulemaking and adjudication in this respect seems greatly overdrawn. The FTC, for example, contends that while adjudication is often retroactive, under the APA "rules made in formal rule-making pro-

through adjudication with extra suspicion "lest an excessively individuated approach may be a seed bed that is too favorable to the rank weed of discrimination").

In the area of trade regulation, the problem of selective enforcement is most troublesome. Although selective enforcement may not be "unfair" in a general sense, it may put certain competitors whose practices are challenged at a competitive disadvantage vis-à-vis those whose practices are not. Nevertheless, the Supreme Court has upheld the discretion of the FTC to enforce cease and desist orders against one violator in an industry before, or even without, proceeding against similarly situated competitors. See *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958) (per curiam).

¹³² Though the FTC's power to employ the class action device has been upheld, *Advertising Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108 (1st Cir. 1956), the occasions of its use appear to be rare.

¹³³ FTC use of class actions is vigorously attacked ("trials in absentia by class suit") by former Commissioner Mason in *National Paper Trade Ass'n. of the United States, Inc.*, [1954-55 Transfer Binder] *TRADE REG. REP.* ¶25,194, at 35,351-58 (1954) (concurring opinion). On the aspect of identity of interests, cf. *Contract Buyers League v. F & F Investment*, 5 CCH *TRADE REG. REP.* ¶72,754, at 86,697 (N.D. Ill. Mar. 28, 1969) (judicial class suit under Fed. R. Civ. P. 23). On the due process requirements of notice and representations, see *Hansberry v. Lee*, 311 U.S. 32 (1940).

¹³⁴ It is to be noted that, in any event, the trade regulation rules do not fully meet the problem of disconformity and discrimination in industry-wide enforcement inasmuch as the rules can be enforced only by individual adjudications. See Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 *MINN. L. REV.* 383, 457 (1964).

ceedings (including, of course, trade regulation rules) are prospective only. (§ 2(c)).”¹³⁵ Such a statement demonstrates the degree to which abstract thinking has triumphed over common sense. Merely because a “rule” is designed to be prospective, and is defined in general terms by section 2 of the APA as having “general or particular applicability and future effect” does not mean that it must invariably be prospective. On the contrary, rulemaking may often in practice have about the same retroactive effect as adjudication.¹³⁶ The FTC’s use of rulemaking in the cigarette case is against a case in point. Had the cigarette rule been implemented when first formulated in 1964, it would have had the same retroactive effect on existing practices as would a cease and desist order against the tobacco companies. The same can be said of most, if not all, of the other trade regulation rules, since they have been promulgated chiefly as a reaction to existing, not future, practices. True, the promulgation of rules would be prospective for firms not then engaging in the forbidden practices, but in this sense so would a cease and desist opinion.

Rulemaking does, of course, avoid the problem of retroactive sanctions, or at least the obloquy of condemnation. So far as the FTC is concerned, however, this point has relatively little force. Since no penalties attach to an FTC adjudication except upon subsequent violation of a cease and desist order, the only possible retroactive penalty in an FTC adjudication is the possible injury to reputation at having been branded a law violator. It is doubtful that this has great significance in the typical case where the FTC has promulgated rules. The seller of TV sets who is told after an adjudication that his advertising of TV set screens is misleading unless based on diagonal measurements or total square inches is not likely to be “hurt” any more than when the FTC promulgates a rule to the same effect.¹³⁷

Outside the arena of the FTC trade regulation, the concern for avoiding retroactive sanctions or condemnation is more substantial, particularly where there has been reasonable reliance on prior agency

¹³⁵ FTC Statement of Basis 8367.

¹³⁶ See Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 933-35 (1965) [hereinafter cited as Shapiro]; cases cited *supra* note 121.

¹³⁷ See 16 C.F.R. § 410.3 (1969). In the context of the FTC’s argument relating to trade regulation rules, it is noteworthy that each of the cases in which the Commission has promulgated rules affects particular advertising practices. Although a “retroactive” order which forbids further use of certain advertisements may have some effect on existing advertising contracts and promotional schemes, it is questionable whether any substantial investment is being significantly affected or whether the firm is seriously prejudiced because of its past assumptions that the practice was lawful. In such cases the complaint of unfairness seems largely a red herring which disguises the true thrust of the objection, which is to the promulgation of any order or rule that adversely affects respondents’ interests.

determinations approving, or at least permitting, the conduct now being proscribed.¹³⁸ However, it is far from clear why the problem of retroactivity should be inextricably bound to adjudication. There is no reason in principle why adjudicative determinations cannot be applied prospectively where fairness so warrants.¹³⁹ As discussed earlier, the Court's decision in *Wyman-Gordon* may be interpreted as forbidding the prospective application of all policy developed in adjudication because, ipso facto, such prospective policy constitutes a "rule" within the meaning of the APA. Of course, such a formalistic approach, whatever one otherwise thinks of it, eliminates the consideration of retroactive versus prospective application as a basis of choice of procedure; but if prospective application in adjudication is not forbidden, either by definition or by fiat, the argument cannot then be made that rulemaking is a preferred technique because it acts prospectively and adjudication does not.

On the whole, it is more responsive to the problem of retroactivity to focus on particular situations in order to determine what fairness to the parties demands, rather than to attempt to resolve this problem by pronouncements on the inherent tendencies of general forms of proceeding. At the very least, an attachment to general theories about forms of proceeding should not obscure the possibility of variation in individual situations.

4. Procedural Freedom

One widely accepted reason for preferring rulemaking as a technique of policy-making is that the usual rulemaking procedures accord greater procedural freedom to the agency than does adjudication. In adjudication, it is said, the ability of the decision-makers to rely on their "expertise" is limited by the formal requirements of adjudicatory hearings and by the restrictions imposed therein. No doubt it is. Such is typically the consequence of all legal requirements; but while not all restraints can be justified, it is questionable whether the constraints imposed by adjudicative proceedings have unduly or unwisely hampered the administrative process. Certainly there are instances when it is desirable to place greater reliance on experience and expert judgment than is now done in many areas of the administrative process, but we have not suffered from too little faith in and reliance on expert wisdom. Professor Louis Schwartz's judgment that "[e]xpertness

¹³⁸ See, e.g., *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) (dictum).

¹³⁹ Compare *City of Chicago v. FPC*, 385 F.2d 629, 641-43 (D.C. Cir. 1967), with cases cited *supra* note 122. See generally Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 260-62 (1938).

has been oversold in this country,"¹⁴⁰ seems accurate. Intensive work in an agency may reward a member with an accumulation of knowledge and experience about particular problems with which the agency deals. But the same processes by which an agency member acquires intensive knowledge and experience about a particular industry, program, or set of problems tends as well to isolate him from other considerations and broader concerns. Expertise all too often means narrow-mindedness. This obviously does not mean that expert judgment and experience is not to be used and never to be trusted. It does mean that it should neither be trusted implicitly, nor be left subject to no greater discipline than its own conscience. Removing procedural restrictions, eliminating the requirement of a record hearing, and denying the use of cross-examination and other requirements of the adjudicative process results, in some cases, in the removal of a significant and salutary discipline from the process.

The attitude of commentators, and the courts to a degree, towards the use of adjudicative procedures seems somewhat ambivalent. In cases involving individual liberties, commentators,¹⁴¹ and increasingly the courts,¹⁴² have deemed judicial methods of proof, especially cross-examination, to be not only a fundamental requirement of fairness, but a uniquely valuable tool for exposing error, falsehood, or bias. On the other hand, in other cases, typically those involving some form of economic regulation where the tasks are variously described as "allocation of resources" or "economic management," adjudicative methods of testimonial proof and cross-examination have come to be regarded by many as unsuitable and inappropriate.¹⁴³

It can be conceded that, for many tasks of regulatory planning, particularly those involving economic "management," adjudicatory pro-

¹⁴⁰ Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 471 (1954).

¹⁴¹ *E.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.05 (1958); 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

¹⁴² *E.g.*, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

¹⁴³ On the use of judicial methods of proof generally, see Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1241 (1966): "Adjudication procedure is made ridiculous when it is enlisted in an attempt to 'prove' planning by evidence." See also 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.06 (1958); L. FULLER, THE MORALITY OF THE LAW 170-77 (1964); J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 17 (1960). On the use of cross-examination in particular, see Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964); W. GELLHORN & C. BYSE, CASES ON ADMINISTRATIVE LAW 866-68 (4th ed. 1960). The objection to testimonial procedures is somewhat softened by the increased reliance on written presentations. See Gardner, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 108, 137 (M. Paulsen ed. 1959). The FCC, the ICC, and the CAB all rely heavily on written presentations. However, it should be noted that, except where parties agree to submit their entire cases on written brief, the use of "canned testimony" does not dispense with cross-examination of the testimony where facts are disputed.

cedures are not well suited. In part, however, this simply reflects the larger truth that for some of these tasks, government processes in general are unsuited and inappropriate,¹⁴⁴ the functions being better left to unregulated social and economic forces. But where these planning tasks have been undertaken, it is an overstatement to generalize, as some have done, that adjudicative forms of regulation are always ill-suited and inappropriate to deal with them. To begin with, it must be emphasized that the question here is not simply whether the procedures are well designed to effectuate the regulatory objectives, since the choice of procedure problem seldom if ever arises, except where those objectives materially, often adversely, affect private interests. It is not then simply a matter of adopting procedures suitable to the interests of public regulation; it is equally one of framing procedures appropriate to evaluating and protecting affected private interests, which—be they the interests of consumers, industry or others—are not made less substantial by weaving them into the fabric of “economic management,” “social planning” or what have you. With the obvious, but necessary, reminder that the aim of procedure is not the monolithic one of efficiently serving the ends of regulation, we may consider further some of the strengths and weaknesses of adjudicative formalities in policy planning.

Challenges to the suitability of adjudicative methods (particularly the reliance on testimonial evidence and cross-examination) where the issues involve policy planning, appear to rest in large part on the notion that “policy,” or, to use Professor Davis’ phrase, “legislative fact,” is something pure, uncontaminated by particular data and questions, assumptions, opinions and biases which have been regarded as properly the subject of such methods in other contexts. But a judgment on policy or “legislative fact” invariably involves an admixture of particular facts, opinions, and biases, some of which may and some of which may not be appropriate for exploration by testimony and cross-examination. To say categorically that general policy questions or “legislative facts” cannot fruitfully be explored by testimonial procedures and cross-examination is to generalize to an extent which can only obscure analysis. Noteworthy in this respect is the *Blocked Space* court’s statement that the principal issue in that case called for “expert opinions and forecasts” which “cannot be decisively resolved by testimony” and is therefore the “kind of issue where a month of experience will be worth a year of hearings.”¹⁴⁵ The theory, apparently, is that

¹⁴⁴ This seems an implicit premise of part of Fuller’s criticism of adjudicative methods. See Fuller, *Adjudication and the Law*, 1960 PROCEDURES OF THE AMERICAN ASSOCIATION OF INTERNATIONAL LAW 1 (1960).

¹⁴⁵ 359 F. 2d at 633.

predictive judgments or forecasts are a class apart from "historical facts," and techniques of testimonial proof and cross-examination are inappropriate in determining the former even though appropriate for the latter. Such a distinction seems untenable.

First, it is doubtful that predictive judgment is radically different from determinations of historical fact. In both cases the determination must almost invariably rest on general conclusions that are inferred from particular factual data and an evaluation of probabilities that may be as appropriate for testimonial proof and cross-examination in one case as in the other.

Second, in some cases testimonial proof and cross-examination can serve a more valuable function in testing forecasts and generalized conclusions underlying future policy planning than in making findings concerning specific past events. For example, assume that a witness testifies before the CAB that in 1960 there were X tons of air freight carried by combination carriers. American Airlines disputes this by showing that it was only Y tons of freight. Cross-examination of the witness would generally be of little utility in situations like this where the fact in question can be readily and effectively disputed simply by offering contradictory data. Suppose, however, there is no dispute over the number of tons involved, but the witness takes the position that most of the X tons of freight should be carried not by combination carriers but by all-cargo carriers because this will strengthen these specialized service carriers, which in turn will promote air freight and also serve the public interest. If the witness's testimony is disputed, the fact in controversy is what the *Blocked Space* opinion evidently regards as "legislative fact," not appropriate for testimonial proof and cross-examination. But is this sound? Even if there is no dispute about specific identifiable "facts," such as number of freight tons involved, and even if the Board's judgment cannot be proved or disproved as easily as its finding as to the number of tons, it may still be desirable to force the Board, through cross-examination of its experts, to disclose the particular premises, including facts, opinions, and reasoning, which underlie its "policy" conclusions.¹⁴⁶ Notwithstanding the absence of any contest over the one readily identifiable "fact," cross-examination of Board witnesses could play an important role in exposing possible error, bias, or lack of solid foundation which cannot be effectively brought to light simply by introducing rebuttal argument against the generalized policy statements. At the very least it puts some burden

¹⁴⁶ Cf. *Moore-McCormack Lines, Inc. v. United States*, 25 Ad. L. Dec. 2d 745, 764-69 (Ct. Cl. 1969) (upholding the right of parties to know the basis of FMA subsidy determination, though not requiring cross-examination or "full-blown" trial-type hearing).

on the agency to explain and articulate the assumptions and the foundations on which its policy rests. It has been observed that cross-examination may not only expose many errors of judgment, but the very prospect of cross-examination can impose a discipline on the presentation.¹⁴⁷ Thus, the knowledge that a written exhibit containing economic data and judgments cannot simply slide surreptitiously into a giant record, but is subject to publicity by cross-examination, can have a healthy disciplinary effect on the presentation of the evidence and the ultimate decision-making process.

Naturally, some price is paid for these methods: they entail additional hearing time, which aggravates the problem of delay, and they increase the size of the record in a case, which aggravates the difficulty of defining the relevant issues and distilling the material facts. But though these problems are considered to be among the chief disadvantages of adjudicatory procedures,¹⁴⁸ their cost may not be as great as one might initially expect. Take first the problem of delay. While delay is unquestionably present in administrative regulation, the problem tends to be exaggerated by reference to extraordinary cases which are not fairly representative of the process as a whole.¹⁴⁹ Even accepting the time honored view that delay is a major problem, it is still questionable how much of it is attributable to reliance on formal procedures. Many of the common complaints about delay relate to routine agency administration—processing of applications, petitions, and the like. Here delay is not a product of the choice of procedure, but a product of managerial organization and operation. Undeniably, delay also exists in formal procedures; but adjudicatory procedure certainly cannot be blamed for all of it. A recent congressional survey of the major federal agencies indicates, for example, that testimonial procedures, and cross-examination in particular, were regarded by agency personnel and practitioners before the agencies as only a minor cause of significant delay.¹⁵⁰ Other attributes of adjudication—pleading, continuances, arguments on motions, and the like—were also listed among the causes of delay, but they did not predominate over other factors

¹⁴⁷ Symposium, *Reflections on the Conduct of An Administrative Hearing*, 20 AD. L. REV. 101, 117 (1967) (comments of William Burt).

¹⁴⁸ See, e.g., Reich, *supra* note 143, at 1242; E. REDFORD, NATIONAL REGULATORY COMMISSIONS, NEED FOR A NEW LOOK 10 (1959).

¹⁴⁹ See Gardner, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMMORROW 108, 118-120 (M. Paulsen ed. 1959) (suggesting that the critics of administrative delay have been "unduly critical").

¹⁵⁰ STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, QUESTIONNAIRE SURVEY ON DELAY IN ADMINISTRATIVE PROCEEDINGS, 89th Cong. 2d Sess. 9-13 (Comm. Print 1966). See also Gardner, *supra* note 149, at 120, who lays much of the blame—and quite correctly—on the attorneys who practice before the agency.

which were not attributable to the particular procedures involved in adjudication. A major factor in the responses of the personnel of all agencies was the complexity of the problem, a factor which can scarcely be attributed to the type of proceeding chosen. As one administrative law practitioner observed:

The fundamental problem is not the nature of the process but the nature of the problems with which the agency is dealing. . . . There is no way that a proceeding like CAB's current *Trans-Pacific Route Case*, involving as it does the future of eighteen air carrier applicants and millions of dollars in revenue, and the route structure of the whole Pacific area, can be made simple or non-controversial. Complexity and delay are inherent in the problem—whatever process is used.¹⁵¹

More troublesome than the problem of delay is that of unmanageably large and diffuse records which, by their sheer size, frustrate attempts to ascertain, organize, and use the relevant facts needed for a sound judgment.¹⁵² This is a problem which can exist quite independent of the nature of the procedure chosen, and to assume that it will disappear if we are clever enough to adopt the right form of proceeding is to view the problem superficially. It has been asserted, however, that attempts to formulate policy by adjudication invariably result in the introduction of evidence bearing on every imaginable issue that the agency might consider:

[S]ince it is tacitly recognized that the agency will be making policy as it goes along there can be no limit to the relevance of evidence. It is the limitless and unfenced range of the agency's probable basis of decision that lies at the root of the procedure problem.¹⁵³

No doubt the submission of irrelevant evidence may hinder perception of the correct course of action, and the absence of clear standards for decision does make it difficult to define relevancy. But the conclusion that the use of adjudication to formulate policy somehow leads ineluctably to irrelevance is mystifying. Why should it be assumed that it is not possible for an agency in an adjudicative hearing (1) to define the relevant issues and policies and to engage in "planning," or (2) to control the admission of evidence? Considering particularly the discretion given to regulatory agencies to initiate proceedings on specified

¹⁵¹ Symposium, *Reflections on the Conduct of An Administrative Hearing*, 20 AD. L. REV. 101, 119 (1967) (comments of William Burt).

¹⁵² See Westwood, *supra* note 143, at 659-60; E. REDFORD, *supra* note 134, at 10.

¹⁵³ Reich, *supra* note 143, at 1241.

issues, for example, by means of an order to show cause,¹⁵⁴ there is no reason to suppose that the agency cannot shape adjudicative proceedings in a manner conducive to effective policy planning.

4. Fairness to Parties

We are told that shaping adjudication to the demands of policy may have unfortunate consequences for the parties involved in litigation. The FTC, for example, warns that:

If the tribunal in an adjudicative proceeding is too intent upon fashioning rules for future guidance, the task of rendering a fair result on the record before it may be slighted. . . . [Consequently, the agency] may frequently fail to do complete justice to the parties before it.¹⁵⁵

Understandably, the FTC does not cite to us any cases in which it has not done full justice to the parties because of its interest in promulgating policy. However, in support of the same general point, Professor Peck has supplied some documentation from NLRB cases in which the Board has "used" certain cases as vehicles for the promulgation of policy at the expense of a careful analysis and fair and expeditious disposition of the case before it.¹⁵⁶ Peck's illustrations are persuasive evidence that the use of individual cases as vehicles for broad policy formulation can markedly conflict with the interests of justice to the litigants in a particular case. In such cases it would no doubt be preferable to employ formal rulemaking procedures rather than to manipulate individual cases to accomplish this aim. But the conflict between fairness to individual litigants is exaggerated when an attempt is made, as the FTC has done, to draw from a few cases the grand conclusion that fairness in adjudication and policy formulation are inherently incompatible. Some of the instances of rulemaking by the NLRB may be rather extreme cases of conscious selection and manipulation of individual cases for an ulterior end, having little relationship to the case at hand. Yet surely not every occasion for policy pro-

¹⁵⁴ On the use of show-cause order proceedings with particular reference to the CAB, see Symposium, *supra* note 151 at 123-24, 139 (comments of William Burt and Howard Westwood); Comm. on Licenses and Authorization of the Administrative Conference, *Licensing of Domestic Air Transportation by the Civil Aeronautics Board*, in SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE, S. Doc. No. 24, 88th Cong., 1st Sess. 342-43 (1963). Apart from the use of formal show-cause order the CAB has virtually complete discretion to initiate proceedings dealing with route awards, and wide discretion to shape the parameters of the proceedings, subject, of course, to the requirements of the *Ashbacker* doctrine. See *id.* 341-42, 394-402.

¹⁵⁵ FTC Statement of Basis 8367.

¹⁵⁶ Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 758-59 (1961); Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968). See also *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969).

nouncement in an individual adjudication leads to distortion of the particular issue in the case. There is no basis for assuming, for example, that if the FTC proceeded by way of complaint against the Tobacco Institute and/or all of the cigarette manufacturers, that it could not promulgate its trade regulation rule requiring health warnings in cigarette advertisements and still do justice both to the particular issues in the case as well as to the long range policy objectives. Since the adjudicative issues and the policy issues involved in this case are virtually identical in substance and coextensive in their implications, such an assumption would be unsupportable. Similarly, in the *Blocked Space* case it is not easy to find any intrinsic conflict between "adjudicative" issues and "legislative" policy which would have resulted in an unfair disposition of the interests of the parties to the litigation if they had been handled in an adjudicatory hearing. Whatever risk there was in either of these cases, it should be of small concern since the parties themselves were evidently willing to take that risk by demanding a full evidentiary hearing on these issues.

5. Clarity of Policy Issues and Judicial Review

Just as greater attention to and fairer treatment of the interests of individual litigants is supposedly ensured by separating general policy concerns from those of an individual litigation, the argument is also made that such a separation correlatively enables the agency to focus more clearly on general policy issues, unobscured by the distractions of individual adjudicative issues.¹⁵⁷ What is more important, such separation makes the policy issues, and the agency's response to them, more visible to the public eye. Justice Douglas, for example, in his dissenting opinion in *Wyman-Gordon* remarks that rulemaking, though no cure-all, "does force important issues into full public display and in that sense makes for more responsible administrative action."¹⁵⁸ He adds that by exposing the policy issues more clearly, rulemaking may facilitate judicial scrutiny of the agency's policy judgment.¹⁵⁹

There is much sense in these observations. Rulemaking may often serve a vital purpose of forcing the agency to clarify its policies and thereby make them more visible to Congress, the public, and the courts. However, despite the strength of this consideration, a word of skepticism may yet be voiced. Discerning a problem is one thing, acting on it, another. If we are concerned with the need for close

¹⁵⁷ *E.g.*, Shapiro 937-40.

¹⁵⁸ 394 U.S. at 779. Substantially the same point is well made by Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931, 943 (1960).

¹⁵⁹ 394 U.S. at 777-78 (by implication).

judicial scrutiny of administrative action, it is not comforting to know that the agency's policy judgment will be clear to the reviewing court, unless that court is willing to examine the policy issues and evaluate the agency's judgment. By casting policy in the form of agency "legislation," rather than adjudication, it seems likely to diminish, not enhance, the willingness of courts to scrutinize agency judgment. The standards stated by the courts themselves recognize a difference in the scope of review of adjudicative decisions under sections 7 and 8 of the APA on the one hand and "legislative" determinations under section 4 on the other. In the former, the agency's judgment must be explicated by reasoned findings and supported by substantial evidence.¹⁶⁰ The requirements imposed on the latter are less restrictive and review is said to be more limited.¹⁶¹

It is, admittedly, quite difficult to demonstrate the degree to which these formal differences have produced correspondingly different results in practice for the simple reason that the administrative agency's substantive judgment is infrequently upset in any case.¹⁶² However, given the general reluctance of courts to challenge an agency's substantive judgment, the procedural requirements which attend adjudication may provide a convenient handle for the court to direct the agency to reconsider. For example, the requirement in adjudication

¹⁶⁰ On findings in cases of adjudication, *see* § 8 of the APA, 5 U.S.C. § 557(c) (Supp. IV, 1969); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *City of Lawrence v. CAB*, 343 F.2d 583, 588-89 (1st Cir. 1965). On substantial evidence, *see* APA § 10(e), 5 U.S.C. § 706(2)(E) (Supp. IV, 1969); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

¹⁶¹ *Borden Co. v. Freeman*, 256 F. Supp. 592, 602 (D.N.J.), *aff'd*, 369 F.2d 404 (3d Cir. 1966), *cert. denied*, 386 U.S. 992 (1967). In *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889, 892 (D.D.C. 1965), the court carefully distinguished review of rulemaking from review of adjudicatory decisions:

[T]he Court does not review a record of such hearings as it does records in judicial or quasi-judicial proceedings. Such hearings are analogous to hearings conducted by Congressional Committees. An Act of Congress need not be supported by formal evidence introduced at hearings.

See also *NBC v. United States*, 319 U.S. 190 (1943); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935); *Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 345 (D.C. Cir. 1962).

¹⁶² In *Automotive Parts & Accessories Ass'n. v. Boyd*, 407 F.2d 330, 336-38 (D.C. Cir. 1968), the court, in discussing the difference between "informal rule making" under § 4 and "formal rule making" after a hearing under §§ 7 & 8, distinguished between the findings and substantial evidence requirements of the latter and the "concise general statement" of purpose requirement of the former. As a consequence it concluded that "there will inevitably be differences of emphasis and approach in the application of the judicial review standards prescribed in APA § 10." However, the court indicated that review of informal rulemaking "need be no less searching and strict in its weighing of whether the agency has performed in accordance with the Congressional purposes, but, because it is addressed to different materials, it inevitably varies from the adjudicatory model." *Id.* at 338.

It is difficult to ascertain from this just how significant the court finds the formal differences. In terms of policy decisions, the courts have recognized such an area of "legislative" discretion, but it does not appear that this court reads these cases as supporting a general thesis that there is no significant difference in judicial scrutiny of rules promulgated in formal legislative rulemaking and those formulated in adjudication.

that the agency make adequate findings may often provide the means for telling the agency, in effect, to change its decision without seeming to clash head on with the agency's substantive "expert" judgment.¹⁶³

C. *Effective Policy: Promise and Performance*

Whatever is said in the abstract about the various strengths and weaknesses of rulemaking or adjudicative procedures, one can scarcely avoid considering the end result to see what, if any, impact the procedures have had. It is here that so many of the assumptions about the choice of procedure problem tend to depart from solid fact into the realm of airy generalization and abstraction. The most marked tendency is to assume that it is the widespread use of adjudicative methods by the various agencies which is responsible for the "malaise" of the administrative process—defined most frequently as the failure of agencies to define clear policy guidelines and implement them in reasonably consistent fashion.

Probably no serious student of administrative law today quarrels with Judge Friendly's conclusion that in many areas of administrative law there has been a failure on the part of agencies to define adequate policy standards to guide their decisions.¹⁶⁴ This has come to be treated as one of those "truths" of administrative law which all neophytes must learn and the cognoscenti readily accept. What is not so readily accepted is the conclusion that the crucial flaw lies in the procedural forms adopted by the agency, and that by adopting rule-making techniques, agencies will somehow correct the entire process. For example, in the *Blocked Space* opinion, the court states that Judge Friendly's analysis of the CAB's certification of domestic air routes indicated that the "case-by-case technique as utilized by the CAB has muddied the waters and operated to avoid an overall policy statement of approach to the route structure."¹⁶⁵ It may be conceded that the Board's approach to route planning, especially its vacillation on the role of competition in airline route awards, has demonstrated, in Judge Friendly's words, a "failure to grasp the nettle."¹⁶⁶ But it should also be noted that it is not Friendly's conclusion that the

¹⁶³ See e.g., *Udall v. FPC*, 387 U.S. 428 (1967). It is hard to read Justice Douglas's opinion for the Court without concluding that the failure of the FPC to develop a full record and make adequate findings was simply a peg on which to hang the Court's disagreement with the FPC's decision on the merits. The same appears to be true of the First Circuit's two-time reversal of the CAB in *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579 (1st Cir. 1964); 345 F.2d 484 (1st Cir.); cert. denied, 382 U.S. 845 (1965). The Board finally got the message, *Reopened New York-Florida Renewal Case*, 2 CCH AV. L. REP. ¶21,700 (CAB 1967).

¹⁶⁴ H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962) [hereinafter cited as FRIENDLY].

¹⁶⁵ 359 F.2d at 630 n.16.

¹⁶⁶ FRIENDLY 105.

Board's failure is necessarily due to case-by-case adjudication or the use of adjudicatory forms. On the contrary, he concludes that the Board could have enunciated policy and resolved the problem of standards within the context of adjudication.¹⁶⁷ The fault lies elsewhere; to regard the Board's choice of procedure as the villain is to ignore the substance of the trouble. Contrary to the suggestion of the court in the *Blocked Space* case, the Board's inadequacies in this area have not stemmed from failure or inability to perceive and formulate a policy, as much as from its inconstancy in pursuing a single policy, its persistent failure to articulate in its opinions the reasons for particular awards, and especially its refusal to explain repeated departures from earlier decisions and pronouncements.

For example, as early as 1943, the Board certified a third carrier, Western Airlines, to the Los Angeles-San Francisco market in competition with United and TWA. At that time, it made a general policy pronouncement about a "strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost."¹⁶⁸ This policy pronouncement may or may not have been perfectly compatible with congressional intent,¹⁶⁹ and it may be hard to square with the Board's rejection of Western's application only a few months earlier,¹⁷⁰ but it plainly was a defensible policy.¹⁷¹ If the Board had consistently adhered to it in subsequent individual cases, giving more precise meaning to the general formula by its later applications in specific economic situations instead of moving backwards and forwards on the question of competition,¹⁷² it would undoubtedly have escaped much of the criticism that has been directed at it. The same point can be made with respect to other aspects of airline regulation where the Board's inconsistent performance has invited sharp criticism: the Board's erstwhile regional airport policy, for instance.¹⁷³

¹⁶⁷ *Id.* 143-44.

¹⁶⁸ Transcontinental & W. Air, Inc., Additional N.-S. Cal. Servs., 4 C.A.B. 373, 375 (1943).

¹⁶⁹ For an opinion that it is inconsistent, see FRIENDLY 77-78.

¹⁷⁰ 4 C.A.B. at 264.

¹⁷¹ See, e.g., D. LOCKLIN, *ECONOMICS OF TRANSPORTATION* 806 (6th ed. 1966); D. PEGRUM, *TRANSPORTATION: ECONOMICS AND PUBLIC POLICY* 385 (rev. ed. 1968). But see FRIENDLY 77-78, 98-99. Compare R. CAVES, *AIR TRANSPORT AND ITS REGULATORS* 444-49 (1962), which advocates a comprehensive deregulation of the industry in favor of allowing free competition in the trunkline markets. Of course, this proposal contemplates a complete revision of the act and regulatory scheme.

¹⁷² See Jaffe, Book Review, 65 *YALE L.J.* 1068, 1074 (1956); FRIENDLY 74-105.

¹⁷³ In *City of Lawrence v. CAB*, 343 F.2d 583 (1st Cir. 1965), the court, reversing in part one of the Board's major regional airport decisions, severely criticized the Board for its inconsistency and its failure to develop policy standards for handling airport consolidations. Criticism of the Board's actions not only in that case but throughout the five-year history (roughly 1961 to 1966) of the regional airport "program" was deserved, but it is not accurate to say that the problem was the Board's

Attributing the Board's erratic performance in these areas to its choice of procedures is superficial. Instead, the more basic problems should be considered: dramatic changes in economic conditions affecting the industry; the predispositions of a shifting Board membership;¹⁷⁴ and the apparent inability of the Board and staff to forecast or make judgments any further ahead than a couple of years. Finally, at least part of the inadequate performance must be attributed to the intellectual poverty of the Board's opinion writing staff which was, and still is, unable to give credible explanations for controversial Board actions, even where sound reasons exist.

Moreover, experience does not support the conclusion of the court in the *Blocked Space* case that such deficiencies in regulatory policy-making are likely to be significantly corrected by resort to rule-making procedures. The blocked space policy is itself a case in point. We are told by the court that rulemaking is uniquely suitable for predictive judgment and formulation of policies and standards, as opposed to the inconsistency and vacillation which adjudication was accused of producing. But what, in fact, was accomplished by the rulemaking case before the court? The policy to allow only all-cargo carriers to sell blocked space was adopted in August, 1964. Four years later the Board abandoned the rule which had scarcely any impact during this time, only one cargo carrier having offered blocked space service.¹⁷⁵ Of course, reversing a policy decision after such a rela-

failure to formulate a policy or to develop guidelines for its implementation. *Id.* at 587-88. The policy had been plainly, though generally, set forth in 1961 in a joint CAB/FAA press release, CAB Press Release No. 61-17, FAA Press Release No. 52 (1961), and criteria for implementing it had also been formulated. *See, e.g.,* North Cent. Area Airline Airport Invest., 41 C.A.B. 326, 346 (1964), *aff'd sub nom.,* Outgamie County v. CAB, 355 F.2d 900 (7th Cir. 1966). The real problem was the erratic, uncertain and inconsistent application of policy; it was what the *Lawrence* court described as "prolific indifference" to its policy, to its criteria for implementing the policy, and to earlier decisions dealing with the same issues. 343 F.2d at 588. *Compare, e.g.,* the Board's handling of the criterion of airport accessibility in the *North Central* case, *supra*, 41 C.A.B. at 331, with its disposition in Eastern N.C. Area Airline Serv. Airport Invest., 40 C.A.B. 645, 646-47 (1964).

¹⁷⁴ *See* CAVES, *supra* note 171, at 203; Hector, *supra* note 158, at 957. Including the present membership of the CAB, some thirty persons have served on the five-man Board since 1938. Of these less than 30% served a full six-year term. Fifty per cent served less than one half of a full term. *See* 1968 CAB ANN. REP. 102. The problems of shifting membership with corresponding changes in philosophical viewpoints are not unique to the CAB. On similar membership shifts on the NLRB, with consequent drastic changes in policy, see Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 254-57 (1968). Such shifts are not, of course, all bad. A reasonably swift turnover is a necessary cure for administrative somnolence.

¹⁷⁵ 33 Fed. Reg. 15413 (1968). In its earlier notice of proposed rulemaking, 32 Fed. Reg. 16225 (1967), the Board explained its reason for abandonment of its earlier "experiment" as follows:

In our order on reconsideration . . . we noted that the blocked space policy was not immutable, and would be subject to amendment in light of changing circumstances.

. . . .

It now appears that the policy confining blocked space exclusively to the all-cargo carriers may be impeding rather than promoting the blocked

tively brief time does not itself demonstrate an insufficient basis for adopting the policy initially, but it should at least make one cautious towards the court's pronouncements on the unique efficacy of rulemaking proceedings in achieving stable and farsighted policy.

If the outcome of the blocked space rule suggests a more cautious appraisal of the efficacy of rulemaking procedures, a review of the results of rulemaking by the FCC teaches outright skepticism. More than any other major federal agency, the FCC has relied on rulemaking procedure for the formulation of policy. It has employed rulemaking procedures in the formulation of virtually all of its major regulatory policies governing broadcast stations; its use of rulemaking procedures, particularly in frequency allocations and assignments,¹⁷⁶ has been con-

space experiment as initially contemplated. When the Board promulgated its policy in 1964 there were five operating all-cargo carriers, and it was reasonable to assume that between them a reasonably broad based blocked space service would be provided. However, since that time, two of these carriers have ceased to operate, and of the remaining three, only Flying Tiger has offered blocked space service. Thus, what was originally intended as a specialized service offered by a class of several carriers, has in effect become a service offered exclusively by a single carrier.

Second, it appears that it may no longer be necessary to confine the service to a small class of carriers in order to permit the blocked space experiment to be successful. In this connection, we note that there has been a very substantial growth in total air freight traffic carried by the airlines, and continuous improvements in air cargo equipment and facilities.

Finally . . . there has been a marked improvement in the financial posture of the all-cargo carriers. . . . [M]aintaining these carriers as the exclusive providers of blocked space service may no longer be required as a source of financial strengthening.

The Board's reversal of policy may be entirely reasonable but its explanation does not completely dispel doubts about the need for or utility of the "experiment" in the first place—or about the "unique value" of rulemaking in promulgating this short-lived policy. Though the factors cited above may indeed justify abandoning the policy of giving all-cargo carriers exclusive blocked space service, one may fairly ask whether these factors should not have been foreseen by the Board in 1964—at least if rulemaking is as farsighted (uniquely suitable for "forecasts") as supposed. Consider, for example, the demise of two carriers. Of these, only one, Slick, showed any interest in blocked space service. An ailing airline for some time, it finally suspended operations in 1965, only a year after the blocked space rules were adopted. 1965 CAB ANN. REP. 14. Slick was acquired in 1966 by another all-cargo carrier, Airlift International, Inc.; CAB Order No. E-23879 (June 30, 1966). To the extent the decrease in numbers of all-cargo carriers is thus regarded as significant, this was probably foreseeable in 1964. The second explanation, that confining blocked space to specialized carriers may no longer be required to promote and develop air freight carriage, is sound enough in principal, but again it is difficult to believe that if the original proceeding had been as forward-looking as rulemaking proceedings are supposed to be, the growth in air freight that occurred in 1965 and 1966 could not have been forecast in 1964. Making such economic forecasts would seem to be the very thing the Board's "expertise"—here given complete procedural freedom—qualifies it to do. The Board's third reason, that blocked space "may no longer be required" to strengthen the all-cargo carriers because of the improvement in financial posture is probably correct, but not complete. It should be added that the only carrier offering the service—Flying Tiger—is now, and in 1964 was, least in need of strengthening. See comparative cargo ratings and financial data, 1965 CAB ANN. REP. 89-90, apps. 5, 7; 1967 CAB ANN. REP. 13, tables 3, 6. It has now cancelled its blocked space rates. CAB Release, 68-115 (Oct. 22, 1968).

¹⁷⁶ *E.g.*, Sixth Report on Television Allocations, 1 P & F RADIO REG. pt. 3, 91:601 (1952); Revision of FM Rules, 21 P & F RADIO REG. 1655 (1962); AM Station Assignment Standards, 2 P & F RADIO REG. 2d 1658 (1964).

sidered a model worthy of emulation by other agencies like the CAB who are required similarly to allocate resources.¹⁷⁷ Yet, the FCC has received little praise for the results of its policy planning efforts. In 1949, the Hoover Commission Task Force on Regulatory Commissions charged that the FCC had "failed both to define its primary objectives and to make many policy determinations required for efficient and expeditious administration."¹⁷⁸ In 1960, James Landis accused the Commission of vacillation "in almost every major area" and of being "incapable of policy planning."¹⁷⁹

A dramatic example of the unsatisfactory results of the FCC's policy planning is provided by the long and tumultuous history of the VHF-UHF deintermixture "policy," one application of which was litigated in the *Transcontinent* case previously discussed.¹⁸⁰ If the adoption of rulemaking procedures has any inherent tendency to produce effective, rational, long-range policy planning, it was not discernible in the Commission's various rulemaking proceedings dealing with this problem.

In 1952, after an extensive rulemaking proceeding, the Commission adopted a comprehensive scheme for assigning all television channels to specific communities across the country.¹⁸¹ One of the major considerations to be taken into account in assigning frequencies was whether to make separate geographical assignments for VHF and UHF frequencies. There was evidence that VHF and UHF stations would not be economically compatible in the same markets because of the disadvantages of UHF vis-à-vis VHF.¹⁸² Notwithstanding, the Commission adopted a plan of "intermixture" in which VHF and UHF were assigned to the same market. This scheme of intermixture soon foundered. Unable to overcome economic disadvantages, UHF broadcasters petitioned the Commission to deintermix their communities by substituting UHF channels for VHF.¹⁸³ Having first denied the petitions, the Commission reconsidered. In 1955, it instituted deintermixture rulemaking proceedings to consider deintermixture in five

¹⁷⁷ See, e.g., E. REDFORD, NATIONAL REGULATORY COMMISSIONS, NEED FOR A NEW LOOK 17 (1959).

¹⁷⁸ COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT, app. N, at 95 (1949).

¹⁷⁹ J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 53 (1960).

¹⁸⁰ Text accompanying notes 78-84 *supra*.

¹⁸¹ Sixth Report on Television Allocations, 1 P & F RADIO REG. pt. 3, 91:601 (1952).

¹⁸² See Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1579-80 (1962) (summarizing the arguments of the CBS and DuMont networks against intermixture).

¹⁸³ E.g., Monona Broadcasting Co., 11 P & F RADIO REG. 477 (1954); West Central Broadcasting Co., 11 P & F RADIO REG. 482a (1954).

markets. Though it terminated those specific proposals later that year on the ground that the problem was too widespread to be solved by changing allocations in only five markets,¹⁸⁴ the Commission reinstated rulemaking proceedings looking toward solution of the problem on a nation-wide basis in 1966. As a result of these proceedings it concluded that the most promising solution would be to transfer all television to the UHF band.¹⁸⁵ As an "interim" measure, it instituted rulemaking proceedings looking toward deintermixture in selected communities. Some communities were deintermixed,¹⁸⁶ others were not.¹⁸⁷ The basis for the distinctions was not always clear and the rationale seldom convincing.¹⁸⁸

As the "interim" deintermixture proceedings dragged on, the Commission evidently forgot the policy it laid down, or almost laid down, in 1956. In early 1959, it reported to Congress, in essence, that it was still "studying" the allocation problem and various possible solutions, but it had concluded that deintermixture was "ineffectual as a national allocation policy," either as an interim measure or as a long-run solution.¹⁸⁹ In the meantime, it had decided on still another "interim" solution (one which it had considered before but rejected) through which new VHF channels would be added to large population centers at less than the mileage separations on which it had based its table of assignments in 1952,¹⁹⁰ a solution completely at odds with deintermixture or with the all-UHF proposal.

¹⁸⁴ First Report on Deintermixture, 13 P & F RADIO REG. 1511 (1955).

¹⁸⁵ Second Report on Deintermixture, 13 P & F RADIO REG. 1571, 1577 (1956).

¹⁸⁶ *E.g.*, Peoria Deintermixture Case, 15 P & F RADIO REG. 1550c (1957), *aff'd sub nom.*, WIRL Television Co. v. United States, 253 F.2d 863 (D.C. Cir.), *vacated and remanded on other grounds*, 358 U.S. 51 (1958), *remanded further*, 274 F.2d 83 (D.C. Cir. 1959).

¹⁸⁷ *E.g.*, Madison Deintermixture Case, 15 P & F RADIO REG. 1563 (1957); New Orleans Deintermixture Case, 15 P & F RADIO REG. 1603 (1957).

¹⁸⁸ Compare Peoria Deintermixture Case, 15 P & F RADIO REG. 1550c (1957), and Springfield Deintermixture Case, 15 P & F RADIO REG. 1525 (1957), *aff'd sub nom.*, Sangamon Valley Television Corp. v. United States, 255 F.2d 191 (D.C. Cir.), *vacated and remanded on other grounds*, 358 U.S. 49 (1958), with Channel Assignments in Champaign-Urbana, 16 P & F RADIO REG. 1630 (1958). In the former cases the Commission deintermixed Springfield and Peoria, Illinois, in order to make west-central Illinois all-UHF. At the same time, however, it refused in the *Champaign-Urbana Case* to deintermix that community, notwithstanding virtually indistinguishable circumstances, and notwithstanding the fact that the signal of the one VHF station in *Champaign-Urbana* covered significant portions of the area supposed to have been made all-UHF in the *Peoria* and *Springfield* decisions.

¹⁸⁹ *Hearings on Television Allocations Before the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 4590 (1960).

¹⁹⁰ *Id.* 4601. See Interim Policy on VHF TV Channel Assignments, 21 P & F RADIO REG. 1695 (1961).

The history of short-spaced VHF assignments ("drop-ins" and "move-ins") itself provides material for fertile study of the effectiveness of Commission rulemaking in the area of allocations. The impetus for "drop-ins" in the years following the *Sixth Report* was provided chiefly by ABC. ABC argued for a policy of "drop-ins" as a means of providing a third VHF station (and a competitive outlet for ABC) in a number of major cities to which the *Sixth Report* had assigned only two VHF

Despite its report to Congress that selective deintermixture was not effective, the Commission thereafter instituted proceedings to deintermix Bakersfield, California. Following rulemaking proceedings, it ordered Bakersfield deintermixed in March, 1961.¹⁹¹ However, the Commission had not yet established a policy of deintermixture and was hopelessly ambiguous about its plans for making one. Finally, in August, 1961, it instituted rulemaking proceedings to consider whether it should adopt a policy of selective deintermixture. At the time it proposed to deintermix some 8 communities, 4 of which it had expressly refused to deintermix after rulemaking proceedings in 1958.¹⁹²

The search for a policy finally came to an end in 1962 when Congress amended the Communications Act to allow the Commission to require that all television sets shipped in interstate commerce be able to receive UHF as well as VHF channels,¹⁹³ thereby eliminating a prime cause of UHF competitive disadvantage. At the same time the respective commerce committees of the House and Senate, declaring national policy to be in favor of an intermixed system of VHF and UHF, exacted from the Commission a promise to terminate its then pending deintermixture proceedings.¹⁹⁴ Following passage of the law, the Commission accordingly declared a "moratorium" on its deintermixture proposals.¹⁹⁵ The suspension has continued in effect, notwithstanding occasional petitions to reinstitute deintermixture.¹⁹⁶

channels—the result of which was (UHF channels being inferior to VHF) that there was not an effective third outlet for the third major network. The Commission first rejected ABC's drop-in proposals in 1956 in its Second Report on Deintermixture, 13 P & F RADIO REG. 1571, 1575 (1956), opting instead for selective deintermixture. In 1957 it again rejected VHF drop-ins even as an "interim" measure pending long-range revision of the allocations. Channel Assignments at Sub-standard Spacings, 13 P & F RADIO REG. 1601 (1957). But ABC was insistent, and the FCC was something less than constant. In 1960 it instituted another rulemaking proceeding to consider short-spaced VHF assignments as a policy, and it concluded in 1961 that, as an "interim" measure, it would consider in further individual rulemaking proceedings short-spaced drop-ins in selected major cities. Interim Policy on VHF-TV Channel Assignments, *supra*. But, although one of the short-spaced assignments contemplated in 1961 was made, the VHF drop-in policy was abandoned in 1963, VHF Drop-ins, 25 P & F RADIO REG. 1687 (1963). However, the Commission did not remain entirely constant on its abandonment of short-spaced assignments. In 1964 it authorized a short-spaced "move-in" of a third VHF channel to serve Baton Rouge, Louisiana. St. Anthony Television Corp., 2 P & F RADIO REG. 2d 348 (1964), *remanded for evidentiary hearing sub nom.*, Louisiana Television Broadcasting Corp. v. FCC, 347 F.2d 808 (D.C. Cir. 1965). Subsequently the proposal to move a VHF channel closer to Baton Rouge was modified to drop the short-spacing. St. Anthony Television Corp., 10 P & F RADIO REG. 2d 38 (1967).

¹⁹¹ Bakersfield Deintermixture Case, 21 P & F RADIO REG. 1549 (1961), *aff'd sub nom.*, Transcontinent Television Corp. v. FCC, 308 F.2d 339 (D.C. Cir. 1962).

¹⁹² Expanded Use of UHF Channels, 21 P & F RADIO REG. 1711, 1714 (1961).

¹⁹³ 47 U.S.C. §§ 303s, 330 (1964).

¹⁹⁴ S. REP. NO. 1526, 87th Cong., 2d Sess. 6-7, 13-19 (1962); H. R. REP. NO. 1559, 87th Cong., 2d Sess. 7-8, 18-26 (1962).

¹⁹⁵ Deintermixture Cases, 23 P & F RADIO REG. 1645 (1962).

¹⁹⁶ See, e.g., Deintermixture in Madison, Wis., 9 P & F RADIO REG. 2d 1535 (1967) (denying petition to reconsider deintermixture in Madison).

If Congress had not intervened, one wonders if the Commission would ever have developed a coherent policy on deintermixture. The history of the Commission's efforts presents the sorry spectacle of an agency desperate for a workable policy, but unable to formulate one, despite a seemingly endless parade of rulemaking proceedings over a period of more than seven years. Even if the fact is discounted that the Commission's grand rulemaking proceeding (culminating in the *Sixth Report and Order*) produced something less than the foresight and rational planning supposedly the hallmark of rulemaking proceedings,¹⁹⁷ after viewing the Commission's subsequent, irresolute march up the hill and an equally irresolute march down the hill in search of an effective policy to save its allocations system, it is only with a sense of ironic humor that one can speak of the "unique value and importance" of rulemaking here as an administrative technique for evolution of general policy.

This is not to suggest that different results would necessarily have been obtained by the use of adjudication either in the case of blocked space rules or in the case of deintermixture. The above examples are offered merely as evidence of the rather simple proposition that rulemaking procedures are inherently no more productive of effective policy-making than are adjudicatory proceedings. If the problems of policy development are to be faced and solved, the regulatory process must be analyzed in depth with less emphasis on the forms of agency action.

III. CONCLUSION: SOME THOUGHTS ABOUT FUTURE THINKING ON ADMINISTRATIVE PROCEDURE REFORM

Reviewing the literature on administrative law brings to mind the ancient tale of the blind men of Hindustan, each of whom attempted to describe an elephant by feeling various parts of the animal's anatomy. Feeling the elephant's trunk, one supposed that the elephant was much like a snake; another, upon feeling the elephant's leg, declared that the elephant was more like a tree; while still another who leaned against its broad side concluded that the elephant must be like a wall. As with the elephant, so with the administrative process. The view of the whole often tends to be based on and distorted by that particular part or function which has been inspected, or with which the viewer is most familiar. Mindful of this tendency, I have been loath to draw many general conclusions about the subject at hand. To the extent that any legitimate conclusions about the choice of appropriate administrative

¹⁹⁷ For a criticism of the *Sixth Report* for its failure to learn a lesson from the earlier problem with FM radio, see Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1582 (1962).

procedures are warranted, it is probably that analysis of the problem has been hindered by too great an attachment to labels and abstract concepts—indeed, by the entire framework into which the problem of procedure has been cast for thirty years.

It is time to ask whether the approach of the Administrative Procedure Act in classifying all administrative procedures as either adjudication or rulemaking, and in attempting to prescribe procedures in accordance with this classification, is not a hindrance to adapting administrative procedures more closely tailored to the needs of different agencies and distinctive agency functions. It is true, of course, that in setting down certain basic, procedural standards for rulemaking and adjudication, the APA does not mandate detailed procedures. It does not necessarily preclude reasonable flexibility by an agency in adapting rulemaking or adjudicatory procedures to the variable needs of the agency and the interests of affected private parties. For example, the prescription of an adjudicatory hearing does not preclude an agency from allowing widespread industry and public participation through intervention and presentation of testimony in written affidavits. Some limits may even be placed on cross-examination.¹⁹⁸ By the same token, the use of nonhearing rulemaking procedures clearly permits, as the court in the *Blocked Space* case quite aptly instructs,¹⁹⁹ appropriate use of facets of adjudicatory procedure, such as cross-examination, oral arguments, and the like.²⁰⁰

Having acknowledged that reasonable flexibility is possible within the adjudication-versus-rulemaking dichotomy, the fact remains that the present approach of the APA and the individual regulatory statutes fosters a general tendency to adopt doctrinal distinctions which are not conducive to a pragmatic use of either rulemaking or adjudicative techniques. Moreover, the arbitrary distinction between modes of proceeding does not provide useful criteria for determining what are the appropriate procedures in any particular kind of case. The same can be said for the “adjudicative fact” versus “legislative fact” distinction. These highly elastic concepts tend to obscure the varied needs of different agencies and varied demands of different regulatory functions.

Future efforts in the direction of administrative procedure reform should steer away from prescription of uniform procedures for the entire administrative system and focus instead on specific procedures

¹⁹⁸ Cf., *Allied Van Lines Co. v. United States*, 1969 FED. CARR. REP. ¶ 82,135 (C.D. Cal. 1969). See also Westwood, *supra* note 143.

¹⁹⁹ *American Airlines, Inc. v. CAB*, 359 F.2d 624, 632-33 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

²⁰⁰ Of course, in some cases a full “adjudicatory” hearing is required by statute for rulemaking. See note 5 *supra*.

tailored to the distinctive functions of each individual agency.²⁰¹ In evaluating the appropriateness of existing airline certification procedures, or in deciding what procedures should be used in the future, it is not very helpful to think in terms of administrative licensing of liquor stores, broadcast stations, or park concessions. From the standpoint of prescribing even minimal standards, such a generalized approach has often been as productive of confusion as enlightenment. Instead of worrying whether the modification of airline certificates by a regulation such as the CAB's blocked space rule is a function of "rulemaking" or "adjudication," it would be more useful to ask: What procedures are best suited to this particular type of airline case; what procedures are best suited to resolving the particular issue of airline freight service or the equities of certificate modifications of this type; what private interests are affected in this type of case; who will desire, and who should be permitted, to participate, and to what extent; what are the administrative burdens and the time pressures that are involved for alternative kinds of procedure in cases of this type? This list of considerations could, of course, be amplified and refined, but it is enough here merely to suggest in a general way the nature of the approach.

This would, of course, undermine to some degree the attempt of the APA to prescribe at least minimal uniformity of procedure among the federal agencies, but this is not a very disturbing thought. It is not at all self-evident that the CAB's blocked space proceeding required the kind of procedures which would be used by the FCC to modify a broadcast license. Nor is it as clear that it was any more appropriate to use the same procedures used by the FPC to set provisions for price changes in natural gas contracts.

This is not to suggest that there would not be certain uniform procedures appropriate to all, or most, of these varied functions. But such uniformity would not be imposed on the proceedings because they are "adjudicative" or "legislative" in character, but would emerge only out of basic similarities in agency functions and in the private interests affected, where they were shown in fact to exist.

Candor requires an admission that this approach does not provide any simple solution to the problem of prescribing appropriate administrative procedures. It will not always be possible to break down an agency's business into distinctive "functions," each with its own distinctive procedures. There must be great room for flexibility in the "mix" of various procedural methods in any given type of case. How-

²⁰¹ For a similar conclusion in the context of state administrative procedure reform, see Byse, *Administrative Procedure Reform In Pennsylvania*, 97 U. PA. L. REV. 22, 49 (1948).

ever, by focusing on particular functions, on the kinds of issues normally confronted, and on the parties normally involved and interested in that function, it should be possible to deal with the problem of procedure in a more pragmatic and useful way than by simply attaching the labels "adjudication" or "rulemaking" to particular cases or issues.

Elimination of the rulemaking-adjudication distinctions would require the concomitant abolition of any varying standard of judicial review based on this distinction. No special deference would be given to agency action simply because it chose to dress its action in the form of rulemaking rather than adjudication, a difference which currently seems to exalt form over substance.²⁰² Hopefully, this would force courts to scrutinize more carefully what the agency did, and how it did it, rather than the label it chose for its actions.

Finally, at the risk of venturing a bit far afield of the primary focus of this Article, a couple of broadly philosophic observations may be hazarded. First, it is necessary to recognize that future administrative procedure reform, no matter how ambitious and well directed, offers by itself only limited promise of significant improvement in administrative regulation. The cases of the FCC and CAB discussed earlier show that the failure adequately to define and consistently to apply policy lies much deeper than the procedural forms in which agency action (or inaction) is cast. Attempts to reform the regulatory process by reordering of administrative forms is in large degree directed more at the shadow than the substance of the problem. Attention to improved techniques of procedure must not be permitted to obscure basic problems of administrative management, such as the critical problem of personnel and leadership. The complaint that many, if not most, of the major agencies suffer from an absence of vigorous leadership and high calibre personnel is an ancient one. James Landis pointed out the crucial need for better appointments ten years ago,²⁰³ and the first Hoover Commission made a similar observation eleven years before that.²⁰⁴ Yet this complaint is a durable one,

²⁰² Compare the criticism of the *Blocked Space* case by Mr. Howard C. Westwood: There are things said in that opinion that really strike me as leading to the possibility that the sky is the limit if an agency will just be cute enough to dress up its language and go through the ritual of invoking the concepts that are involved in rule making.

Symposium, *Reflections on the Conduct of an Administrative Hearing*, 20 AD. L. REV. 101, 139 (1967). This view may be a little extreme in regard to the *Blocked Space* opinion, but it does point to the real danger of preoccupation with labels and form instead of substance.

²⁰³ J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 11-13 (1960). See also Friendly, *A Look At The Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 444-45 (1960).

²⁰⁴ THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 431 (1949).

and it is not apparent that significant improvement has been made in this respect in the past twenty years.²⁰⁵ Absent some improvement in this area, procedural reform is only cosmetic. What purpose is served, after all, by telling an agency to employ rulemaking techniques in the formulation of policies regarding competition if agency members are collectively unwilling, or unable, to commit themselves to any firm, clear position on the matter—or, if having done so, the policy set in one year evaporates in the next as a consequence of new appointments with ideological commitments against the policy?

Second, the procedural and managerial problems of administrative policy planning cannot usefully be studied in isolation from the issues of substantive policy itself. This is not the occasion for a monologue pleading the need for more intensive consideration and study of the substantive legal, economic, and social—not to ignore political—aspects of regulation. That plea has been made by others. It nevertheless bears repeated emphasis that no appraisal of the problems of administrative policy-making can be meaningfully complete without attention being given to the vexing, often intractable, problems of policy itself. It is not enough to complain of the failure of agencies such as the CAB or the FCC to formulate viable and reasonably stable regulatory policy. Consideration must be given as well to what the policy alternatives are. To say, for example, that the CAB has failed to implement coherent policy with respect to the role of competition in airline route awards is useful only as a point of departure for analyzing the far more difficult questions which remain: What policies should they adopt; what are the relevant economic standards; how should those standards be implemented in varied market situations; what is the impact of technological factors; what are the political forces which must be confronted and how can they be realistically and effectively dealt with? Obviously, these questions are not easily answered, which may account for their not being asked very often. Nevertheless, a complete evaluation of the past performance of any agency and a realistic expectation of what its performance should be in the future must face up to these ultimate issues of administrative regulation.

²⁰⁵ See, e.g., the critical evaluation of the calibre of personnel and leadership within the FTC in the recent REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 32-36 (1969).