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CONFINING AND CONTROLLING ADMINISTRATIVE DISCRETION WITHIN THE SEVENTH CIRCUIT

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A study of administrative law is largely an examination of the confining and controlling of administrative discretion. Until fairly recently, this study was limited to examination of quasi-judicial procedures and control of quasi-judicial decisions through judicial review. Yet much of the exercise of discretion falls outside the quasi-judicial agency functions. Consequently, scrutiny of a wider range of discretionary processes is essential.

In the past, movement in this direction was inhibited by an unrealistic assumption against the propriety of administrative discretion. Great strides in dealing with discretion were possible only after theorists recognized that discretion is necessary to the successful functioning of our system. Efforts to completely eliminate discretion are fruitless and must fail. We now recognize that to cope with discretion we must first admit the need for it and try to understand its exercise so that it can be confined and controlled where doing so will in fact, not in theory, improve the services the government renders its citizens.

Advocates of controlling discretion rely in varying degrees on the courts as an instrument for achieving the necessary reforms. Because judicial courts can only react retrospectively to the cases presented to them and the courts can handle only a limited number of cases, the best hope for effective reform may be in legislative or administrative action. Judicial review does serve, however, to stimulate reform. For example, discussion of court action impacts on congressional and administrative handling of discretionary justice problems. Consequently, while the real solution to

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most discretionary justice problems may lie in legislative or executive action, discussions, such as this one, which concentrate on the potential role of the judiciary in confining or controlling discretion can contribute to solutions.

Courts have been somewhat reluctant to embark into the less charted areas of administrative action. Part of the reason for this must lay with the failure of practitioners to gain the sophisticated understanding of administrative law necessary to make adequate presentations. But a great deal of the cause has to rest on the administrative law theorists and teachers who have not given courts or practitioners the necessary guidance.

Professor Kenneth Culp Davis offers the most help in this area. Indeed, the subject matter would be a great deal poorer but for him. He raised interest with his book on discretionary justice,[1] and, since that book, he has continued to push for study of informal and discretionary action.[2] His general plan would structure the exercise of discretion through open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure, and would check discretion through official supervision whereby one officer would check another.[3] Substantial contributions made by several commentators[4] and greater involvement by the judiciary[5] has resulted in important analytical development in recent years.

In the last year, the Court of Appeals for the Seventh Circuit has explored the problems of administrative discretion. Often, its approach has been sophisticated. As a result, it has become one of the leaders in developing useful techniques for confining and controlling discretion.

Discretion exercised in informal adjudicatory-type administrative action has puzzled the judiciary and commentators alike and, hence, a good deal of difficult law has been made in the seventies about procedures for informal agency adjudication. The Court of Appeals for the Seventh Circuit is among those courts which continually examine the problem of structuring

1. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

2. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 4.08-3 (1976) [hereinafter cited as DAVIS SEVENTIES]; K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 4.13-4.22 (Supp. 1970) [hereinafter cited as DAVIS SUPP. 1970].

3. DAVIS SUPP. 1970, *supra* note 2, at §§ 4.14-4.18.

4. The Administrative Conference of the United States has produced several studies on the exercise of discretion in the administrative agencies. *See generally* ADMIN. CONF. OF THE U.S., RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1968-1976); Clagett, *Informal Action—Adjudication—Rule making: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51; Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972).

5. The Court of Appeals for the Seventh Circuit, for example, has played a significant role in the development of administrative law, as this article will demonstrate.

informal adjudicatory action, and it has contributed valuable thinking concerning the myriad problems involved with the notion of "some kind of hearing" for informal adjudication.[6] In addition, the Seventh Circuit has worked to check the growth of unnecessary discretion by insisting that agencies follow their own precedent and rules or explain why they chose to deviate from prior policies. By requiring consistency in informal action, unnecessary discretion will be further limited. More important is the Seventh Circuit's continued use of required rule-making as a remedy for too much delegated discretion. Required rule-making assigns the agencies, rather than the courts or the legislatures, the task of building the boundaries around broad discretion. The notion of judicially required rule-making is one of the most important developments in the effort to confine and control discretion and the Seventh Circuit has been, and continues to be, a leader in the growth of this practical technique for limiting unnecessary discretion. Because of the Seventh Circuit's advanced work in all of these areas of administrative discretion, the discussion below is more than a review of recent cases; it is an analysis of the circuit's recent contributions to the development and implementation of the several techniques for assuring discretionary justice in the administrative process.

STRUCTURING ADMINISTRATIVE DISCRETION: PROCEDURAL FAIRNESS IN INFORMAL ADJUDICATION

Discretionary action may take numerous forms of which informal adjudication[7] is only one. While more numerous than formal adjudication, informal adjudication is a small portion of all discretionary action,[8] but its direct impact on citizens' lives makes it a most important type of discretionary action. Recently, a great deal has been said about structuring discretion

6. *See generally* Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975).

7. Informal adjudication, in a general way, refers to discretionary action related to a specific individual or group taken without formalized procedures. It increasingly represents a type of informal exercise of discretion for which some formality, short of trial-type procedure, may be profitably considered.

> The term 'informal adjudication' has no commonly accepted meaning. . . .[I]t broadly refers to administrative decisions that are not governed by statutory procedures, but which nevertheless affect an individual's rights, obligations, or opportunities. Perhaps it is easier to say what the term does not mean. It does not mean rulemaking, either formal or informal under section 553 of the Administrative Procedure Act. Nor does it mean formal adjudication, as defined either by sections 554, 556, and 557 of the APA or by organic agency legislation that establishes comparable procedure formality. A key indicium of formality in this context is the presence of an administrative law judge as the presiding official. In essence, informal adjudication is a residual category of procedural entitlement that grows or diminishes in 'formality' more by judicial and administrative notions of fairness than by legislative plan or design.

Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 n.1 (1976).

8. DAVIS SUPP. 1970, *supra* note 2, at § 4.13; *see* Gardner, *The Procedures By Which Informal Action Is Taken*, 24 AD. L. REV. 155, 156 (1972).

when exercised through informal adjudication.[9] The Supreme Court of the United States and the other federal courts continue to struggle with the complex problem of devising the right level of formality in each of the myriad informal adjudicative activities.[10]

Like all other federal courts, the Seventh Circuit has had to apply the amorphous Supreme Court law on informal adjudication to specific cases.[11] The question of proper informal procedures lies on the periphery of several recent Seventh Circuit opinions.[12] The Seventh Circuit continues its exploration of the problem of damage liability for violation of due process in the exercise of discretion in informal adjudicative situations.[13] It also offered some guidance as to when an agency has statutory authority to choose informal adjudication over formal adjudication.[14]

9. Numerous important scholarly contributions have been produced recently. Among the most useful are Friendly, *supra* note 6; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976); Verkuil, *supra* note 7.

10. Mashaw, *supra* note 9, at 28 n.1.

11. The Seventh Circuit also considered formal adjudication during the last term. Relying on *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 97 S. Ct. 1261 (1977) the court held that Congress could assign an agency the task of adjudicating health and safety violations without providing for trial by jury. Penn-Dixie Steel Corp. v. Occupational Safety & Health Review Comm'n, 553 F.2d 1078, 1080 (7th Cir. 1977).

The Seventh Circuit also reasserted that private contract principles do not apply to government consent settlement agreements and, hence, a respondent cannot withdraw from a settlement agreement even though the agency has not finally accepted a proposed consent order. Johnson Products Co. v. FTC, 549 F.2d 35, 38 (7th Cir. 1977).

In *United States Steel Co. v. Train*, 556 F.2d 822 (7th Cir. 1977), the Seventh Circuit found considerable flexibility in the formal procedures required by the Administrative Procedure Act. An initial decision from the employee presiding at the hearing is not required for "applications for initial licenses," 5 U.S.C. § 554(d)(A) (1970), or where "the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision." 5 U.S.C. § 557(b) (1970). 556 F.2d at 834-35. The court also found that one seeking a permit was the "proponent of a rule or order" and must bear the burden of proof under the Administrative Procedure Act, 5 U.S.C. § 556(d) (1970). 556 F.2d at 834.

In *Allen v. Weinberger*, 552 F.2d 781 (7th Cir. 1977), the court found that expert consultant opinion based on medical reports rather than examination was not inadmissible hearsay, but should be given little weight in arriving at the decision. *But see* text accompanying notes 97-101 *infra*.

In *Squillacote v. Teamsters Local 344*, 561 F.2d 31 (7th Cir. 1977), the Seventh Circuit explored in depth the exception to the exhaustion doctrine. The case actually involves the related problem of when access to district court is permitted where the statute requires direct appeal of final order to the court of appeals. The decision takes a very narrow view of the exception. A district court is, of course, the appropriate forum to challenge an agency subpoena.

12. One case, *Hathway v. Mathews*, 546 F.2d 227 (7th Cir. 1976), offered a particularly valuable opportunity for the court to delve into the problems of informal adjudication. *See* text accompanying notes 57-69 *infra*.

13. *See* text accompanying notes 108-25 *infra*.

14. *See* text accompanying notes 126-57 *infra*.

When are Procedures Required for Informal Adjudication?

The Seventh Circuit, along with the entire federal judiciary,[15] has been wrestling with the new developments in the law of informal adjudication. *Goldberg v. Kelly*[16] is generally conceded to be the antecedent to the great mass of inquiries into what procedures are required in informal adjudicative procedures.

Goldberg marked the initiation of a trend to extend the application of due process requirements into the area of executive and administrative action which had been the exclusive domain of adminstrators exercising unstructured discretion.[17] *Goldberg* compels courts to look at a seemingly infinite variety of informal action to determine whether more formality is required. Because of that case, a great experiment has been undertaken to examine when fairness and feasibility combine to indicate new procedural prescriptions.[18] These inquiries have brought about a due process explosion as the entire federal judiciary is laboring to find order after the cataclysmic decision in *Goldberg*.

Goldberg involved state termination of public assistance payments without an opportunity for an evidentiary hearing prior to termination.[19] Justice Brennan, speaking for the Supreme Court, stated "that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial."[20] However, the Supreme Court imposed a plethora of evidentiary type procedures on the pre-termination decision-making process.[21] In holding that these public aid recipients were entitled to what amounted to an evidentiary hearing, the Supreme Court relied on a characterization of welfare benefits as something approaching a property right: "a matter of statutory entitlement."[22] The Court seemed to find that this entitlement necessitated some due process safeguards before the benefits could be taken. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer

15. Friendly, *supra* note 6, at 1273; Mashaw, *supra* note 9, at 28 n.1.

16. 397 U.S. 254 (1970).

17. Mashaw, *supra* note 9, at 29; Verkuil, *supra* note 7, at 739; Note, *Procedural Due Process: After Goss v. Lopez*, 1976 DUKE L.J. 409, 411.

18. The Administrative Conference has also been working to examine the problem of whether more procedures for informal action should be required. *See* Clagett, *supra* note 4, at 63-64; Gardner, *supra* note 8, at 163-64.

19. The state, subsequent to the filing of the suit, adopted informal procedures which included a conference with a caseworker, supervision, a statement of reasons for termination and the right to higher level administrative review. In addition, a denied claimant could seek an evidentiary-type hearing after termination.

20. 397 U.S. at 266.

21. *Id.* at 266-71.

22. *Id.* at 262.

grievous loss' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[23] The Court suggested a balancing of interests. It found that the costs of losing the minimal level of sustenance provided under the program outweighed the additional expense that would be imposed on the government by requiring additional procedural safeguards.[24]

In this case, the Supreme Court pushed for "some kind of hearing" in a number of discretionary situations.[25] While the 1973 term showed some pull back, the 1974 term brought resumed development.[26] There no longer can be any exercise of administrative discretion which is beyond procedural scrutiny. Some formality may be added to any informal discretionary action.[27]

Despite the quantity of Supreme Court pronouncements, there is no clear standard for the imposition of some procedures on administrative discretion. The inquiry usually begins with the question of whether due process is required in a particular decision-making process and then, where required, what is the requisite process necessary to meet that standard.[28]

The first analysis of whether due process is required begins with the theoretical qualification that the requirements of procedural due process apply only to deprivations of "life, liberty, or property" protected by the fifth and fourteenth amendments. New notions of protected liberty and property, however, infinitely expand the potential application of the doctrine. At one time a distinction was drawn between those governmental benefits characterized as "rights" and those characterized as "privileges."[29] Due process guarantees were held not to apply to depriva-

23. *Id.* at 262-63.

24. *Id.* at 266. Balancing individual interest against governmental or community interests is one of the doctrinal concepts derived from this case and others. For a valuable discussion of this concept, *see* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

25. Friendly, *supra* note 6, at 1273-74.

26. *Id.* at 1274.

27. Another question which pervades these cases is whether a hearing must precede the final discretionary determination:

> One line suggested a presumption in favor of prior evidentiary hearings: The deprivation of any substantial interest prior to an opportunity for hearing would have to be justified by some reasonably compelling governmental necessity. The other line seemed to reverse that presumption: summary process that preliminarily disposed of property or other interests was acceptable, provided there was later opportunity for a hearing that might lead to a reinstatement of the interest.

Mashaw, *supra* note 9, at 36-37.

28. *E.g.*, Coppenbarger v. Federal Aviation Administration, 558 F.2d 836, 839 (7th Cir. 1977).

29. *E.g.*, Barsky v. Board of Regents, 347 U.S. 442, 451 (1954) (practice of medicine is a privilege); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (admission of aliens to U.S. is a privilege). *See generally* DAVIS SUPP. 1970, *supra* note 2, at §§ 7.11-7.13; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

tions of privileges, on the theory that the government had a free hand in denying benefits which were mere "privileges." Recently, the Supreme Court has heeded critics of this distinction and refused to deny appropriate procedures in cases which might well involve traditional privileges.[30] Resolution of the due process question no longer depends on this distinction. Indeed, the class of protected property interests extends well beyond actual ownership of legal property and the class of protected liberty interests beyond mere freedom from overt restraint.[31] The analysis of when more formalized procedures are necessary for informal adjudication looks to new definitions of liberty rights and property rights.

The Supreme Court's opinion in *Board of Regents v. Roth*[32] serves as a foundation for defining protected liberty interests. The case involved the firing of an assistant professor at a state school. Since the professor had taught only one year, and did not have tenure, his reappointment was left to the "unfettered discretion" of university officials. The Court found that the respondent was not deprived of procedural due process because he did not show deprivation of liberty or property protected by the fourteenth amendment. The Court analyzed both the liberty interest and the property interest. As to the liberty interest, the Court found that minimal requirements of due process must be satisfied "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[33] This language, and the holdings of other cases, substantially expanded the perimeter of liberty interest beyond the historical meaning of the term. The cases delineate two situations in which harm to a person's liberty interest requires due process safeguards:

> (1) where the government has made charges against the individual which might seriously damage his standing and associations within his community, or which threatens his good name, reputation, honor, or integrity, and (2) where the state imposes a stigma or other disability upon the individual that forecloses his freedom to take advantage of future employment opportunities.[34]

Harm to these liberty interests must be "serious."[35]

Property interest has given rise to a more sophisticated application of *Goldberg* principles. A comparison of *Roth* with a case based on similar facts, *Perry v. Sindermann*,[36] indicates a boundary between protected and

30. *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).
31. Note, *supra* note 17, at 412.
32. 408 U.S. 564 (1972).
33. *Id.* at 573.
34. Note, *supra* note 17, at 420.
35. *Id.*
36. 408 U.S. 593 (1972).

unprotected property interests. Both cases involved the dismissal of non-tenured teachers. In *Perry*, however, the Court refused to permit non-retention without first affording some kind of procedures. The Court found in *Perry* a de facto tenure system. Sindermann had more than Roth's mere expectancy of employment. Because of the de facto tenure, Sindermann's interest had ripened into a property interest in his job which could be terminated only for cause. Rules and understandings officially promulgated by the college gave Sindermann a legitimate claim of entitlement to job tenure.[37] This entitlement demanded some procedural safeguards.[38] As the Court said, in refusing to impose procedures in *Roth*: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation . . . . He must . . . have a legitimate claim of entitlement to it."[39]

Employment has been the one area where the concept of property interest has taken the firmest hold. Shifting the analysis from examining the usefulness of procedures to defining property interests has undermined an entire line of job security cases.[40] Recently, in *Bishop v. Wood*,[41] the Supreme Court relied on distinguishing property interest from the absence of property interest to permit termination of employment without procedures. Bishop was dismissed from the city police after three years because the chief of police claimed he had failed to discharge his duties properly. The dismissal came after a conference with the chief and the city manager. At no time was he given an evidentiary hearing. In upholding the dismissal, the Supreme Court distinguished *Arnett v. Kennedy*,[42] a prior case in which it required procedural safeguards. In doing so, the Court stated that:

> In [*Arnett*] the Court concluded that because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection. In [*Bishop*], a holding that as a matter of state law the employee 'held his position at the will and pleasure of the city' necessarily establishes that he had *no* property interest.[43]

These cases exemplify the regressive process which has destroyed the promise of *Goldberg*. The genius of the *Goldberg* decision is not its individual holding but its focus on the need to impose procedural safeguards in informal actions. The recent line of entitlement cases eschews flexibility for "once a property interest was established the inquiry into what process

37. *Id.* at 601-02.

38. *See generally* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 for a discussion and criticism of the entitlement doctrine.

39. 408 U.S. at 577.

40. Rabin, *supra* note 9, at 73.

41. 426 U.S. 341 (1976).

42. 416 U.S. 134 (1974).

43. 426 U.S. at 345 n.8.

was due developed variations on a single theme: the adjudicatory hearing model."[44]

Nowhere is this inflexible approach more destructive than in employment cases. The inquiry should avoid definitional analysis of what constitutes a property interest and proceed, instead, toward assurance of some procedures in many more situations.[45] Attention must not be diverted from the crucial question: due process is always required for all administrative action and, hence, the search should be for the process in each exercise of discretion which will be fair not only to the individual or group directly involved but also the entire populace. While many opinions focus undue attention in interest definition, the Supreme Court has often analyzed the problem in terms of the appropriateness of additional procedures.

In *Mathews v. Eldridge*,[46] the majority opinion articulates a set of criteria with a comprehensiveness that suggests a preliminary integration of the Court's recent efforts to impose additional procedures.[47] The case arose from the Social Security Administration's affirmance of a state agency's finding that Eldridge was no longer disabled, resulting in termination of disability benefits. The administrative decision was the result of an informal investigation and a brief statement of reason was provided. Nonetheless, Eldridge argued that he could not get a proper airing of his claim except at an oral hearing before an impartial hearing official. An overwhelming majority upheld the Social Security Administration's termination procedure. The generalized criteria agreed upon by the entire Supreme Court would have a court consider:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[48]

According to these criteria a court must first weigh the extent of the private interest involved. This process is very subjective and impressionistic.[49] An example is the Court's own effort to distinguish *Eldridge* from the welfare recipients protected by *Goldberg* on the grounds that *Goldberg* had involved an income maintenance scheme of last resort for those in financial

44. Rabin, *supra* note 9, at 75.
45. *See* Rabin, *supra* note 9, at 77.
46. 424 U.S. 319 (1976).
47. Mashaw, *supra* note 9, at 29. Professor Mashaw suggests that the case also marks the point at which the court began to avoid "balancing" analysis by finding the due process clause inapplicable. *Id.* at 29 n.5.
48. 424 U.S. at 335.
49. Mashaw, *supra* note 9, at 39.

need, while the Social Security disability system in *Eldridge* made payments to the disabled irrespective of financial necessity.[50]

The second factor, value of additional procedural safeguards, raises the crucial question.[51] The Court determined that additional or alternative procedure, particularly oral presentation or evidentiary hearing, would add little to the determination. The decision before the agency was essentially technical fact-finding. For such decisions, accuracy and veracity could be guaranteed by the investigatory procedures used by the agency. The written procedures were well designed; they provided reasons for tentative decisions and an opportunity to submit additional written evidence.[52] Nonetheless, for some reason, face-to-face contact with the decision-maker seems to make a substantial difference in the outcome of such cases. The Supreme Court was troubled by the high reversal rate where there were agency reconsiderations after a hearing. Professor Mashaw suggests that, in this context, accuracy may be meaningless and consistency at least unachievable; hence, "[oral hearing] may make sense precisely because accuracy and consistency are so elusive in this system."[53] The subjective nature of the decision suggests to him procedures which increase the input of intangibles. Yet, the high reversal rate does not necessarily demonstrate that hearing officers are more just; they may merely be more lenient. A just system may demand less subjective decisions, unaffected by psychological drives to bestow charity on a particular individual with whom the decision-maker is made to empathize by personal contact.[54] Community interests are cheated by decisions which grant money to the undeserving. Funds available to the needy will be depleted by useless evidentiary proceedings. Overall justice may lie in permitting abbreviated procedures where, as here, such procedures are not demonstrably incompetent.

Therefore, the third consideration, public interest, becomes exceedingly important, not only to the generalized interests, but to the particular interests the system is attempting to help. A court must consider both the costs of making additional procedures available and the money and psychological costs of bestowing benefits on ineligible recipients. Increasingly, we are being made aware of the fact that public funds are not infinite.[55] The key question is how to optimize the impact of the finite and relatively scarce

50. 424 U.S. at 340-41. The Court does acknowledge in *Goldberg* that the "degree of difference can be overstated." *Id.* at 341.

51. *See* text accompanying notes 70-96 *infra*.

52. *See* Coppenbarger v. Federal Aviation Administration, 558 F.2d 836, 840 (7th Cir. 1977).

53. Mashaw, *supra* note 9, at 45.

54. Face to face contact with the decisionmaker substantially enhances a welfare recipient's chances. *Id.* at 43.

55. Friendly, *supra* note 6, at 1276.

resource, monies transferred from the harried middle class to the economically disadvantaged. Maximized social welfare must pervade judicial procedural decisions; fine tuning individual decisions can do substantial harm if overall impact is ignored.[56]

In an exceedingly important and useful Seventh Circuit opinion, *Hathaway v. Mathews*,[57] Judge Swygert conducted a search for the right blend of fairness to the individual and furtherance of the general public good. The case involved a very loaded fact situation. The Department of Health, Education and Welfare[58] terminated Medicaid benefits allocated for patients in Ms. Hathaway's nursing home because it found that the home did not comply with federal health and safety standards. Funds paid to her patients were cut off without first affording her notice and any sort of hearing. Apparently, the grievance asserted that the nursing home had no sprinkler system.[59] HEW never clarified that point even at oral argument.[60] While the defect was discovered by an inspection team, the HEW inspectors did not inform Ms. Hathaway of the deficiency. Instead, HEW informed the state agency which in turn notified Ms. Hathaway. She contended that benefits to her patients could not be terminated without notice to her of specific violations and an opportunity to rebut HEW's allegation at a hearing. HEW's position was that even if a hearing must be held, it need not be a pre-termination hearing. On the procedural issue, the district court found that any due process requirement could be satisfied by the post-termination hearing.[61]

The court of appeals held that as long as the home complied with state and federal requirements, Medicaid payments to its residents is a protected property right under the due process clause.[62] The implications of this holding are that the health and safety requirements provide the government with the authority to discontinue its obligation on the one hand and provide the recipient with the basis for demanding some procedural protection on the other. Had entitlement to the benefits somehow been solely at the whim of the government, as in *Roth* and *Bishop*, perhaps no procedural protection

56. Professor Mashaw offers an abstract value oriented system as the proper calculus for prescribing procedures in administrative adjudication. Mashaw, *supra* note 9, at 46-57.

57. 546 F.2d 227 (7th Cir. 1976).

58. Hereinafter referred to as HEW.

59. *See* 546 F.2d at 231 n.4.

60. *Id.* at 230.

61. *Id.* at 228. The district court also found that Hathaway could not seek a remedy against the federal agency because her relationship was with the state. The circuit court found that this argument exalted "legal formalism over reality." *Id.* at 229. It refused to ignore the fact that HEW's action would force her out of business. The circuit court also found that there were no state remedies to exhaust because the state was ready to pay the Medicaid benefits, but for the federal action. *Id.* at 229-30.

62. *Id.* at 230.

would be available. The court confidently found that this situation fell within the "long line of cases"[63] finding sufficient property interest to reach one protection of the due process clause, for the statute created an expectation which could not be withdrawn without notice and hearing.[64] The interest was of the variety for which a post-termination hearing was not sufficient protection:

> In determining whether a hearing must be afforded *before* a statutory entitlement can be removed, we must *balance the interests* of the Government in protecting the health and safety of the Home's residents and the integrity of the Medicaid program against Hathaway's interests in not having the flow of Medicaid payments interrupted while she waits for her hearing.
>
> . . . .
>
> Where the deprivation to the individuals affected by the removal of a governmental benefit is this severe, the Government's asserted interest must be pressing to justify postponing the hearing until after termination.[65]

The facts did not support the agency's contention that there was an imminent health and safety danger. After all, the court said, if there were a danger, why did the agency wait three months.[66] Thus, there were no time constraints compelling expediated termination.

The fact situation in this case prohibits a result oriented procedural decision. The court was required to tread through several public policy dilemmas and its predicament here exemplifies the practical problem with procedural innovation in the area of informal adjudication. The rights of a nursing home operator had to be balanced against the ability of the government to protect very helpless citizens. The need for pre-termination procedure had to be balanced against the prospect that other nursing home operators will use the law to delay compliance with minimal standards, and to bargain insistence on burdensome procedures for compromise as to health and safety.[67] The cost of the procedures had to be weighed against the benefit which might accrue. Finally, the court had to remember that a pronouncement which might be fair in this individual case may make law which will be neither useful nor fair to the real interest to be protected: those

63. *See* 546 F.2d at 230.

64. *Id.* at 230-31.

65. *Id.* (emphasis added). For criticism of the balancing approach *see* Note, *Specifiying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

66. 546 F.2d at 231.

67. *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1289-90 (1972) (formal rule-making); Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 443 (1975) (trial procedure for informal rule-making).

legitimately in need of Medicaid. The balance, the court decided, tipped in favor of some kind of hearing before termination.

Since some sort of minimal level of procedural fairness had not been attained in *Hathaway*, the Seventh Circuit needed only to suggest techniques which may have served. For this reason, the opinion is somewhat deficient as to the truly important question: what type of hearing is necessary. The court seems to envision an evidentiary type hearing with an impartial fact finder. Yet, procedural fairness may have been attained merely by providing for an informal conference before termination. On this basis, it distinguished *Case v. Weinberger*[68] where the termination was upheld because of such a pre-termination conference. The court suggested that mere notice might have avoided the entire controversy, and a statement of reasons accompanying proposed termination may have sufficed.[69]

Procedural Requirements for a Valid Hearing

The crucial and difficult determination is what kind of procedure should be required for any given form of informal agency action. Myopic commitment to a trial-type hearing has stunted development in this area.[70] Greater flexibility in procedural alternatives should replace the definitional analysis requiring a choice between full trial procedures and no formal procedures for a hearing. Despite the Supreme Court's numerous admonishments in favor of flexibility,[71] the commitment to procedural flexibility is largely illusory.[72]

There is little excuse, except for simple traditionalism, for this lack of vision. Judge Friendly has provided an encyclopedic reference on the strengths and weaknesses of the various elements of procedure.[73] If judges could escape the strictures of the judicial model, they could use this tool to prescribe the elements of procedure which will serve a particular decision-

68. 523 F.2d 602 (2d Cir. 1975). *See also* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (where the Supreme Court found that a procedure which provided for preremoval conference at which counsel can object to removal). The interplay of rights—child's, parent's, foster parent's and community's—in the *Smith* case is exceedingly interesting.

69. 546 F.2d at 231 n.4. The agency's failure to communicate its complaints in *Hathaway* stands in stark contrast with the agency's methods approach in Mathews v. Eldridge, 424 U.S. 319 (1976). Mashaw, *supra* note 9, at 41.

70. *See* Rabin, *supra* note 9, at 75. *But see* Mashaw, *supra* note 9, at 54.

71. *E.g.*, Wolff v. McDonnell, 418 U.S. 539, 560 (1974); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). *See generally* Richardson v. Perales, 402 U.S. 389 (1971); Hannah v. Larche, 363 U.S. 420 (1960).

72. Rabin, *supra* note 9, at 75.

73. Friendly, *supra* note 6, at 1277-1304.

making problem. Crafting new "tests" for imposing trial procedures is an unproductive, and often detrimental, game of legal semantics.[74]

In *Goss v. Lopez*,[75] the Supreme Court attempted to set forth realistically modeled procedures. That case involved a student who was suspended from public school for ten days without a hearing. Full trial, even very limited adversary processes, would have been inappropriate, counter-productive and unduly expensive for all concerned. Yet, the Supreme Court would not permit irresponsible administrative action to stand merely for want of the imagination necessary to look beyond forensic methods. The Supreme Court said that school officials could not dismiss a student even for ten days without providing some process by which the decision could be tested. Even so minor a disciplinary action is not within absolute administrative discretion. In defining what procedures are required, the Supreme Court showed sensitivity to the unique problems inherent in a school setting. Rather than requiring the school to follow a judicial model, the Court stated that the principal must provide the kind of process that a fair-minded principal would require under similar circumstances.[76] After articulating its concern for the practical problems of school discipline, the Court stated:

> [D]ue process requires . . . that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.
>
> . . . .
>
> In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are *inappropriate in a classroom setting*. Instead we have imposed requirements which are, if anything, less than *a fair-minded school principal would impose upon himself in order to avoid unfair suspensions*.
>
> . . . .
>
> Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, *cost more than it would save in educational effectiveness*. Moreover, further formalizing the suspension process . . . [may] destroy its effectiveness as part of the teaching process.[77]

Consequently, the Supreme Court mitigated the dilemma of balancing the harm to the individual against detriment to functional effectiveness by

74. Anxiety over keeping manageable the "right" to some kind of hearing rather than weighing the functional advantages of some procedures has driven the Supreme Court to set too high a threshold at which the right accrues. *See* Rabin, *supra* note 9, at 76.

75. 419 U.S. 565 (1975).

76. *Id.* at 583.

77. *Id.* at 581-83 (emphasis added).

procedural imagination and flexibility.

A conceptual base for determining what procedures are necessary rests on three elements: fairness, efficiency and satisfaction to participants.[78] These three values must interact. Where satisfaction to participants dominates, as in *Goldberg*,[79] the process will be unduly cluttered with procedures. Too much procedure can be as harmful as too little.[80] If efficiency dominates, procedures will be insufficient to assure accuracy and equity. Thus, what is needed is a methodology for applying the three values to evaluate particular cases.[81]

Each respective agency must have the initial choice to decide what type of hearing procedure would be most suitable for handling grievances in their area. Practical considerations, rather than judicial restraint, probably lead the Supreme Court in *Mathews v. Eldridge* to say: "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."[82] The judicial duty is to supervise, not preempt. In doing so, the reviewing court must remember that it is dealing with "mass justice."[83]

The needs of mass justice contradict the instinct for requiring every possible procedural safeguard in each individual case. Mass justice demands justice for all individuals in the system. While courts and commentators talk of the "government's interest," what they mean is the class' or general social welfare's interest. Balancing fairness against efficiency becomes serious business which cannot be resolved by a presumption in favor of the individual. The result of such insensitivity to community interests will be manifest injustice to perhaps millions of other individuals.[84]

78. Verkuil, *supra* note 7, at 740. "Fairness implies procedural justice; efficiency, optimum resource allocation; and satisfaction, participant trust in the process." *Id.* at 740 n.4. *See also* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972).

79. *See* text accompanying notes 16-25 *supra*.

80. Concern for individual satisfaction in Social Security disability cases has undermined the whole system. *Hearings on Delays in Social Security Appeals Before the House Ways and Means Committee*, 94th Cong., 1st Sess. 36-39 (1975); Mashaw, *supra* note 9, at 31 n.10. For a discussion of the effect of such laws on the Utah Schools *see* Marquardt & Plenck, *School Suspension and the Right of Due Process: The Effect of Goss and Wood in Utah Schools*, 3 J. CONTEMP. LAW 85 (1976). Judge Friendly points out that the English consider the whole development as one of over-judicialization of the administrative process. Friendly, *supra* note 6, at 1269.

81. Verkuil, *supra* note 7, at 740.

82. 424 U.S. at 349.

83. Verkuil, *supra* note 7, at 744.

84. *See* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1523-27 (1975).

Judge Friendly offers some guidance as to the hierarchy of seriousness to the individual which will be of assistance in balancing individual fairness against efficiency or group fairness. First, the actions may be divided between those which change an individual's existing status and those which deny a *request* for a benefit. The former represents a significantly higher level of seriousness to the individual.[85] He would then rank those actions falling into the change in status category in order of seriousness: (1) actions depriving an individual of liberty (*e.g.*, parole revocation, civil commitment, deportation); (2) revocation of professional licenses; (3) termination of public benefits (*e.g.*, welfare, school, housing); and (4) reduction of those public benefits.[86] Efforts to rank particular classes of informal adjudication according to such interests will create understanding leading to awareness of the appropriate procedural ingredients.[87]

Ranking the individual seriousness according to this interest hierarchy offers some feeling for weighing the individual interest against that of the public's interest. This valuation can be used to choose among the elements of procedure. In evaluating the elements of procedure, Judge Friendly places highest value on three elements: notice, opportunity to comment and impartial decision-maker.[88] Notice, opportunity for at least written comment and reasons may be a minimum for informal adjudication.[89] However, some informal adjudication may not warrant even these exceedingly efficient procedures. While Judge Friendly states that "[g]ood sense would suggest that there must be some floor below which no hearing of any sort is required,"[90] rare will be the instance where reasoned explanation cannot and should not be provided by those exercising discretion.[91] At the very least, agencies should provide findings and reasons[92] and open themselves to post-decision reconsideration.[93] Judicial review should demand explana-

85. Friendly, *supra* note 6, at 1295-96. He cautioned that he does not intend by this distinction to resurrect the right/privilege doctrine. *Id.* at 1295.

86. *Id.* at 1296-98.

87. Verkuil, *supra* note 7, at 747. He suggests procedural rule-making to create a forum by which the agency could study the impact of its informal action. *Id.* at 747 n.31.

88. *See* Friendly, *supra* note 6, at 1279-81.

89. The "notice and comment" procedures of informal rule-making (5 U.S.C. § 553 (1970)) may provide the core ingredients for all informal action. Verkuil, *supra* note 7, at 750.

90. Friendly, *supra* note 6, at 1275.

91. Rabin, *supra* note 9, at 79-80. *See* Dunlop v. Bachowski, 421 U.S. 560, 571 (1975); Camp v. Pitts, 411 U.S. 138, 142-43 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). Cost and functional arguments which can be made against most procedures are rarely valid for the modest procedure of reason explanation. Rabin, *supra* note 9, at 89 n.98.

92. In some cases, merely completed forms will suffice.

93. *See* Hayes v. Walker, 555 F.2d 625, 633 (7th Cir. 1977). The fundamental due process right may be "a reasoned explanation of government conduct that is contrary to the expectations the government has created." Rabin, *supra* note 9, at 77. The opinion in *Hathaway* demonstrates how reasoned explanations can resolve issues efficiently. Hathaway v. Mathews,

tion as the starting point.[94] Nonetheless, the presumption should be strongly in favor of notice, comment and statement of findings and reasons.

Judge Friendly believes an impartial decision-maker may solve many problems.[95] No one can quarrel with this conclusion, but in the mass justice situation, there is no reason why the investigating officer himself will not be impartial. His job is to assure that the benefits go to the eligible.[96] He does not have to pay the benefits, nor does his salary relate to whether benefits are paid or not. Of course, different officials will have different philosophies but mere separation of functions will not change that. The drive to go outside the agency for the decision-maker may reflect a commitment to appearance. The motivation of creating the appearance of fairness must not cloud procedural determination in informal adjudication. Appearances often come at too high a price.

Two recent Seventh Circuit cases, *Allen v. Weinberger*[97] and *Coppenbarger v. Federal Aviation Administration*[98] demonstrate an interesting contrast in approaches to the concept of the impartial decision-maker. In *Allen*, the court reviewed an HEW determination that the plaintiff was not eligible for disability insurance benefits. In reaching that decision, both the administrative law judge and the agency's Appeals Council based their decisions on the opinions of agency medical specialists who relied on the medical evidence in the record. The court virtually dismissed the opinions of two agency doctors who had not examined the claimant. Without the opinion of agency experts, the record contained only the favorable opinion of the treating physician and, hence, the record did not contain sufficient evidence to support the agency decision. The court correctly found that the opinions of two agency experts, based only on the medical reports, were not inadmissible hearsay.[99] Instead, it found that the opinions of the agency experts must be disregarded for want of firsthand knowledge and that the only reliable opinion was that of the treating physician even though he was very likely to be biased. The court's mistake lay in classifying the opinions of the agency experts as "evidence;" whereas, in fact, the experts' partici-

546 F.2d at 231 n.4 (7th Cir. 1976). For a discussion of *Hathaway see* text accompanying notes 57-69 *supra*.

94. Professor Rabin suggests a "limited standard of judicial review, providing an aggrieved individual with a judicial remedy when the agency fails to supply an explanation for its decision that indicates clearly and in detail why the adverse determination has been reached." Rabin, *supra* note 9, at 85.

95. *See* Friendly, *supra* note 6, at 1279.

96. *See* Verkuil, *supra* note 7, at 755. The adversary process is not preferred where interests correspond, standards are clear and both sides see the value of efficiency. *Id.* at 754-56.

97. 552 F.2d 781 (7th Cir. 1977).

98. 558 F.2d 836 (7th Cir. 1977).

99. 552 F.2d at 786.

pation was part of the decision-making process not part of the information gathering process.

In *Coppenbarger*, a different panel refused to disapprove of the Federal Aviation Administration's use of expert opinion which was not properly introduced into evidence. The agency had denied a pilot certificate for medical reasons. In doing so, the agency relied on the opinion of unnamed consultants in neurology to evaluate the medical reports. The court found that this expert opinion need not be presented as evidence and the experts need not be made available for cross-examination: "[T]he Administrator's purpose in retaining the experts was merely to obtain their help in evaluating the data which petitioner had supplied. The Administrator was entitled to do this, and petitioner had no more right to cross-examine the experts than he had to cross-examine the Administrator himself."[100] Not only does the approach in *Coppenbarger* seem more consistent with the Supreme Court's pronouncement in the leading case of *Richardson v. Perales*[101] but it evidences an understanding of decision-making in the administrative process. No one administrative official can obtain the knowledge which is imputed to agency decision-makers as "expertise." Rather, in order to fill the need for expertise, the administrative process permits the decision-maker to freely make use of various experts. By doing so, an official has not consulted extra-record evidence but rather has taken the necessary expert into the decision-making process. Thus, as the *Coppenbarger* panel suggests, the experts and the presiding officials become interrelated parts of the decision-making process. Of course, both must be impartial but the techniques for assuring impartiality are not necessarily the same as those used in a trial to test witnesses.

Judge Friendly would rank such testimonial devices as the right to know opposing evidence, to call witnesses,[102] to cross-examine and to be represented by counsel[103] at a much lower level than impartial decision-making.[104] He would shift the emphasis to what he calls the "investigatory"

100. 558 F.2d at 840.

101. 402 U.S. 389, 408 (1971). In *Perales*, the Court held that written reports by physicians constituted substantial evidence notwithstanding the reports' hearsay character, the absence of cross-examination and the directly opposing testimony. The Court held that due process had not been violated. *Id.* at 402.

102. In *Hayes v. Walker*, 555 F.2d 625, 629 (7th Cir. 1977), the Seventh Circuit recognized substantial limits on the right to call witnesses in informal administrative proceedings. Nonetheless, the court found that "[d]ue process does not permit the automatic exclusion of the right to call witnesses." *Id.*

103. An empirical study appears to value this element more highly. Verkuil, *supra* note 7, at 750 (citing W. Popkin, REPORT FOR THE COMMITTEE ON GRANT AND BENEFIT PROGRAMS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, JUNE 27, 1975 (unpublished final draft)).

104. *See* Friendly, *supra* note 6, at 1278-91.

model[105]—scientific fact finding or information gathering. Impartial investigation might replace adversary methods. The investigatory process would give the government officials power to inquire into the facts without limiting the method of inquiry to the dialectic. Certainly, the best approach is not to begin with full trial procedures and subtract certain elements. The best approach is to begin with a minimum, perhaps notice, written comment and statement of findings and reason, and add procedures.[106] Accuracy and sensitivity to the relevant class must be the goals of the informal action.[107]

Damage Liability for Denial of Due Process

Recently, the choice of an appropriate remedy has become complicated by new law creating damage liability for due process violations. The sole question in the Seventh Circuit case of *Piphus v. Carey*[108] was damage liability. The case involved the twenty-day suspension of two public school students. The district court found that the suspensions were ordered without a hearing in violation of due process but ordered neither damages nor equitable relief. The finding of due process violation was not raised on appeal and, hence, the court of appeals had to decide only whether damages could be assessed against either the individuals or the institution responsible for deprivation without minimal due process.[109] Traditionally, the remedies for this kind of due process violation are declaratory orders or injunctions. However, the Supreme Court in *Wood v. Strickland*[110] opened the door to damage liability. Since that case, the Seventh Circuit has been a force in the development of the law.

Wood v. Strickland involved expulsion of three Arkansas high school students for "spiking" punch. The suspension decision was made by the school board at a meeting. The students were not present at the meeting nor were they permitted any means of defending themselves. They brought a section 1983 action[111] claiming that their federal constitutional rights to due process were infringed under color of state law. The amended complaints asked not only for injunctive relief but also for compensatory and punitive damages against the members of the school board, two school adminis-

105. *Compare* Friendly, *supra* note 6, at 1289-90 *with* Mashaw, *supra* note 9, at 53-54.

106. Gardner, *supra* note 8, at 163-64.

107. The case of *Young v. Brashears*, 560 F.2d 1337 (7th Cir. 1977), suggests an approach to choosing the proper informal procedure. The case involved the removal of Dr. Quentin Young as Clinical Director of the Department of Medicine at Cook County Hospital. After finding entitlement which gave rise to a due process requirement of some kind of hearing, the district court asked the parties to suggest just what elements of procedures were required in this instance. The appellate court seemed to approve.

108. 545 F.2d 30 (7th Cir. 1976), *rev'd*, 46 U.S.L.W. 4224 (Mar. 21, 1978) (76-1149).

109. *Id.* at 31.

110. 420 U.S. 308 (1975). *See generally* Marquardt & Plenck, *supra* note 80.

111. 42 U.S.C. § 1983 (1970).

trators, and the school district. The major part of the opinion concerns official immunity from section 1983 actions. The Supreme Court refused to recognize absolute immunity for school officials. It did, however, find that official discretionary actions were entitled to qualified, good faith immunity from liability for damages. The Supreme Court expressed concern that the threat of money damages would inhibit the school officials from furthering educational needs and discourage competent people from entering school administration. It found that absolute immunity was not necessary to assure against these evils and "would deny much of the promise of section 1983."[112] School administrators could be held to "a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges . . . ."[113] The Court stated:

> [I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[114]

The Supreme Court conceded the emerging nature of the law with its caution that school officials cannot be held to predict the future course of constitutional law.

In *Piphus*,[115] the district court found that the first test of *Strickland* was met because the school officials "should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs."[116] The key question, therefore, was not whether defendant officials were technically liable for damages but whether any damages could be proved. The district court found no proof of actual damages. The court of appeals found that non-punitive damages are recoverable for a violation of due process even if there is no proof of either individual injury or pecuniary loss. The amount will depend on the nature of the wrong. Thus, plaintiffs may be entitled to damages for deprivation of due process rights even where no individual injury is shown and to special damages based on the value of school days lost. But damages based on the suspension itself may not be imposed if defendants can show that the

112. 420 U.S. at 322.

113. *Id.*

114. *Id.* The Court relied generally on *Sheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). In the context of the Kent State killings, the court refused to find absolute official immunity. 416 U.S. at 238-49.

115. 545 F.2d 30 (7th Cir. 1976), *rev'd*, 46 U.S.L.W. 4224 (Mar. 21, 1978) (76-1149).

116. *Id.* at 31 n.2.

plaintiffs would have been suspended even if a proper hearing had been held.[117]

In *Hostrop v. Board of Junior College District No. 515*,[118] Judge Tone had constructed a firm foundation for the proposition that failure to provide necessary due process might give rise to damages unrelated to the possible outcome of the hearing.[119] This leading case for due process-related-damages involved alleged wrongful termination of the employment of a former president of a public junior college. The Seventh Circuit held that he should have been afforded a hearing and, hence, was entitled to damages against the Board but not the individual members. The court found that the plaintiff had a legitimate claim of entitlement which could not be denied without a hearing because the Board's regulations "in fact" established a tenure policy.[120] The circuit court did not subject the individual members to damage liability because it found them protected by official immunity.[121] With respect to the Board as an institution, however, the court held that damages were appropriate.[122] The court agreed that plaintiff would have been terminated after a full hearing, but found that plaintiff was nonetheless entitled to damages for violations of due process rights.[123] The court granted "recovery of non-punitive damages for the deprivation of intangible rights for which no pecuniary loss can be shown."[124] The factors to be considered in measuring such ephemeral damages include "the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation suffered by the plaintiff."[125]

When an Agency May Choose Informal Adjudication

While judicially created law may mandate some formalized procedures in informal adjudication, statutory language settles the question of whether the agency is free to proceed by informal procedures. In *United States Steel Corp. v. Train*,[126] the Seventh Circuit was forced to determine when, in the absence of clear statutory mandate, an agency must proceed by formal trial-

117. *Id.* at 32. Equitable relief, declaratory and injunctive, should not depend on whether plaintiffs would have been suspended in any event.

118. 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976).

119. *Id.* at 579.

120. *Id.* at 575-76.

121. *Id.* at 578.

122. *Id.* at 577. The government, rather than employees, should be liable. The victim of official misconduct will be compensated without making government officials even more timid. DAVIS SEVENTIES, *supra* note 2, at 597.

123. 523 F.2d at 579.

124. *Id.*

125. *Id.* at 580.

126. 556 F.2d 822 (7th Cir. 1977).

type adjudicatory procedures. The case arose from the steel company's challenge to the conditions placed on a discharge permit granted by the United States Environmental Protection Agency.[127] The bulk of the case involves complicated questions of fact and several other procedural issues.[128] The major administrative procedural issue was whether section 554 of the Administrative Procedure Act[129] required formal adjudicatory procedures.

The APA prescribes formal procedure, for both rule-making and adjudication, where either is "required by statute to be determined on the record after opportunity for an agency hearing."[130] The key phrase is not the requirement of agency hearing but that the statute requires the decision to be made "on the record." The term "hearing" in administrative law has a myriad of meanings from full trial to mere written comment.[131] Thus, Congress does not necessarily intend to require trial-type procedures merely by providing for a "hearing" or even a "full hearing."

Strict construction of the phrase "on the record after opportunity for an agency hearing"[132] in rule-making proceedings was suggested by the Supreme Court opinion in *United States v. Florida East Coast Ry. Co.*[133] That case involved the language of section 1(14)(a) of the Interstate Commerce Act[134] which stated that "[t]he Commission may, after hearing . . . establish reasonable rules."[135] The Court held that this language was not sufficient to compel trial-type rule-making. The Court read the activating language in section 553 of the APA[136] very strictly in reliance on its prior opinion in *United States v. Allegheny-Ludlum Steel Corp.*[137] While conceding that words other than "required by statute to be determined on the record after opportunity for an agency hearing" may activate the formal procedural requirement, the Court left little room for variation in language.

127. Hereinafter referred to as the EPA.

128. The court found that because the Company was the proponent of the permit order, it could be required to bear the burden under 5 U.S.C. § 556(d) (1970). And because 5 U.S.C. § 554(d)(A) (1970) exempts "applications for initial licenses" from 5 U.S.C. § 554(d) (1970) and 5 U.S.C. § 557(b)(1970), the hearing officer may certify the record without rendering an initial decision. 556 F.2d at 834.

129. 5 U.S.C. § 554 (1970). [Hereinafter the Administrative Procedure Act will be referred to as the APA].

130. 5 U.S.C. § 553(c) (1970) (rule-making); 5 U.S.C. § 554(a) (1970) (adjudication).

131. Friendly, *supra* note 6, at 1270; ***but see*** K. DAVIS, ADMINISTRATIVE LAW TEXT 157 n.1 (3d ed. 1972) and DAVIS SUPP. 1970, *supra* note 2, at § 7.01.

132. 5 U.S.C. § 1(14)(a) (1970).

133. 410 U.S. 224 (1973).

134. 49 U.S.C. § 1(14)(a) (1970).

135. *Id.*

136. 5 U.S.C. § 553 (1970).

137. 406 U.S. 742 (1972).

However, in *Florida East Coast Ry.*, the Supreme Court drew a distinction between rule-making and adjudication. The railroads argued, relying on *Morgan* and *Louisville*,[138] that the words "hearing" or "full hearing" compelled the trial procedures as surely as the words contained in the APA. The Supreme Court found that these cases applied only to "quasi-judicial" proceedings, *i.e.* formal adjudicative determinations, and not to rule-making.[139] Adjudication, it implied, might be treated differently and the strict construction given the key phrase may not be appropriate in an adjudicative context.[140]

The Seventh Circuit's holding in *Train* that a formal proceeding was required[141] seems consistent with the approach of treating adjudication differently than rule-making that was suggested by the Supreme Court. In *Train*, the court was required to decide whether formal procedures were necessary in an adjudicative setting. The statute in question provided that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant . . ."[142] and did not contain the words "on the record." The court felt that the absence of the words "on the record" was not conclusive and, hence, it went behind the language in order to determine the full extent of the hearing provision. It was troubled by the fact that Congress had used the magic words in other sections of the statute. This fact suggests that Congress knew how to provide for formal hearing when it was so inclined.[143] However, it found this statutory construction consideration outweighed by its finding of congressional intent.[144]

The court found some support for requiring formal adjudicative procedures in the provision for judicial review. Little force can be given to the court's concern for judicial review, however, because the provision for judicial review does not necessarily require any particular kind of record-making procedures.[145] Certainly, it does not require a formal record compiled through formal adjudication. Courts can, and have, in fact, conducted review on a "written record" which was not a formal, evidentiary record.[146]

138. Morgan v. United States, 304 U.S. 1 (1938) (Morgan II); ICC v. Louisville & Nashville Ry. Co., 227 U.S. 88 (1913).

139. *Contra*, Nathanson, *Probing the Minds of the Administrator: Hearing Variations and Standards of Judical Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 731-33 (1975). (Professor Nathanson reads the legislative history of the APA, in light of these two cases, as supporting the railroad's position).

140. 410 U.S. at 244-45.

141. 556 F.2d at 836-37.

142. 33 U.S.C. § 1342(a)(1) (Supp. II 1972).

143. 556 F.2d at 833.

144. *Id.*

145. *See* Camp v. Pitts, 411 U.S. 138, 140-42 (1973).

146. *E.g.*, United States v. Midwest Video Corp., 406 U.S. 649 (1972).

The court primarily relied on a close, common sense reading of section 509 of the Federal Water Pollution Control Act.[147] That section suggests that Congress did not intend to provide for disparate forms of adjudication. Subsection (c) provides for review of "any judicial proceeding brought under subsection (b) of this section," which must be made "on the record."[148] Since both section 402 of the FWPCA,[149] the section at issue, and section 307 of the FWPCA,[150] which contains "on the record" language, are listed in subsection (b), both must be covered by the "on the record" language which activates APA section 554[151] formal procedures if disparate forms of adjudication are to be avoided.

As an additional argument, the Seventh Circuit supported its conclusion by looking to the scope of review. The court found that licensing decisions such as the one at issue require APA sections 556[152] and 557[153] procedures and hence APA section 706(2)(E)[154] imposed "substantial evidence" review. Substantial evidence review must by definition be made on a formal record: evidentiary review is impossible on an informal record because there is no evidence.[155] Thus, the imposition of "substantive evidence" review requires formal adjudication in order to build the evidentiary record which will permit the court to conduct such review.[156]

These semantic conclusions, however, probably were not the motivating force behind the decision. The court leaned in this direction basically because it was confronted with adjudication, not some other agency action such as rule-making where the traditional mode of proceeding is not trial. Trial-type procedures seemed appropriate where adjudication was involved.

The court also examined the practical impact trial-type procedures would have on the EPA's ability to protect the environment.[157] The court

147. 33 U.S.C. § 1369 (Supp. II 1972) [hereinafter referred to as FWPCA].
148. 33 U.S.C. § 1369 (Supp. II 1972).
149. 33 U.S.C. § 1342 (Supp. II 1972).
150. 33 U.S.C. § 1317(a)(2) (Supp. IV 1974).
151. 5 U.S.C. § 554 (1970).
152. 5 U.S.C. § 556 (1970).
153. 5 U.S.C. § 557 (1970).
154. 5 U.S.C. § 706(2)(E) (1970) provides in part:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5] or otherwise reviewed on the record of an agency hearing provided by statute.

155. Of course, review is possible under arbitrary, capricious or abuse of discretion standards. Where the adjudicative procedure will not result in an adequate record, the court may conduct de novo review. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).
156. For a full development of this logic *see* Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1249-63 (D.C. Cir. 1973) (the court used similar analysis to require some trial procedures even where formal rule-making was prescribed by statute).
157. 556 F.2d at 834.

concluded that although trial procedures in all permit situations would render the process practically impossible, the few instances in which a hearing is actually requested is not beyond the practical limit. Implicit in this examination, however, is the court's insistence on weighing the practical implications, at least where the congressional mandate of formal procedures is unclear, before compelling such procedure.

CONSISTENCY AS A LIMIT ON DISCRETION

Another way to confine discretion is to force agencies either to be consistent[158] or to explain why they are not. The question of consistency most often arises in the context of both adjudicatively created precedent and agency commitment to its own rules.

Consistency in informal adjudicative decisions is an important factor in the fairness of those decisions. Nonetheless, compelling an agency to be consistent in their adjudicative decisions will not always result in fairness and justice, especially where discretion is intentionally delegated. Sometimes individualizing requires that the agency deviate from precedent.[159] Moreover, practicality rules out a system whereby the decision-makers must be consistent with massive numbers of rulings.[160] In mass justice systems, keeping current with all of the millions of agency rulings is impossible. Consequently, courts cannot require complete consistency and must tolerate some, perhaps much, inconsistency, but courts can require "(a) that administrators must strive for consistency, (b) that they must consider their own precedents when doing so is feasible, and (c) that when administrators depart from their own precedents they must normally explain why they do."[161] The latter is the most important concept. While fairness often requires individualizing rather than consistency, the agency should formulate and disclose the reason for inconsistency.

In *Hilt Truck Line, Inc. v. United States*,[162] the Seventh Circuit rejected the agency decision because the Interstate Commerce Commission[163] deviated from a long series of agency precedent. The case involved an appeal from the ICC's restriction on authorized operating rights purchased from another carrier. The ICC found that dormancy, or failure to provide service, withdrew operating authority in some counties in Illinois,

158. K. DAVIS, *supra* note 1, at 106-07 (1969); *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33-34 (1921). *But see* L. Jaffe, JUDICAL CONTROL OF ADMINISTRATIVE ACTION 586-87 (1965).

159. K. DAVIS, *supra* note 1, at 21, 107; *see* Sofaer, *supra* note 4, at 1354.

160. Sofaer, *supra* note 4, at 1353-54.

161. DAVIS SEVENTIES, *supra* note 2, at 412.

162. 548 F.2d 214 (7th Cir. 1977).

163. Hereinafter referred to in the text as the ICC or the Commission.

ignoring prior decisions in which the Commission had consistently held that harm to protesting carriers is a necessary prerequisite to a finding of dormancy.[164] Since the Commission adopted the Administrative Law Judge's[165] finding of an absence of harm, the court held that "[t]he Commission cannot disregard its own precedents but must reasonably explain an alternation [sic] of policy."[166] The court confined discretion by requiring uniformity unless sound reasons for modification are articulated.[167]

Although courts will give great deference to an agency's interpretation of its own rules,[168] they will not permit an agency to fail to follow its rules,[169] at least without giving reasons for doing so. Here also, justice may demand that an agency should individualize rather than blindly follow its own rules. As in adjudication, fairness compels a balance between consistency and individualizing.

The Seventh Circuit, in *Cox v. Benson*,[170] carefully examined whether the parole rules should apply to petitioners. Petitioner sought habeas corpus in the district court to question denial of parole by the parole board's national appellate board. He claimed that the board failed to follow its own regulation and applied the regulation in violation of due process. The appellate board on its own motion had reversed the examiner's favorable decision and denied parole. The board's action was based on a guideline provision which, due to the severity of the offense, placed petitioner in the highest category of punishment. Petitioner argued that the guidelines were arbitrarily applied to him. He received a favorable case worker report on his fitness to re-enter society and he had not been given an opportunity to refute the unproven facts under which he was characterized. The court held that the board arbitrarily applied the guidelines to petitioner. The court found support for this decision in the board's failure to proceed according to its own procedural regulation.[171]

164. 548 F.2d at 215.

165. Hereinafter referred to as the ALJ.

166. 548 F.2d at 216 (citing both Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) and National Ass'n of Food Chains, Inc. v. ICC, 535 F.2d 1308 (D.C. Cir. 1976)).

167. *See* Friendly, *Judicial Control of Discretionary Administrative Action*, 23 J. LEGAL ED. 63, 65 (1970).

168. Udall v. Tallman, 380 U.S. 1, 16 (1965). ***But see*** FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973); Volkswagenwerk Aktiengesellschaft v. Ford Motor Co., 390 U.S. 261, 272, *modified on other grounds*, 392 U.S. 901 (1968).

169. United States v. Pennsylvania Ind. Chem. Corp., 411 U.S. 655, 673-75 (1973); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363, 373-76 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265-68 (1954). *See generally* Berger, *Do Regulations Really Bind Regulators?*, 62 NW. U.L. REV. 137 (1967).

170. 548 F.2d 186 (7th Cir. 1977).

171. *Id.* at 189. Judge Fairchild was more receptive to the Board's discretion to deny parole

In another denial of parole based on severity of the offense, *Garcia v. United States Board of Parole*,[172] the petitioner challenged application of the rule. Garcia pleaded guilty to charges stemming from his involvement in the bombing of several retail shops in Chicago. He was denied parole based on the Board's guidelines. The severity of the offense led the Board to find that his release would depreciate the gravity of the offense and would be incompatible with the welfare of society. At the first review, the district court ordered a new parole hearing because the Board's reasons were not specific enough.[173] In this second consideration, the district court granted habeas corpus, finding the reasons still insufficient. The Seventh Circuit reversed and remanded.[174] It recognized that minimum due process included a statement of reasons for denying parole. To be acceptable in parole cases, reasons must be sufficient for review; detailed findings of facts are not required so long as the reasons evidence consideration of all relevant factors and furnish essential facts and the grounds for the decision. The board is not required to issue an opinion supporting its decision.[175] The court found that the reasons here met this standard. It noted that, although the board applied the guidelines, it did not do so blindly. The court was convinced that the Board undertook sufficient consideration of individual circumstances. The board considered the actual gravity of the offense and did not resort to mere definitional application of the language of the guidelines.[176]

An agency's interpretation or application cannot bend the language of its regulation beyond natural meaning. In *Amoco Oil Co. v. Occupational Safety & Health Review Commission*,[177] the court considered an attempt by the Occupational Safety and Health Review Commission to include petitioner's shop storage dispensing tank under a regulation for "service stations." The court needed only to consult ordinary dictionaries in finding that the interpretation strained beyond the breaking point. It found that the Commission could have prohibited the petitioner's above ground dispensing tank, but it did not do so.[178] An agency cannot cover its mistakes by misinterpreting the language of its guidelines.

CONFINING DISCRETION THROUGH REQUIRED RULE-MAKING

The Seventh Circuit was one of the first in the federal judiciary to

"based on the egregious nature of the offense." *Id.* at 192. He concurred in requiring the Board to find the necessary facts in exercising that discretion. *Id.*

172. 557 F.2d 100 (7th Cir. 1977).
173. 409 F. Supp. 1230, 1239-40 (N.D. Ill. 1976).
174. 557 F.2d at 107.
175. *Id.* at 105.
176. *Id.* at 106.
177. 549 F.2d 1 (7th Cir. 1976).
178. *Id.* at 2.

recognize the utility of judicially required rule-making as a technique for confining administrative discretion. Recently, in *Mandley v. Trainor*,[179] the circuit gave further impetus to the concept of judicially required rule-making.[180]

The foundation case for judicially required rule-making, *Holmes v. New York City Housing Authority*,[181] held that the City Housing Authority must allocate scarce public housing in accordance with "ascertainable standards."[182] Similarly, the Seventh Circuit in *Soglin v. Kauffman*[183] found the absence of adequate administrative standards fatal to administrative action.[184] Other Seventh Circuit opinions evidence recognition of the potential for judicially required rule-making as a device for confining discretion.[185]

This concept of judicially required rule-making is gaining acceptance throughout the federal court system and in some states.[186] Its most ardent promoter has been Professor Kenneth Davis. The concept largely emanates from Professor Davis' seminal work on discretionary justice[187] and has been nurtured by him ever since.[188] Professor Davis offers a choice of four rationales which can support a judicial mandate of rule-making.[189] The first is the due process technique suggested by the *Holmes* and *Soglin* decisions.[190] The second reformulates and revitalizes the discredited nondelegation doctrine.[191] The third uses the "void for vagueness" doctrine to suggest that administrative action may be saved even if based on a vague statute if agency regulation adequately fills in the detail.[192] The fourth simply looks to the common law process to develop judicially created law compelling rule-making in certain situations.[193] Professor Davis prefers the last rationale[194]

179. 545 F.2d 1062 (7th Cir. 1976).
180. *See* text accompanying notes 218-23 *infra*.
181. 398 F.2d 262, 265 (2d Cir. 1968).
182. *Id.*
183. 418 F.2d 163 (7th Cir. 1969).
184. *Id.* at 168.
185. *See, e.g.*, Morales v. Schmidt, 494 F.2d 85, 87-88 (7th Cir. 1974).
186. The Administrative Conference has long looked to rule-making as a technique for limiting discretion. ADMINISTRATIVE CONFERENCE RECOMMENDATION 1 C.F.R. § 305.71-3 (1977); Gardner, *supra* note 8, at 159.
187. DAVIS, *supra* note 1. Closely related points were made in Judge Friendly's lectures on the *Holmes* case. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards pts. 1-3*, 75 HARV. L. REV. 863, 1055, 1263 (1962).
188. *See* DAVIS SEVENTIES, *supra* note 2, at §§ 2.00-2.04, 2.17, 4.00-4.20, 6.13, 17.07; DAVIS SUPP. 1970, *supra* note 2, at §§ 1.04-8, 1.04-13, 4.13-22; Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).
189. DAVIS SEVENTIES, *supra* note 2, at § 6.13. *See also* Clagett, *supra* note 3, at 64-65 (discussing the rationales for judicially required rule-making).
190. *See* text accompanying notes 195-97 *infra*.
191. *See* text accompanying notes 199-206 *infra*.
192. *See* text accompanying notes 207-08 *infra*.
193. *See* text accompanying notes 209-16 *infra*.
194. DAVIS SEVENTIES, *supra* note 2, at § 6.13-1.

and the Seventh Circuit opinion in *Mandley v. Trainor* is another step in the development of such law in the Seventh Circuit.

The penumbral due process doctrine is the first of the constitutional notions which will support required rule-making. Professor Davis,[195] supported by Judge J. Skelly Wright,[196] suggests that due process might require rule-making in some situations. Judge Wright argues that due process includes the right to have one's conduct judged by known standards; without standards there is no law.[197] This is the theory of the leading *Holmes* case.[198]

The second rationale for required rule-making, the non-delegation doctrine, also looks to the evils of standardless power—power without boundaries. This fear has always supported the non-delegation doctrine. Briefly, the non-delegation doctrine questions the legality of delegation of "legislative" authority to the executive branch or administrative agencies. The practical weakness of the doctrine led to retreat from absolute prohibition against the delegation of "legislative" functions.[199] The first step in the retreat was to permit such delegation with clear standards. The practical impossibility of precise legislative standards led to gradual acceptance of vague, general standards. At present, the vitality of the requirement of legislative standards is questionable. Under current theory, the permissible limits of delegation are very broad.[200] By 1970, Professor Davis was prepared to say that "[t]he non-delegation doctrine is almost a complete failure . . . . The time has come for the courts to acknowledge that the . . . doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power."[201]

195. DAVIS SUPP. 1970, *supra* note 2, at § 2.00-6; DAVIS SEVENTIES, *supra* note 2, at § 6.13.

196. Wright, *Book Review*, 81 YALE L.J. 575, 588 (1972).

197. *Id.* at 588-89.

198. 398 F.2d at 265. In that case, the Fifth Circuit was driven toward a due process requirement of administrative standards because it feared that power without standards to govern its exercise is "an intolerable invitation to abuse." *Id.* The court recognized that there was not enough public housing to satisfy all eligible applicants and, hence, that agency compliance with its statutory mandate was physically impossible. The court had to fashion a remedy which complied with due process and yet solved the difficult problem of choosing who would be favored among eligible applicants. The only remedy which made sense involved forcing the agency to allocate the scarce housing by some unbiased process. To solve this practical problem, the court required the agency to articulate the standards by which it would dispense housing.

199. Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

200. Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 70 (1974).

201. DAVIS SUPP. 1970, *supra* note 2, at § 2.00. *Contra*, Wright, *supra* note 196, at 582 ("the reported demise of the delegation doctrine is a bit premature."). The Seventh Circuit in *Penn-Dixie Steel Corp. v. Occupational Safety & Health Review Comm'n*, 553 F.2d 1078 (7th Cir. 1977) found that Congress could delgate adjudicative authority in cases regarding OSHA

One of the "better ways" is required rule-making. To require rule-making, the non-delegation doctrine need only be "reformulated."[202] Though standards will be required, the standards can be provided by the agency. Rather than striking down legislation which has insufficient standards, the doctrine will be used to compel agencies to fill in the details with more definite standards.[203] Indeed, administrative standards may often be preferable to legislative standards.[204]

This rationale has two fundamental weaknesses, one practical and the other theoretical.[205] The practical weakness stems from the potential danger that rigid application of this abstract principle will eliminate necessary flexibility. The theoretical weakness runs from the general principle that if Congress, under the doctrine of separation of powers, cannot delegate legislative functions, then nothing the agency does can save the unconstitutional delegation.[206] Neither of these weaknesses is compelling. As long as the need for discretion is recognized, the required standards will leave room for individualizing and, since the doctrine is a judicial creation, its theoretical parameters can be changed by the courts.

The third rationale looks to the general prohibition against vagueness. Required rule-making offers an alternative to striking down a statute as too vague; required rule-making may be used to force the responsible agency to give definition to overtly vague statutory provisions. Professor Davis contends that the Supreme Court suggests this idea in *Papachristou v. Jacksonville*.[207] If the vagueness is impermissible because it permits and encourages arbitrary and discriminatory enforcement of the law, then the remedy need not be so drastic as to void the statute.[208]

Of the four rationales, common law development offers the simplest and most straight-forward support for required rule-making. The above three rationales emanate from constitutional interpretations. While the Constitution structures our law, it is not the primary source of movement in

violation even though penalties were involved. The question of standards was not mentioned. Relying on *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 97 S. Ct. 1261 (1977) the court found that the seventh amendment did not require trial by jury in such penalty adjudication. 553 F.2d at 1080-81.

202. DAVIS SEVENTIES, *supra* note 2, at 224-25.

203. Thomforde, *Controlling Administrative Sanctions*, 74 MICH. L. REV. 709, 736-37 (1976).

204. DAVIS SUPP. 1970, *supra* note 2, at §§ 4.14-4.17.

205. Thomforde, *supra* note 203, at 736-38.

206. Professor Sofaer suggests the opposite as a theoretical objection to required rule-making. If the legislature delegates discretion, the agency cannot avoid the delegation by establishing rules. Sofaer, *supra* note 3, at 1319-31.

207. 405 U.S. 156 (1972).

208. DAVIS SEVENTIES, *supra* note 2, at 24-25. Other than to support required rule-making, "void for vagueness" offers little promise in inhibiting virtually unlimited grants of discretion in noncriminal matters. Clagett, *supra* note 4, at 55 n.7.

the law. Our system depends on judicial development. Too often, in recent times, we ignore common law development as support for new legal concepts. Everything need not start with a constitutional base.[209] Greater flexibility and greater opportunity for experimentation result from the evolutionary, common law process.

The most influential case leading to such common law development is *Environmental Defense Fund, Inc. v. Ruckelshaus*.[210] The Court held: "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible."[211] The Environmental Defense Fund, an organization engaged in activities related to environmental protection, asked for suspension of registration for any pesticides using DDT. The opinion suggested that, although discretionary power was vested in the agency, its exercise was reviewable for abuse of discretion under section 706(2)(A) of the APA.[212] One of the ways abuse of discretion review can confine and control delegated discretion is by compelling administrative officers to articulate standards.

While serving on the Seventh Circuit appellate panel, Justice Stevens made a valuable contribution to the common law evolution of required rulemaking.[213] The views of then Judge Stevens were expressed in a dissent from a remand in *Morales v. Schmidt*.[214] The majority found the key question to be whether the prison's limitation on prisoners' rights to correspond was related to a legitimate rehabilitation purpose. Judge Stevens noted that the prohibition was not supported by a regulation, and would place a heavier burden of justification in the case of ad hoc determinations "[i]n view of the risks of error inherent in an ad hoc determination, unsupported either by preformulated guidelines or by a more complete exposition of the reasons why less drastic alternatives could not be equally effective . . . ."[215] Thus, especially where individual rights are in danger, an agency should by rules define the exercise of its discretion. Where it can do so but does not, it increases its burden of persuasion in explaining its ad hoc discretionary action.[216] Judicial review can thereby add incentive for

209. *See* Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting); D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 470-72 (1942) (Jackson, J., concurring); *accord*, Friendly, *supra* note 6, at 1301-02.

210. 439 F.2d 584 (D.C. Cir. 1971).

211. *Id.* at 598.

212. 5 U.S.C. § 706(2)(A) (1970).

213. DAVIS SEVENTIES, *supra* note 2, at 226-27.

214. 489 F.2d 1335 (7th Cir. 1973).

215. *Id.* at 1349.

216. As Professor Davis points out, the requirement of findings and reasons is interlocked

agencies to make rules which confine their discretion.

The more often those challenging agency action ask the court to require rules and the more often the courts reject the exercise of discretion without standards, the more the law will evolve. Already numerous courts have utilized this remedy.[217] One such case is the Seventh Circuit's decision in *Mandley v. Trainor*.[218] That case involved a second review of the Illinois implementation of the Emergency Assistance Program.[219] Part of the proposed final judgment ordered HEW to file a regulation with the district court. HEW contended that the district court could not order the adoption of a particular rule. The Seventh Circuit found that the promulgation of rules implementing the Social Security Act is mandatory.[220] Consequently, the court found that the ordered rule-making was consistent with legislative intent.

Perhaps, the court put too much emphasis on statutory construction. Statutory language should not be read to compel agencies to proceed first by rule-making before it can take other appropriate action.[221] Agencies must have the discretion to choose how to attack a regulatory problem. While the discretion should not be unbridled, the propriety of the discretionary choice must be judged according to the needs of specific situations and not statutory construction. Only the cleanest legislative intention to narrow the method of proceeding should compel a court to narrow such discretion solely upon the statutory language. Nonetheless, a court should require rule-making where circumstances surrounding a specific regulatory problem demand such action. Under the circumstances of *Mandley*, the agency should have used rule-making and the district court quite properly required it to do so. *Mandley* continues the line of cases establishing required rule-making as an appropriate remedy in the Seventh Circuit.[222]

The Seventh Circuit agreed with the HEW that a district court could not

with the requirement of rules. The requirement of reasons is itself a valuable tool for confining and controlling discretion. *See* text accompanying notes 187-94 *supra*.

217. DAVIS SEVENTIES, *supra* note 2, at 227-29. Even the alleged absolute discretion of prosecutors and police may be confined by administrative rule-making. *E.g.*, McGowan, *Rule-making and the Police*, 70 MICH. L. REV. 659 (1972); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971); K. DAVIS, *supra* note 1, at 162-214.

218. 545 F.2d 1062 (7th Cir. 1976).

219. Mandley v. Trainor, 523 F.2d 415 (7th Cir. 1975).

220. 545 F.2d at 1072 (citing Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2nd Cir. 1973)).

221. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974); SEC v. Chenery Corp., 332 U.S. 194, 201-02 (1974).

222. The case of *Mystik Tape v. Pollution Control Bd.*, 16 Ill. App. 3d 778, 306 N.E.2d 574 (1973), *modified on other grounds*, 60 Ill. 2d 330, 328 N.E.2d 5 (1975), is state authority within the Seventh Circuit for required rule-making. *See also* Doyle v. Board of Review, 31 Ill. App. 3d 968, 334 N.E.2d 776 (1975).

mandate specific provisions of rules. While strongly urging the inclusion of certain items, the court modified the proposed final judgment so that it would "not order HEW specifically to include any items in its new regulation."[223] Although it is unlikely that HEW would decline such an invitation, proper allocation of functions demands that courts not infringe too far into the substance of administrative decisions. The doctrine of required rule-making must not displace the agencies from their delegated functions.

A court must be extremely careful in its determination to interfere with decision-making allocated to the agency by the legislature. The development of the required rule-making remedy demands a careful weighing of costs and benefits. Courts and commentators often overlook the double values inherent in the required rule-making effort. Required rule-making aims to compel agencies to formulate and disclose policy. It may also focus on the question whether an agency should use notice and comment procedures to develop policy or may make general policy through other processes which do not permit general public participation. For example, the NLRB's much criticized "Excelsior rule"[224] was promulgated in a formal adjudicative setting. A plurality of the Supreme Court disapproved of such rule-making because it did not utilize the general public procedures of the APA.[225] However, the "Excelsior rule" was a laudable effort in the direction of clarifying and disclosing policy; the procedures the NLRB should have used is another, distinct question. Indeed, furtherance of the second value, public participation in agency policymaking, may work against the first value, encouraging public disclosure of policy, by increasing the burden on the agency when it chooses to disclose policy.[226] Of course, both values are important and courts should require or encourage agencies both to disclose policy and to utilize public procedures. Nonetheless, many times policy can be announced without resort to APA procedure. Procedures less burdensome than notice and comment may be used to announce policy in the form of non-legislative rules.[227] Adjudication may be, and traditionally has been, an appropriate means for developing policy.[228] Consequently, a court which is inclined to require rule-making must consider two separate ques-

223. 545 F.2d at 1073.

224. Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

225. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763-65 (1969). The Court was correct in approving the NLRB's decision because the agency had reached an entirely new determination in the *Wyman-Gordon* case without relying on the rule. The decision took the form of a de novo consideration and resulted in an order having its own force, totally independent of the rule. Hence, any deficiency in the rulemaking was irrelevant to the case presented to the Supreme Court.

226. Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1073-74 (1976).

227. *Id.* at 1075.

228. Clagett, *supra* note 4, at 83, 86. *See generally* Sofaer, *supra* note 4, at 1314-19.

tions: first, should the agency be required to create public policy before it can act; and second, should the agency be compelled to do so through public procedures, either notice and comment procedures for legislative rules or some variety of public procedures for non-legislative rules.

CONCLUSION

The administrative process is as old as the United States: the first session of the First Congress enacted three statutes conferring significant administrative powers and eleven important administrative agencies were in existence prior to the close of the Civil War. The development of administrative agencies results from responses to practical problems and, hence, the growth of administrative process concepts has proceeded along pragmatic lines. Great damage would be done to the utility of the administrative process if judicial doctrines were to ignore this pragmatic, problem-solving orientation.

In the Seventies, we have embarked on many ventures to improve the process of government. Many of those, though well meaning, have been disastrous to the ability of the government to serve its citizens. Those who have looked most frequently to the government to solve social problems have also lead the fight to disable the government from doing so. Administrative law must find ways to reconcile these two movements.

The answers may lie in the careful thinking that has been done in confining and controlling administrative discretion. The best of this thinking has recognized the practical problems and has set forth principles which can reform administrative decision—protecting the citizen from harmful government action—without preventing the government from functioning for the benefit of its citizens. The government does not exist of its own force; it exists only through the force of the needs of its citizens. Government functions which do not serve the citizens should be eliminated, not reformed. Where the government process serves the citizens, reform must avoid transforming a necessary function into a useless one.

This article has discussed some of the efforts to reconcile these competing values in the Seventh Circuit and other jurisdictions. Seventh Circuit efforts have often been sophisticated and the circuit remains a leader in the search for discretionary justice.