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INFORMAL AGENCY RULEMAKING AND THE COURTS: A THEORY FOR PROCEDURAL REVIEW

COOLEY R. HOWARTH, JR.*

PROLOGUE

In the celebrated *Vermont Yankee*¹ case, the Supreme Court attempted to restrict what it saw as intrusive judicial supervision of the procedural discretion afforded federal administrative agencies engaged in informal, "notice and comment" rulemaking.² The Court declared that the procedural format for such rulemaking is a matter governed solely by statutory mandate and administrative discretion, not judicial

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1. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

2. The federal Administrative Procedure Act (APA) sets out two procedural formats for agency rulemaking: informal, "notice and comment" rulemaking and formal rulemaking. 5 U.S.C. §§ 553, 556, 557 (1982). Unless Congress specifies otherwise, most administrative rulemakers need follow only the informal notice and comment rulemaking procedures. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973). Under these procedures, an agency engaged in substantive rulemaking must publish a public notice of proposed rulemaking outlining its proposal, allow for public comment, usually in writing, on the proposal, and provide a concise general statement of the basis and purpose for the promulgated final rule. 5 U.S.C. § 553(b)-(c) (1982). In certain instances Congress may decide that a more formal procedure should be used by the agency. When the agency's enabling statute specifies that rules are "to be made on the record after opportunity for an agency hearing," agency rulemakers are required to utilize a trial-type hearing procedure outlined in §§ 556-57 of the APA. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 234-37 (1973). This article is concerned only with the adequacy of the informal, notice and comment rulemaking format.

preference. The extent of a court's procedural review of informal agency rulemaking is to be marked by the procedural dictates of the agency's organic statute and the federal Administrative Procedure Act (APA). "Absent constitutional constraints or extremely compelling circumstances,"³ these congressional requirements are the maximum procedures which courts may impose upon rulemakers.⁴ The employment of supplemental or different procedures is a matter left to the discretion of the agency—a discretion which reviewing courts are not to subject to "Monday morning quarterbacking" or "Kafkaesque" remands for perceived procedural shortcomings.⁵

Had the Court's opinion in *Vermont Yankee* been directed at an isolated incident of overzealous judicial intervention in agency rulemaking, the case probably would have evoked little comment. The breadth of the opinion, however, left little doubt that the court intended to halt the active judicial review of informal rulemaking procedures which had, over the years, become a basic tenet of the "collaborative partnership" between rulemakers and reviewing courts.⁶ After *Vermont Yankee*, judicial review of agency rulemaking was to be directed away from procedural concerns towards increased reliance on substantive analysis of the agency's rule. In the six years since *Vermont Yankee*, however, many commentators have expressed serious doubts about the wisdom of the Court's approach.⁷ Moreover, an examination of lower court opinions reveals that many reviewing courts have simply ignored the spirit, if not the letter, of *Vermont Yankee*.⁸

The lack of enthusiasm evident in these academic and judicial reac-

3. 435 U.S. at 543.

4. *Id.* at 524.

5. *Id.* at 547, 557-58.

6. *See, e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 848-49 (D.C. Cir. 1972). *See generally* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

7. *See, e.g.*, Davis, *Administration Common Law and the Vermont Yankee Opinion*, 3 UTAH L. REV. 3 (1980); McGowan, *Reflections on Rulemaking Review*, 53 TUL. L. REV. 681 (1979); Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183 (1979); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1804 (1978).

8. *See, e.g.*, *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980); *East Tex. Motor Freight Lines, Inc. v. United States*, 593 F.2d 691 (5th Cir. 1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

tions to *Vermont Yankee* is not hard to understand. Administrative rulemaking, once referred to as “one of the greatest inventions of modern government,”⁹ has long been in need of an overhaul. The bare-boned procedural format of notice and comment rulemaking no longer provides a mechanism which insures that difficult regulatory problems will be resolved by decisionmakers armed with either sufficient data or the adequate means to evaluate that data. While Congress has long been aware of this problem, so far it has failed to provide an updated informal rulemaking procedure tailored to meet the demands of most modern regulatory problems.¹⁰

Prior to *Vermont Yankee*, a number of agencies were prompted to reform their informal rulemaking procedures when reviewing courts began to subject their procedural decisions to more careful scrutiny.¹¹ In some instances these courts remanded agency rules when the agency had failed to employ rulemaking procedures beyond those expressly outlined in the agency’s organic statute or the APA.¹² This judicial attention to the procedural aspects of the informal rulemaking process was directly credited with improving the quality of substantive agency decisionmaking.¹³ *Vermont Yankee* threatens to stifle these reforms. The Supreme Court’s literal approach to the informal rulemaking provisions of the APA and the Court’s narrow view of the scope of procedural judicial review affords administrative rulemakers far too much discretion, allowing agencies to resolve increasingly complex economic and social issues under procedures which give little assurance of reasoned decisionmaking.

Perhaps the most serious consequence of the *Vermont Yankee* decision is its potential for undermining confidence in the legitimacy of

9. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970).

10. See, for example, the history of the United States Senate’s unsuccessful attempts to reform the rulemaking process in S. REP. NO. 284, 97th Cong., 1st Sess. 1-2 (1981).

11. See, e.g., United States Food and Drug Administration, Administrative Practice and Procedures, 40 Fed. Reg. 22,950-23,046 (1975) (amending scattered sections of 21 C.F.R.); 37 Fed. Reg. 8664 (1972) (rules on cross-examination in OSHA rulemaking proceedings) (currently codified as amended at 29 C.F.R. § 1911.15(a)(3) (1983)). See also the discussions of the EPA’s development of “hybrid” rulemaking procedures in Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59-60 (1975); Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clear Air Act*, 62 IOWA L. REV. 713, 731 n.89 (1977).

12. See, e.g., *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

13. Pedersen, *supra* note 11, at 59-60; Stewart, *supra* note 11, at 731.

agency rulemaking. It has always been clear that, regardless of the amount of discretion Congress believed an agency must have in order to deal with the complexities of the social and economic responsibilities entrusted to it, Congress also envisioned a process of regulatory rulemaking that would be both fair and accountable. While the case law prior to *Vermont Yankee* generated procedural safeguards which tended to reinforce the fairness and accountability of the APA's informal rulemaking process, thereby providing a basis for public assurance that the agency had acted legitimately,¹⁴ *Vermont Yankee's* apparent rejection of that case law removes much of the basis for that public confidence. Given the current scope of regulatory authority and the national significance of the social and economic problems to be resolved by agencies, literal compliance with the notice and comment procedures of the APA no longer provides a politically acceptable method for the development of regulatory policy. Congressional inaction coupled with *Vermont Yankee's* proscriptions threatens to impede the evolution of decisionmaking processes which not only respond functionally to these regulatory challenges, but which also preserve the political values which support and legitimize the use of administrative agencies.

The problem with administrative rulemaking has always been one which could be simply stated: Federal rulemakers who have been granted broad discretion to set national regulatory policy must be held accountable for accomplishing that task in a way that is not only efficient and effective, but is also fair to all concerned. During the past ten years we have seen the emergence of a number of "reforms" which have sought to resolve this multifaceted problem by imposing greater control on the rulemaking arena. Deregulation, legislative vetoes, and the imposition of cost-benefit analysis on all major rulemaking are examples of congressional and executive responses to the problem.¹⁵ The issue now becomes one of defining the proper role of the judiciary in supervising agency rulemaking. Should courts, as *Vermont Yankee* seems to demand, be limited to reviewing the substantive rationality of

14. See, e.g., *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966).

15. For a discussion of these recent congressional and presidential efforts, see Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1195-220 (1981).

agency decisions? Or should courts be allowed to supplement this substantive review with careful oversight of the procedural decisions of agency rulemakers? While many judges and commentators have answered the latter question in the affirmative, these authorities have failed to articulate any comprehensive rationale which would either support the legitimacy of judicial review of informal agency rulemaking procedures or even meet the practical concerns which prompted the Supreme Court's limitations on such review.¹⁶

This Article will demonstrate that judicial review of agency rulemaking procedures, if properly structured, is an acceptable and important tool for the control of regulatory policy-making. The procedural discretion of administrative rulemakers should not be as broad as *Vermont Yankee* suggests. Courts have the power to review the procedural decisions of rulemakers and to require the use of rulemaking procedures which meet the minimum requirements established not only by the letter of the APA, but by its spirit as well. There are certain procedural values inherent in the concept of notice and comment rulemaking. An interpretation of the APA's informal rulemaking procedures in light of these values reveals that courts can and should review the procedural choices of rulemakers and require more than mere literal compliance with the APA. Moreover, while agencies may enjoy considerable procedural discretion beyond the statutory minima, that discretion should be subjected to a judicial review designed to insure that, in any given context, rulemaking proceedings will respond to the procedural values inherent in the concept of informal administrative rulemaking.

The first part of this Article will identify the procedural values which should serve as normative guides to the adequacy and legitimacy of informal rulemaking. The second part will examine the Supreme Court's opinion in *Vermont Yankee*, criticizing its approach to procedural review of informal rulemaking as a threat to the integrity of that rulemaking process. In the third section of the Article, the judicial and scholarly reactions to *Vermont Yankee* will be examined and critiqued. It is clear that neither the courts nor the commentators have yet succeeded in developing an approach to procedural review of informal rulemaking which adequately responds to the problems created by *Vermont Yankee*. The Article will conclude with a suggested theory for procedural review of informal rulemaking. This theory will present an

16. See, e.g., Davis, *supra* note 7; McGowan, *supra* note 7; Stewart, *supra* note 7.

instrumental interpretation of section 553 of the APA which establishes the minimum procedural requirements needed to preserve the procedural values that insure the integrity of informal rulemaking. The theory will also outline a method and supporting rationale for judicial review of the discretionary procedural decisions of agency rulemakers—decisions by agencies to employ (or not employ) additional rulemaking procedures beyond those minimally required by the APA.

I. PROCEDURAL VALUES IN INFORMAL RULEMAKING

While the search for procedural values has received a good deal of attention at the hands of constitutional scholars,¹⁷ a number of eminent authorities on administrative law have attempted to specify those values which should animate administrative procedure as well. Dean Roger Cramton has suggested that accuracy, efficiency, and acceptability should be considered hallmarks of fair administrative procedure.¹⁸ Dean Paul Verkuil has told us that administrative procedure should provide fair and efficient decisionmaking processes which satisfy the participants in those processes.¹⁹ Gilbert Hahn would test the adequacy of administrative procedures by examining the extent to which those procedures are suitable, adaptable to the tasks at hand, and productive of results to which the public can consent.²⁰ James Freedman has rested the very legitimacy of the administrative process on its fairness, effectiveness, and accountability.²¹

These commentators have been concerned, however, with the administrative process as a whole, examining both adjudicative as well as legislative agency decisionmaking. Thus the principles they have identified reflect constitutional as well as statutory values. In rulemaking, of course, reliance on constitutional principles of procedural ade-

17. See, e.g., Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: NOMOS XVIII* 126 (J. Pennock & J. Chapman eds. 1977); 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); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

18. See Cramton, *A Comment on Trial-Type Hearings in Nuclear Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972).

19. See Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-93 (1978).

20. See Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation* (pts. 1 & 2), 30 AD. L. REV. 467 (1978), 31 AD. L. REV. 31 (1979).

21. See J. FREEDMAN, *CRISIS AND LEGITIMACY* 11 (1978).

quacy is misplaced.²² The search for normative guides to the adequacy of rulemaking procedures must instead focus upon congressional intent and judicial interpretation of that intent. Such an inquiry leads to the conclusion that the APA's rulemaking provisions were intended to provide a decisionmaking process that would be efficient, effective, fair, and accountable.

A. Efficiency

It seems almost unnecessary to stress the importance of preserving procedural efficiency in the development of regulatory policy. Faced with an enormous regulatory agenda and finite resources, government must attempt to conserve time, money, and effort wherever possible if it is to have any hope of accomplishing its tasks. Prescriptive rulemaking by administrative agencies was initially conceived as a method of formulating policy which would avoid the delay, expense, and uncertainty attendant to judicial or legislative implementation of regulatory goals; procedural efficiency remains an important factor in the design of rulemaking procedures. Agency efforts to attain simplicity and flexibility in the design of rulemaking procedures are consistently endorsed. Where an agency is truly engaged in setting regulatory standards with general impact and future effect, courts routinely turn back attempts to impose redundant, unnecessary, or overly formal procedures.²³ In the name of procedural efficiency, courts reject arguments which would force agencies, as a matter of due process, to establish policy on a case-by-case basis.²⁴ Practical concerns demand that agency rulemaking be freed of the procedural constraints of due process.²⁵ Even where Congress arguably requires that policy be developed by means of more cumbersome procedures, courts often allow, and even encourage, agencies to avoid these procedures and employ simpler, more efficient methods.²⁶

It seems unlikely that this concern for procedural economy in rulemaking will diminish in the future. As the scope and complexity of

22. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915). See also *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973).

23. See, e.g., *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966).

24. See *FPC v. Texaco*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966).

25. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915).

26. See, e.g., *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

the economic and social problems facing administrative agencies continues to increase, so does the importance of efficient rulemaking. As a result, rulemaking procedures should be designed to take into account the costs, to both government and the regulated community, of using those procedures.

B. Effectiveness

The procedures for rulemaking should also be designed with an eye toward their effectiveness. Rulemaking procedures should be structured to promote rational implementation of the legislative power delegated to the agency.²⁷ Indeed, as the legislative history of the APA indicates, one of the primary purposes of establishing notice and comment rulemaking was to provide a procedure which would serve both to inform and to educate agency rulemakers.²⁸ While no particular rulemaking procedure can ever guarantee that an agency will reach a rational result,²⁹ the procedural format of the rulemaking process can certainly enhance the ability of the agency to reach such a result.

To the extent that regulatory policy is no longer solely a product of in-house agency expertise, an effective rulemaking process will be one that is continually open to information or opinions that may assist in the development of new policy. Participation in the rulemaking process by those who may be directly affected by the agency's proposed rule will provide the agency with valuable information about the prob-

27. *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973) ("[T]he validity of a regulation . . . will be sustained so long as it is reasonably related to the purposes of the enabling legislation.") (quoting *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81 (1969)). See *American Trucking Ass'n v. United States*, 344 U.S. 298, 308-13 (1953).

28. See HOUSE COMM. ON THE JUDICIARY, REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, H.R. REP. NO. 1980, 79th Cong., 2d Sess. 259 (1946); SENATE COMM. ON THE JUDICIARY, REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 752, 79th Cong., 1st Sess. 201 (1945); STAFF OF THE SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT 20 (Comm. Print 1945); ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 102, 103, 108 (1941) [hereinafter cited as FINAL REPORT]; U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) [hereinafter cited as ATT'Y GEN. MAN.]. The Senate Judiciary Committee Print and both the Senate and House Reports cited above were reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1946, S. DOC. NO. 248, 79th Cong., 2d Sess. (1946) [hereinafter cited as LEG. HIST.].

29. See Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 394 (1974). But see *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

able implications of its tentative policy choice and may serve to identify policy alternatives.³⁰ When the rulemaking process proceeds to the evaluation of accumulated data, its effectiveness will be dependent upon the extent to which the procedures used serve both to discipline and to improve the agency's evaluative skills. Thus, an agency which is required to respond to the material data it has received from the public and to provide some public demonstration of its deliberative process will have a strong incentive to examine its data carefully, to identify and discard irrelevant, redundant, or erroneous information, and to develop a logical and coherent rationale for its ultimate decision. The effectiveness of this evaluative stage also will be affected by the extent to which it is structured to allow for outside participation in the appraisal of data. Since agencies possess no monopoly on evaluative expertise, a rulemaking procedure which allows for the critical examination of data by those who may be affected by the proposed rule cannot fail to result in a more informed decision.

C. *Fairness*

The notion that rulemaking procedures should be fair has found wide acceptance in the case law and scholarly commentary.³¹ But some unresolved questions concerning the source and content of this particular aspect of rulemaking procedure still remain. When an agency purports to use a legislative format to accomplish an adjudicative purpose, its procedure will be tested for a fairness of constitutional origin and dimension.³² When the agency is truly engaged in legislative activity,

30. See LEG. HIST., *supra* note 28, at 20; FINAL REPORT, *supra* note 28, at 101-03. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). The importance of securing a broad base of relevant data in rulemaking has prompted agencies and reviewing courts to concern themselves with the adequacy of rulemaking notices and the need for additional public input when new issues arise or the agency's initial proposals are significantly altered. See, for example, the cases discussed in Rochvarg, *Adequacy of Notice of Rulemaking under the Federal Administrative Procedure Act—When Should a Second Round of Notice and Comment be Provided?*, 31 AM. U.L. REV. 1 (1981) and Note, *Toward a More Complete Notice of Proposed Rulemaking: A Judicial Overview and Suggestions for Change*, 84 W. VA. L. REV. 227 (1981).

31. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *O'Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 630 (D.C. Cir. 1966). See also J. FREEDMAN, *supra* note 21, at 11; Verkuil, *supra* note 19, at 279-80; Wright, *supra* note 29, at 379-81.

32. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435

however, the due process clause has little, if any, role to play in shaping the fairness required of rulemakers.³³ Instead, procedural fairness in rulemaking seems governed by repeated, though extremely vague, admonitions found in the legislative history and judicial interpretations of the APA.³⁴ While these brief references may serve as legitimate sources for a requirement of procedural fairness in rulemaking, they offer little guidance as to its scope or implications.

Judge Skelly Wright, the only commentator to attempt a definitive analysis of this issue, has suggested that, in the context of notice and comment rulemaking, procedural fairness does not require that the affected public be afforded a right to participate in the rulemaking process or that the procedures chosen promote either accuracy or accountability in agency decisionmaking.³⁵ Rather, for Judge Wright, fairness simply requires that a rulemaker not hide his decision or his reasoning, or fail “to give good faith attention to all the information and contending views relevant to the issues before him.”³⁶ In other words, in rulemaking, fairness requires only that the process of decision-making be “openly informed, reasoned, and candid.”³⁷ Moreover, Judge Wright feels that with a bit of creative statutory construction on the part of the courts, the APA’s notice and comment rulemaking procedures are more than sufficient to enforce this conception of procedural fairness in rulemaking.³⁸

There is much to commend in Judge Wright’s perceptive analysis. Certainly fairness requires that a rulemaker consider and evaluate the data she has gathered or received with openness and honesty. The integrity of the rulemaking process depends in no small part on the public’s confidence that the agency’s closed-door deliberations are conscientious, even-handed, and rational. A rulemaker who completely ignores public comments filed with the agency, closes her mind to the input of certain participants, or gives greater weight to submitted

U.S. 519 (1978); *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973); *American Airlines, Inc. v. CAB*, 369 F.2d 624 (D.C. Cir. 1966).

33. See cases cited *supra* note 22.

34. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969); *Association of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *LEG. HIST.*, *supra* note 28, at 187, 200, 258; *FINAL REPORT*, *supra* note 28, at 104; *ATT’Y GEN. MAN.*, *supra* note 28, at 124; see also cases cited *supra* note 31.

35. Wright, *supra* note 29, at 379.

36. *Id.*

37. *Id.*

38. *Id.* at 380-81, 395.

data on the basis of its source rather than its substantive content, is not acting fairly or in the public's interest. The same is true of a rulemaker who grants some of the parties to a proceeding access to or influence upon the deliberative stages of the rulemaking process which is denied to or kept secret from other parties to the proceeding. In addition, fairness is compromised when the agency's public explanation of its deliberative process fails to represent accurately the agency's thinking.

Unfortunately, Judge Wright's analysis of procedural fairness in rulemaking does not go far enough. If the rulemaking process is to be a fair process, that fairness must permeate the *entire* process, not just the agency's private deliberations. The rulemaking process also includes a stage of public notice and participation which precedes these deliberations. These initial phases of the rulemaking process must also be designed and executed in a way that is fair to those affected by the proposed rule.

Judge Wright is correct when he observes that the right to participate in rulemaking does not emanate from some notion of procedural fairness. Rather, the right to participate in rulemaking finds its origins in the APA, where Congress codified its perception that public participation is "essential . . . to afford adequate safeguards to private interests."³⁹ It is only after recognition of this statutory right to participate that notions of procedural fairness in rulemaking take on significance. The public's right to participate, once granted, must then be structured and protected in order to achieve a procedural fairness which assures the public a genuine opportunity to know what the agency proposes to do and to inform the agency's final decision.

This approach to the issue of fairness in rulemaking should characterize not only administrative and judicial interpretation of the APA's required rulemaking procedures, but also the implementation of any procedural discretion which Congress affords informal rulemakers. Under this approach, the concern for fairness should have procedural ramifications at all stages of informal rulemaking. Thus, whenever an agency engages in rulemaking it must provide public notice which will "fairly apprise interested parties of the issues involved."⁴⁰ To that end, public notice in informal rulemaking should be sufficiently detailed to "adequately frame the subjects for discussion" and provide a complete

39. LEG. HIST., *supra* note 28, at 20 (citing FINAL REPORT, *supra* note 28, at 101-03).

40. *Id.* at 200.

and "accurate picture of the reasoning that has led the agency to the proposed rule."⁴¹ Moreover, there is no reason to conclude that Congress intended to limit the public's statutory right to notice to the pre-comment stage of informal rulemaking. Rather, the right should extend throughout the rulemaking process, imposing an obligation on the agency to provide the public with continuous notice of and access to all information pertinent to the rulemaking proceeding. Absent such detailed and continuous notice of what the agency is proposing to do, the public's right to inform the rulemaking process is unacceptably jeopardized and the fairness of the entire proceeding is compromised.

In the public comment stage of rulemaking, fairness requires that an agency structure its procedures in a way which responds to the needs and capabilities of those affected by the rulemaking proceeding. When agency rulemakers attempt to resolve different types of regulatory problems which affect the public in different degrees or different ways, the agency's procedures should be designed to accommodate diverse modes of public participation. For example, the significance or public importance of a particular rulemaking proceeding may, as a matter of fairness, require a procedure which meets the needs of a broadly based, less organized, or less sophisticated public participation.⁴² When the agency's rule will have a markedly different impact on various segments of the public, the proceeding will inevitably take on an adversarial element. In such situations, fairness requires that the agency disclose all public comments on its proposed rule and provide an opportunity for response or rebuttal in order to insure that the agency's evaluation of the competing viewpoints and interests is fully informed.

Fairness also requires that the design of rulemaking procedures be sensitive to the nature of the issues involved in any particular proceeding. This requirement merely reflects the fact that certain procedures are better suited to the resolution of certain types of issues.⁴³ For example, use of trial-type procedures in rulemaking has been rejected on grounds that it is an ineffective and inefficient method for resolving broad policy-type questions.⁴⁴ This same conclusion might also be

41. *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530, 533 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982).

42. See LEG. HIST., *supra* note 28, at 200-01, 259.

43. See Verkuil, *supra* note 19, at 303-10; Williams, "Hybrid Rulemaking" under the *Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 403-11 (1975).

44. See, e.g., Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, 1 C.F.R. § 305.72-5(3) (1983); Boyer,

reached on grounds of procedural fairness. The proponent of a rule, asked to prove the efficacy of a particularly political proposal by means of an evidentiary trial, could probably be excused if she felt unfairly handicapped by the required procedure. On the other hand, when the agency's ultimate policy choice will rest largely upon empirical questions about which there is some dispute, fairness requires that such questions be resolved in a trial-like setting in order to ensure an accurate result. While the concern for accuracy has been thought largely misplaced when the issue facing a rulemaker is essentially a choice between competing value judgments,⁴⁵ it is possible to achieve at least some degree of accuracy in decisionmaking when the issues are factual in nature.⁴⁶ Given the significant impact which agency rulemaking can have upon the regulated community and other interested persons, accuracy will indeed become relevant to the fairness of rulemaking proceedings involving factual issues and may counsel the use of procedures conducive to accurate fact-finding.

If the congressional call for fairness in rulemaking is to be fully heeded, an agency's rulemaking procedures must offer more than an impression or symbolic reassurance of fair decisionmaking. Procedural fairness can and should have concrete implications throughout the entire rulemaking process. To that end, the requirement of fairness must be read to impose an enforceable duty upon agencies to interpret and employ the APA's rulemaking procedures in a way that is not only rational, but open, even-handed, candid, and responsive to context.

D. Accountability

The final value which should affect the procedural structure of a rulemaking proceeding is a concern for the accountability of the administrative agency. Agency accountability, a basic and pervasive principle of administrative law, has always provided a major source of the political legitimacy of regulatory authority.⁴⁷ Granted sometimes vast lawmaking and enforcement powers, the unelected "fourth branch

Alternatives to Administrative Trial-Type Hearings for Revolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111 (1972); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

45. See Williams, *supra* note 43, at 407-08.

46. See *id.* at 404-07.

47. See J. FREEDMAN, *supra* note 21, at 58-77.

of government” has always been subject to the supervision of one or more of the other branches. While in recent years both Congress and the President have developed new mechanisms to strengthen their own oversight powers,⁴⁸ the major responsibility for supervising the conduct of administrative agencies has fallen to the judiciary. The courts have been charged with seeing that the actions of agencies remain consistent with the Constitution and the instructions of their democratically elected principals.⁴⁹

With the enormous expansion of administrative authority during the last twenty years, particularly in the area of rulemaking, the growing concern for agency accountability has altered both the nature and significance of judicial review of agency action. The relationship between agencies and courts now is seen as a collaborative partnership for the effectuation of regulatory policy.⁵⁰ Agency rulemaking is subject to a much more frequent and intensive judicial scrutiny. While a court might have been willing in the past to presume the rationality of agency decisionmaking,⁵¹ now that entire decisionmaking process is subject to a “thorough, probing, in-depth review.”⁵² While a “presumption of regularity” still attaches to all agency rules, limiting the court’s role to insuring that the agency’s rule is rational, informal rulemaking is nonetheless subject to a “searching and careful inquiry.”⁵³ What is sought is some assurance that the agency is engaged in fair and principled decisionmaking.⁵⁴

Given this heightened concern for administrative accountability, it is somewhat curious that some commentators nevertheless feel that ac-

48. See, e.g., *Pierce & Shapiro*, *supra* note 15, at 1195-220 (discusses legislative veto provisions in regulatory enactments and executive attempts to control agency discretion).

49. 5 U.S.C. § 706 (1982) (requiring courts to insure that agencies do not stray beyond the bounds of their statutory and constitutional authority and that agency decisionmaking represents a rational implementation of delegated authority free from procedural error).

50. See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 848-49 (D.C. Cir. 1972); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). See also Wald, *Making “Informed” Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 138 (1982).

51. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935).

52. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

53. *Id.* at 416. See also *Rodgers, A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 704-08 (1979).

54. See *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1145-48 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *National Lime Ass’n v. EPA*, 627 F.2d 416, 451-53 (D.C. Cir. 1980); *Friends of the Earth v. AEC*, 485 F.2d 1031, 1032-33 (D.C. Cir. 1973).

countability has no role to play in the design of agency rulemaking procedures.⁵⁵ Most participants in the administrative process would disagree, believing rather that agency rulemaking procedures can and should be structured to enhance the ability of the courts and Congress to supervise the fairness and substantive rationality of agency action. The APA requires rulemakers to prepare a public explanation of the basis and purpose for their rules to assist in the process of public, congressional and judicial oversight.⁵⁶ The Supreme Court has often insisted that agencies supply reviewing courts with contemporaneous documentation and a full explanation of their decisionmaking processes.⁵⁷ In the last fifteen years, lower federal courts have often imposed procedural requirements on agency rulemakers which the courts felt were necessary to insure competent judicial review.⁵⁸ Indeed, some judges have observed that agency accountability is better served by procedural review of agency action than by the uninformed substantive scrutiny of the courts.⁵⁹ Finally, both Congress and the President have sought to enhance the accountability of administrative agencies by requiring new analytic procedures in all rulemaking proceedings.⁶⁰

Agency accountability is a value basic to the integrity of administrative law which, if not out of necessity then surely as a matter of policy, should inform and influence the procedural design of agency rulemaking. Those who have been charged with insuring the accountability of agency rulemakers have consistently warned that effective supervision demands a persistent sensitivity on the part of the agency to the needs of the supervisors.⁶¹ That sensitivity can, and probably should, be

55. See Wright, *supra* note 29, at 379.

56. 5 U.S.C. § 553(c) (1982).

57. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549 (1978); Dunlop v. Bachowski, 421 U.S. 560, 571-74 (1975); Camp v. Pitts., 411 U.S. 138, 143 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971).

58. See, e.g., Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 528 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

59. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.) (en banc) (Bazelon, J., concurring), *cert. denied*, 426 U.S. 941 (1976); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring). See also Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 823 (1977); McGowan, *Reflections on Rulemaking Review*, 53 TUL. L. REV. 681, 687 (1979).

60. See, e.g., S. 1080, 97th Cong., 2d. Sess., 128 CONG. REC. S2713-21 (daily ed. Mar. 24, 1982) (passed by the Senate); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

61. See *supra* notes 57, 58 & 60.

manifested in the employment of rulemaking procedures which promote the effectiveness of judicial and congressional review. To that end, the procedures chosen by rulemakers should be geared to provide a complete, accurate, and understandable explanation of the agency's rulemaking process—an explanation which demonstrates that the process has been both fair and rational.

II. VERMONT YANKEE AND INFORMAL RULEMAKING

Vermont Yankee may not have had the immediate and devastating impact on judicial review of agency rulemaking procedures which its author intended or its critics feared,⁶² but the case nonetheless has had a definite influence on the manner in which Congress and the courts have viewed the APA's notice and comment rulemaking procedures and the relationship between reviewing courts and administrative rulemakers.⁶³ Now, with the apparent demise of the latest congressional efforts to revise the rulemaking provisions of the APA,⁶⁴ attempts to refresh the informal rulemaking process for the regulatory problems of the coming decade will have to confront directly the significant obstacles to reform presented by *Vermont Yankee*. The Court's opinion in that case seems not only to embrace an unrealistic approach to judicial review of the procedural discretion of rulemakers, but also to present a serious threat to the effectuation of the procedural values which must characterize legitimate administrative rulemaking.

The Court's opinion in *Vermont Yankee* was specifically concerned with judicial imposition of rulemaking procedures beyond those called for by the APA. The opinion suggests that judicial construction of the APA's rulemaking provisions rarely should stray from a literal reading of the statutory text. Throughout the opinion the Court seems to treat the APA as a "Magna Charta" for administrative procedure, to be approached with a judicial reverence reminiscent of strict constitutional construction.⁶⁵ Quoting verbatim from the text of the APA the Court declared that section 553 established the "maximum procedural re-

62. See, e.g., Davis, *supra* note 7, at 15-16; Stewart, *supra* note 7, at 1820-22.

63. See, e.g., S. REP. NO. 305, 97th Cong., 1st Sess. 6-9, 14-36 (1981); S. REP. NO. 284, 97th Cong., 1st Sess. 93-106 (1981). See also *Sierra Club v. Costle*, 657 F.2d 298, 391-92 (D.C. Cir. 1981); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1169-71 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

64. S. 1080, 97th Cong., 1st Sess., 128 CONG. REC. S2713-18 (daily ed. Mar. 24, 1982). See also *Legal Times*, Jan. 17, 1983, at 11, col. 1.

65. See Scalia, *supra* note 6, at 375-82.

quirements which Congress was willing to have the courts impose” upon agency rulemakers.⁶⁶ Indeed, it is hard to come away from the opinion without concluding that, regardless of the context, a court’s review of procedural matters in rulemaking should end when the agency can demonstrate textual compliance with the undemanding provisions of section 553. The Court’s opinion made it emphatically clear that the decision to employ rulemaking procedures beyond those specifically required by the APA is a matter left to the discretion of the agency.⁶⁷ Although the Court conceded that this procedural discretion is indeed subject to judicial review, it left no doubt that any such review was to be extremely narrow, finding procedural abuse only where “constitutional constraints or extremely compelling circumstances” might exist.⁶⁸ The Court provided no clue as to what it might consider to be an “extremely compelling circumstance,” but it is unlikely that judicial perceptions of the relative fairness or efficacy of any particular rulemaking procedure would be found to justify a procedural remand to the agency. Apparently the Court feels that the need for efficiency, uniformity, and predictability in rulemaking requires the recognition of a broad procedural discretion in agencies, free from the fear of ad hoc judicial disapproval.⁶⁹

To the extent that this is an accurate assessment of the Supreme Court’s position on the APA and the procedural discretion enjoyed by rulemakers, or that *Vermont Yankee* can be read to suggest even such an approach to these issues, the case has serious ramifications for administrative law. As Judge (then Professor) Scalia has observed, the Court’s scriptural approach to the APA fails to take into account the apparent flaws in the Act as originally promulgated, the radical changes in administrative law which have occurred since the passage of the APA, and the fact that Congress does not now, if it ever did, intend the APA to be so interpreted.⁷⁰ Moreover, the recognition of an almost unfettered procedural discretion in rulemakers threatens to exacerbate a problem which has plagued administrative law for decades. Broad administrative discretion, the subject of repeated criticism,⁷¹ is un-

66. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978).

67. *Id.*

68. *Id.* at 543.

69. *See id.* at 546-47.

70. Scalia, *supra* note 6, at 375-88.

71. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543-44 (1981) (Rehn-

wisely and unnecessarily freed of yet another restraint. At a time when distrust of government has become widespread and belief in the competence of administrative agencies has ebbed,⁷² *Vermont Yankee* undercuts a fairly conservative approach to the control of administrative discretion in rulemaking,⁷³ and can only be considered seriously out-of-step. Absent the revival of the non-delegation doctrine,⁷⁴ and given the limited utility of congressional or executive attempts at oversight, procedural control of agency rulemakers deserves more careful consideration. As it is, after *Vermont Yankee*, substantive judicial review appears to be the only remaining restraint on the discretion of administrative rulemakers, and there is some doubt whether that method of control is adequate.⁷⁵

What is most troubling about *Vermont Yankee* is the effect it may have on the effectuation of the procedural values which underlie the administrative rulemaking process. While ostensibly concerned with the integrity of that process, the case extols the virtues of procedural efficiency while ignoring a wealth of contemporaneous authority that the procedural discretion it champions simply fails to insure fair, effective, or accountable agency rulemaking.⁷⁶ In fact, the Court's restrictions on judicial review of agency rulemaking procedures serve to

quist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring); 1 K. DAVIS, *supra* note 9, at 207-08; *Pierce & Shapiro*, *supra* note 15, at 1179-80; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

72. See J. FREEDMAN, *supra* note 21, at 31-58.

73. McGowan, *supra* note 7, at 689; Wald, *supra* note 50, at 140.

74. Under the non-delegation doctrine, congressional attempts to delegate legislative authority to administrative agencies absent a clear and ascertainable standard to guide and confine the exercise of that legislative discretion have been held unconstitutional. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). For thorough discussions of the use of the non-delegation doctrine to control the delegation and use of administrative discretion, see *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring); W. GELLHORN, C. BYSE, & P. STRAUSS, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 52-103 (7th ed. 1979); Wright, *supra* note 71, at 582-86.

75. Compare authorities cited *supra* note 59 with *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976) and Wright, *supra* note 29 at 388-95.

76. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977); *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-37 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); Leventhal, *Environmental Decisionmaking and the Role of the Court*, 122 U. PA. L. REV. 509, 536-40 (1974); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234-44 (1974); Williams, *supra* note 43, at 436-55.

jeopardize the integrity of informal rulemaking, undermining its fairness, effectiveness, and accountability.

To the extent that *Vermont Yankee* frees rulemakers of the duty to utilize procedures more elaborate than the literal requirements of the APA, informal rulemaking becomes an ineffective process in the modern regulatory context. The vaunted expertise of the administrative agency, which was an article of faith at midcentury, is simply no longer a sufficient guarantee of effective policymaking. Rather, effectiveness in rulemaking will be enhanced only to the extent that the process is accompanied by comprehensive and continuous public notice of the agency's intentions, structured to allow for meaningful outside participation in the accumulation and evaluation of rulemaking data, and subjected to procedural requirements which provide real incentives for reasoned regulatory decisionmaking.

Vermont Yankee's proscriptions against judicial review of agency rulemaking procedures increase the risk that informal rulemaking will experience a very real reduction in substantive quality. As others have already noted, there is substantial evidence that the additional procedures once prompted by judicial remands improved the caliber of agency rulemaking decisions.⁷⁷ Without the deterrent of procedural review, rulemakers will now have little incentive to experiment with procedural formats which may prove more effective or appropriate than the bare-boned notice and comment rulemaking of the APA. Absent congressional or self-imposed procedural reform, the decisionmaking discipline which judicial supervision once encouraged could well be lost as agencies, now shielded by *Vermont Yankee*, ease into literal compliance with the APA's undemanding informal rulemaking procedures.

Vermont Yankee also undermines the fairness of notice and comment rulemaking. Literal compliance with the informal rulemaking provisions of the APA no longer insures procedural fairness in most modern rulemaking contexts. Indeed, there are those who contend that the nature and scope of agency rulemaking has been so significantly altered since 1946 that no one rulemaking procedure could possibly insure fairness in every regulatory context.⁷⁸ Certainly the multitude of variables which might affect procedural fairness in rulemaking is obvi-

77. See *supra* note 13.

78. See Scalia, *supra* note 6, at 400-09. See also Gifford, *Administrative Rulemaking and Judicial Review: Some Conceptual Models*, 65 MINN. L. REV. 63, 86-88 (1980).

ous to even the most casual observer of the current regulatory scene. The nature, complexity, and significance of the problems and issues to be resolved by rulemakers vary from day to day and from agency to agency. The experience and expertise which can be brought to bear upon these problems fluctuate from agency to agency and from problem to problem. Agency attitudes toward regulation differ. At one extreme, a rulemaker may, in her zeal to accomplish her mission, be blind to the practical concerns of the regulated community. At the other extreme, she may be captured by that community and be blind to the public's interest. Finally, the public, whose interest must be served by the agency, may not retain the same character, degree of interest, or participatory capability from one rulemaking proceeding to the next.

Given these variables, procedural challenges to the fairness of agency rulemaking are inevitable. It is extremely unlikely that a fair notice in one rulemaking context will be "fair" in the next, that one procedure will always suffice to guarantee the public, however constituted, a genuine opportunity to inform the agency's decision, or that the deliberative stages of every rulemaking will be both disciplined and free from improper influence. It is doubtful that the integrity of the rulemaking process can long survive an approach to procedural fairness which relies on a literal interpretation of the APA or a procedural discretion shielded from challenge in all but the rarest circumstances. Unfortunately that is precisely the approach the Supreme Court has taken in *Vermont Yankee*.

The inherent advantage of informal rulemaking lies not only in the procedural efficiency so adamantly defended in *Vermont Yankee*, but also in the acceptability of rulemaking as a legitimate mechanism for the formulation of regulatory policy. That legitimacy or acceptability will in turn depend, at least in part, upon the real or apparent fairness of the informal rulemaking process. To the extent that *Vermont Yankee* restricts judicial review of the accuracy and scope of rulemaking notices, of the adequacy of the opportunities provided for public participation in the accumulation and evaluation of rulemaking data, or of the integrity of the agency's deliberations, procedural fairness in rulemaking will be undermined.

Prior to *Vermont Yankee*, lower courts often sought to enhance the accountability of informal agency rulemaking by requiring detailed explanations of the basis and purpose of promulgated rules as an aid to

substantive judicial review.⁷⁹ The APA's call for a "concise general statement" was interpreted functionally. Agencies were required to identify the issues they had addressed, to detail the evidentiary support for their findings of fact, and to discuss both the manner in which policy considerations affected the agency's final rule and the agency's reasons for rejecting contrary findings or opposing arguments.⁸⁰ While the APA did not compel the compilation of a record to serve as the basis for the agency's decision, some courts threatened remands where the agency did not provide an organized "rulemaking record" to assist the process of judicial review.⁸¹ On rare occasions, courts even suggested the limited use of trial-type procedures on remand to "flesh-out" disputed factual issues which remained vague or undeveloped after less-formal rulemaking procedures.⁸²

After *Vermont Yankee*, the ability of reviewing courts to impose such procedural requirements, either as an incentive to reasoned decision-making or as an aid to effective judicial review of the rationality of agency rules, has become a doubtful proposition at best. Instead, *Vermont Yankee* redirects judicial review of rulemaking from procedural review to substantive review and severely restricts the ability of courts to require enhanced rulemaking procedures which might assist the substantive review process. By doing so the Court may well have undermined the accountability of informal rulemaking.

It has become increasingly clear that substantive judicial review is often an inadequate means for insuring reasoned agency rulemaking. This is apparent from the disagreement among courts and commentators as to even the appropriate scope of substantive review of agency rules. Some authorities have called for continuation of the "hard look" review of the last decade which requires a court "to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent."⁸³ Others have counseled

79. *E.g.*, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

80. *See supra* note 79.

81. *E.g.*, *Texas v. EPA*, 499 F.2d 289, 297 & n.8 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1976).

82. *See, e.g.*, *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1263 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631-32, 649 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 503 (4th Cir. 1973).

83. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*,

a return to a judicial scrutiny that affords maximum deference to the agency's expertise and judgment.⁸⁴ Still others have apparently sought to find some intermediate standard of review which would overturn agency rules on substantive grounds only in the face of some "manifest irrationality."⁸⁵ This uncertainty concerning the proper scope of substantive judicial review may result in the same "ad hoc" judicial remands which *Vermont Yankee* feared, only now the remands will be of a substantive rather than procedural character.

Equally troubling is the increasing frequency of cases where even "hard look" substantive review apparently reaches its limits and fails to insure adequately the accountability of agency rulemakers. For example, where rulemaking involves so-called "science policy" issues, even a dedicated substantive judicial review often seems reduced to a finding that the agency at least has made a leap of faith in the right direction.⁸⁶ As Professor Rodgers has so aptly observed, in many recent cases "hard look" substantive review might be better described as a "soft glance."⁸⁷

In all, a preference for a substantive judicial review unaided by or as a substitute for its procedural counterpart simply fails to insure the accountability of rulemakers. No matter what one's perspective on the appropriate relationship between courts and agencies, if *Vermont Yankee* is read to require exclusive reliance on substantive judicial review to insure agency accountability, that reliance seems ill-advised. For those who see the need for active judicial review, the Supreme Court's prohibitions against procedural review will serve only to decrease the effectiveness of a substantive review already inadequate to its task. For others, a judicial review limited exclusively to substantive concerns presents an increased risk that courts will substitute their own judg-

403 U.S. 923 (1971), cited in *National Lime Ass'n v. EPA*, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980). See also Rodgers, *supra* note 53, at 706-08; Stewart, *supra* note 7, at 1811 & n.26; Wald, *supra* note 50, at 151.

84. See *Associated Indus. v. United States Dep't of Labor*, 487 F.2d 342, 354 (2d Cir. 1973) (Friendly, J.) (citing *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935)).

85. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 423 (1981); see also Wright, *supra* note 29, at 391-94.

86. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 26-29, 31-32 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976), discussed in McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 780-808 (1979); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974).

87. Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191, 216-18 (1980).

ments concerning the wisdom or efficacy of rules for those of the agency. In either case, accountability in rulemaking suffers.

III. REACTION TO *VERMONT YANKEE*

A. *From the Commentators*

Vermont Yankee has drawn a varied response from the academic community. Some observers have applauded *Vermont Yankee* as an attempt to protect the integrity of agency decisionmaking processes from improper or overzealous judicial tinkering.⁸⁸ For these scholars, the case marks a return to what they perceive as the original intent of the APA—that the administrative agency be able to exercise its own informed discretion in the design of the procedural framework of rulemaking.⁸⁹ Unrestrained judicial review of rulemaking procedures, especially judicial imposition of procedures beyond those required by the APA, is seen as an unacceptable threat to the procedural discretion of administrative rulemakers. The fear is that ad hoc procedural re-mands by reviewing courts will lead agencies to provide elaborate trial-like rulemaking hearings which will judicialize rulemaking and impair the efficiency of policy development.⁹⁰

Other commentators have seen *Vermont Yankee* in an entirely different light. For this group, the case elevates procedural efficiency and statutory formalism at the expense of fairness, effectiveness, or accountability in administrative rulemaking. With varying degrees of virulence, these scholars have excoriated *Vermont Yankee* as either destructive, foolish, or out of touch with the realities of administrative law.⁹¹ Invective aside, the thrust of the criticism is that, if the decision is read literally, *Vermont Yankee* might well put an end to the most effective, and perhaps least intrusive, check on agency discretion, a check utilized by the Supreme Court itself on numerous occasions.⁹² The Court's statutory literalism freezes administrative law in the rigid mold of the 1940's—a mold with premises and limitations which no

88. E.g., Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Verkuil, *supra* note 85.

89. See Byse, *supra* note 88, at 1829.

90. See Wright, *supra* note 29, at 387-88.

91. See Davis, *supra* note 7, at 13-17; Rodgers, *supra* note 53, at 708; Stewart, *supra* note 7, at 1820.

92. See *supra* note 91.

longer accord with modern day regulatory realities.⁹³ These commentators note that the Supreme Court itself recognized the need for change some time ago and, in past cases, has radically altered the premises of administrative law.⁹⁴ Now, in *Vermont Yankee*, the Court apparently has failed to see the need for the reform of rulemaking which should follow from these basic alterations.⁹⁵

Regardless of their reaction to *Vermont Yankee*, virtually all commentators recognize that the informal rulemaking procedures of the APA are simply no longer adequate to the task in many, if not most, of the regulatory contexts in which they are used.⁹⁶ All agree that, for one reason or another, agencies engaged in rulemaking should utilize procedures which go beyond those specifically outlined in section 553 of the APA. They differ, of course, as to which additional or enhanced rulemaking procedures should be encouraged, when those procedures should be utilized, how to justify supplemental procedures, and, most emphatically, who should decide whether additional rulemaking procedures are required in any given context—Congress, the courts, or the agency. By and large, the specific proposals for insuring the adequacy of agency rulemaking procedures in the wake of *Vermont Yankee* seem to fall into three groups: one group which calls for legislative reform of agency rulemaking procedures, a second group which counsels continued reliance on the procedural discretion of agency rulemakers, and a third group which would grant reviewing courts the authority to impose additional or enhanced procedures upon agencies engaged in informal rulemaking.

Among the proponents of a legislative response to *Vermont Yankee*, few find solace in the current congressional practice of legislating procedures on an agency by agency basis.⁹⁷ While such attempts to hand-tailor rulemaking procedures for particular agencies or programs may increase the responsiveness of procedures to different rulemaking contexts and allow for valuable experimentation with new or different procedural formats, the practice has been widely criticized for the

93. See Scalia, *supra* note 6, at 375; Stewart, *supra* note 7, at 1805.

94. See Scalia, *supra* note 6, at 375-78; Stewart, *supra* note 7, at 1814 & n.41.

95. See Scalia, *supra* note 6, at 378; Stewart, *supra* note 7, at 1805.

96. See, e.g., Byse, *supra* note 88, at 1824; Scalia, *supra* note 6, at 378-86; Stewart, *supra* note 7, at 1805; Verkuil, *supra* note 19, at 323, 327.

97. See, e.g., Federal Trade Commission Improvements Act, 15 U.S.C. § 57a (1982); Consumer Product Safety Act, 15 U.S.C. § 2058(a)(2) (1982); Toxic Substances Control Act, 15 U.S.C. § 2605 (1982).

procedural chaos and confusion it has engendered.⁹⁸ Many commentators therefore have suggested that a more uniform and consistent approach to procedural reform can be achieved through amendments to the APA. Unfortunately there is little agreement on the nature of these amendments.

Dean Paul Verkuil suggests a major revision of the APA, a “comprehensive solution” which would address not only the procedural problems of rulemaking, but those endemic to formal and informal adjudication as well.⁹⁹ Rejecting a rigid adherence to the troublesome distinctions between rulemaking and adjudication, he suggests legislative amendments which would establish a “unitary administrative procedure” of public notice, written commentary, and an agency statement of the reasons for its decision.¹⁰⁰ These basic procedures would be supplemented with oral presentation or cross-examination only in limited instances.¹⁰¹ The “unitary” procedure would be utilized in all administrative decisionmaking, whether rulemaking or adjudication, save those situations when the agency seeks to impose a sanction for past conduct or when the Constitution forbids such an informal process.¹⁰² In these latter two instances, and in only these instances, Verkuil calls for the employment of trial-type hearing procedures.¹⁰³ Verkuil recognizes the current inadequacies of notice and comment rulemaking,¹⁰⁴ and indeed his new APA would codify much of the “hybrid rulemaking” case law. He would prohibit use of trial-type procedures in rulemaking, however, and permit the use of oral presentation or cross-examination only when a rulemaker found such techniques necessary or desirable.¹⁰⁵

Dean Carl Auerbach has proposed a more modest legislative approach which would supplement the rulemaking provisions of the APA with a requirement that persons seeking judicial review of rules promulgated under notice and comment rulemaking first be required to file a protest against the rule with the agency.¹⁰⁶ Under this “protest

98. *See, e.g.,* *Associated Indus. v. United States Dep't of Labor*, 487 F.2d 342, 345 n.2, 349 (2d Cir. 1973); Verkuil, *supra* note 19, at 317.

99. Verkuil, *supra* note 19, at 310-11, 320.

100. *Id.* at 322-24.

101. *Id.*

102. *Id.* at 321.

103. *Id.*

104. *Id.* at 323, 327.

105. *Id.* at 323.

106. *See* Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 *Nw. U.L. REV.* 15, 61-68 (1977).

procedure" the agency would then be required to conduct a trial-type, on-the-record hearing on the issues raised by the protestor.¹⁰⁷ Auerbach's proposal is designed to preserve the advantages of informal rulemaking, while providing reviewing courts with an adequate record in those instances when judicial review of an agency's rule is sought.¹⁰⁸ While he seems to feel that his "protest procedure" could be adopted as a procedural rule by all rulemakers without necessarily amending the APA, the proposal, nonetheless, would drastically alter the informal rulemaking process and effectively eliminate formal rulemaking.¹⁰⁹ Thus, adoption of the proposal is perhaps best accomplished by revising the APA and, where necessary, the organic statutes of agencies.

Professor Nathanson continues in his belief that the Supreme Court has long been laboring under a mistaken interpretation of the APA's formal and informal rulemaking provisions.¹¹⁰ He has suggested a limited amendment to the APA which would make clear that "rules which must be reviewed on the administrative record are also 'required to be made on the record' within the meaning of the APA."¹¹¹ The gist of Professor Nathanson's proposal seems to be that a "correct" interpretation of the APA would require a more frequent use of the on-the-record rulemaking procedures of sections 553, 556, and 557.¹¹² Thus, his amendment would overrule the Supreme Court's famous *Florida East Coast*¹¹³ decision, which sharply limits the use of formal rulemaking, while making clear that on-the-record rulemaking need not necessarily entail the trappings of a trial-type hearing.¹¹⁴ The practical effect of this amendment would be to codify much of the hybrid rulemaking case law developed by reviewing courts prior to *Vermont Yankee*. Professor Nathanson's proposal seeks to correct what he perceives as a ser-

107. *Id.* at 61.

108. *Id.*

109. *See id.* at 66, 68.

110. *See* Nathanson, *supra* note 7, at 183; *see also* Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377, 407 (1978) [hereinafter cited as *Report on Ex Parte Communications*]; Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 724-40 (1975) [hereinafter cited as *Probing the Mind*]; Report of Judicial Review Committee of Admin. L. Section, *Recent Developments in Interpretation of the APA: Florida East Coast and its Progeny*, 28 AD. L. REV. 377 (1976).

111. Nathanson, *supra* note 7, at 203.

112. *See id.* at 189-99; *see also* Nathanson, *Probing the Mind*, *supra* note 110, at 724-33.

113. *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

114. *See* Nathanson, *supra* note 7, at 204.

ious flaw in the interpretation of the current APA and, in so doing, to insure the adequacy of the rulemaking record and both the fairness and the procedural efficiency of agency rulemaking.

Judge Scalia and Professor Gifford doubt that Congress could ever construct a single procedure which would meet all the current objections to informal administrative rulemaking.¹¹⁵ If, as Judge Scalia believes, procedural requirements are basically imposed by Congress to restrict the political power of rulemakers, an amended APA should contain “not merely three, but ten or fifteen basic procedural formats,” allowing Congress to select a format which would best suit its political expectations for a particular administrative agency.¹¹⁶ Professor Gifford’s revisions of the APA also would establish several rulemaking models, each reflecting a typical variation in the organizational dynamics of agency rulemaking. This would allow Congress to specify, with more precision than is now possible, the procedural framework best suited to assure efficiency, effectiveness, and fairness in a particular rulemaking context.¹¹⁷

Though each of these proposals for amendment to the APA may have its own merits and flaws, there is a basic inadequacy which plagues them all—a dependence on congressional initiative. Legislative action may be an effective and legitimate way to restore the normative balance to rulemaking procedure set askew by *Vermont Yankee*, but the last four Congresses have all failed in attempts to reform regulatory practice and amend the APA.¹¹⁸ Notwithstanding the argument that substantial amendment to the APA is unnecessary,¹¹⁹ if the last eight years are any indication, the likelihood of APA amendment in the foreseeable future is far from assured.

Professor Byse’s views on procedural review of rulemaking present a second approach to the question. He advocates continued reliance on agency discretion.¹²⁰ While he concedes that the APA’s informal

115. See Gifford, *supra* note 78, at 87 & n.110; Scalia, *supra* note 6, at 406.

116. Scalia, *supra* note 6, at 408.

117. See Gifford, *supra* note 78, at 87.

118. See, e.g., S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2718 (daily ed. Mar. 24, 1982); S. 262, 96th Cong., 1st Sess., 125 CONG. REC. S17770-71, 17772 (daily ed. Mar. 24, 1982); S. 2490, 95th Cong., 2d Sess., 124 CONG. REC. 2201-05 (1978); S. 3297, 94th Cong., 2d Sess., 122 CONG. REC. 10,430-36 (1976).

119. See Wright, *supra* note 29, at 397; see also Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199 (1974).

120. Byse, *supra* note 88, at 1823-24.

rulemaking procedures may sometimes prove inadequate, he nonetheless supports *Vermont Yankee's* restrictions on procedural review of rulemaking.¹²¹ Professor Byse suggests that there are both practical and theoretical reasons for concluding that courts should not be permitted to impose procedural requirements on rulemakers beyond those specified in the APA. Initially he observes that, since the judiciary can lay little claim to expertise in the design of rulemaking procedures, a court's belief that a particular procedure may somehow be "better" than the one chosen by the agency may be wrong.¹²² Byse would put more faith in agency personnel, whose responsibilities and experience offer greater assurance for procedural adequacy.¹²³

More important for Byse, however, is his belief that procedural review by courts is both unauthorized and unwise. Noting that the legislative history of the APA leaves many procedural choices to the discretion of the agency,¹²⁴ he fears that judicial usurpation of that discretion will seriously undermine the integrity of the administrative process.¹²⁵ He does not agree that judicial imposition of extra procedures is necessary to improve either the effectiveness of rulemaking or the substantive judicial review of that rulemaking.¹²⁶ Rather, he suggests that when a court lacks the data it needs to judge the substantive rationality of an agency's rule, or when careful judicial scrutiny of the substantive aspects of a rule reveals a less than rigorous analysis of the problem by the agency, the courts should vacate the rule or remand to the agency for further explanation or consideration.¹²⁷ Such a remand, reminiscent of that employed by the Supreme Court in *SEC v. Chenery Corp.*¹²⁸ (*Chenery I*), should induce agencies to use whatever further procedures they choose to resolve the substantive problems which have triggered the remand.¹²⁹ In this way, the courts still can satisfy themselves that rulemakers have taken a "hard-look" at the issues, while preserving the agency's discretion to choose a procedural format best suited to "the substantive issues involved and the agency's institutional

121. *Id.*

122. *Id.* at 1828.

123. *See id.*

124. *Id.* at 1829.

125. *See id.* at 1828, 1831-32.

126. *Id.* at 1826-29.

127. *Id.* at 1827 (quoting Williams, *supra* note 43, at 454-55).

128. *SEC v. Chenery*, 318 U.S. 80 (1943).

129. *See Byse, supra* note 88, at 1827.

capacities.”¹³⁰

However, once one concedes the current inadequacies of notice and comment rulemaking, as Byse does, the *Chenery I* approach hardly seems to presage any real improvement in the relationship between rulemakers and reviewing courts. Byse’s approach fails to provide reviewing courts with any guidelines for deciding whether an agency’s rulemaking record is substantively adequate or must instead be supplemented on remand. Courts therefore would be free to remand or vacate agency action on an ad hoc basis, but now for substantive as opposed to procedural reasons. Additionally, it is hard to see any real difference between a *Chenery I* remand and a remand for a more definite statement of the basis and purpose of the rule. If the latter is to be considered inappropriate as a judicial expansion of the APA’s procedural requirements,¹³¹ should not a *Chenery I* remand suffer the same opprobrium? Absent some post hoc rationalization by the rulemaker, a *Chenery I* remand is likely to induce the agency to reopen the proceedings to resolve the uncertainties which led to the remand. As a consequence, a *Chenery I* remand may well, in many instances, simply be a disguised remand for additional agency procedures, but one which fails to offer any helpful indication as to how the agency might resolve the court’s substantive problems with the rule.

Professor Byse’s approach to judicial review of rulemaking also fails to promote the procedural values which underlie notice and comment rulemaking. Certainly agency accountability is not adequately insured. A *Chenery I* remand for further consideration or explanation does not guarantee that the agency will organize the rulemaking record into a manageable or useful tool for judicial review; it merely enlarges that record. And where, as is frequently the case, unresolved factual issues have frustrated judicial review, a *Chenery I* remand gives the agency little direction as to how it might cure the obscurity in its rationale which occasioned the remand.¹³² Such a remand may instead prompt an agency response which merely exacerbates the factual uncertainty rather than resolve it.¹³³

It has been noted that judicial review for rational decisions is no sub-

130. See Williams, *supra* note 46, at 455.

131. See Scalia, *supra* note 6, at 395.

132. See Stewart, *supra* note 7, at 1818-19.

133. See Williams, *supra* note 43, at 425.

stitute for rational decisionmaking processes.¹³⁴ If that is true, Professor Byse's preference for an exclusively substantive judicial review of rulemaking, even when coupled with the threat of a *Chenery I* remand, provides only an indirect and inadequate inducement for the employment of effective rulemaking procedures. As others have pointed out, the *Chenery I* technique is certainly of little assistance to a party who has raised a factual challenge to an agency rule during judicial review, only to find on remand that the controversy is mooted by the belated production of data which the agency possessed from the beginning.¹³⁵ Such a waste of time, money, and effort on the part of all concerned seems unavoidable unless agencies can be prompted to employ rulemaking procedures which allow for public participation in the evaluation of rulemaking data in the first place. To that end, even Professor Williams, from whom Byse derived his approach,¹³⁶ and who also doubts the wisdom of an intensive procedural review of rulemaking, has recognized the occasional need for judicial remands which give the agency a clear indication that further procedures may be necessary to resolve the substantive inadequacies in a rule.¹³⁷ Williams has even suggested that such remands might require the use of cross-examination to clarify substantive uncertainties.¹³⁸ In the end it seems clear that absent the deterrent of some procedural scrutiny by courts, there is very little assurance that agencies will structure rulemaking proceedings to inform and educate themselves effectively, as the drafters of the APA intended.

Like the Supreme Court in *Vermont Yankee*, Professor Byse gives little consideration to the notion that rulemaking procedures should be responsive to concerns for fairness. While his approach might induce procedural choices on the part of the agency which assist judicial review of agency rules, it fails to bring even indirect pressure on agencies to consider the openness, impartiality, and responsiveness of rulemaking procedures. To the extent that fairness, or just its appearance, might require increased public access to public rulemaking data, some opportunity for rebuttal, or even an evaluative process free of questionable influences, Byse's approach would place all trust in the procedural

134. W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 43 (1941).

135. See Williams, *supra* note 43, at 425.

136. Byse, *supra* note 88, at 1827.

137. See Williams, *supra* note 43, at 455.

138. *Id.* at 444-46.

discretion of the agency. Unfortunately, such trust is difficult to accord given the number of recent experiences which cast doubt on the willingness or ability of agencies to exercise that discretion in a politic fashion.¹³⁹

A third response to *Vermont Yankee* has come from a group of commentators who seem to feel that reviewing courts should, or at least will, limit, distinguish or simply ignore the basic thrust of *Vermont Yankee* and continue to impose procedural requirements upon rulemakers which go beyond those outlined in the APA. Some, like Professors Davis and Stewart, have strenuously objected to the Supreme Court's attempt to exclude the judiciary from the development of the procedural law of rulemaking.¹⁴⁰ Their protests are based upon the belief that procedural "adequacy" in rulemaking simply cannot be assured by relying exclusively on congressional or administrative initiative, as *Vermont Yankee* would seem to require.¹⁴¹ Rather, continued judicial supervision of rulemaking procedures is needed to preserve flexibility in meeting the varied demands of specific rulemaking contexts, to provide valuable experience upon which subsequent legislative action can be based, or just to insure that procedural innovation is not frustrated by congested congressional dockets or administrative inertia.¹⁴²

Professor Davis has called upon reviewing courts to reject *Vermont Yankee* and has instructed them in ways to escape, at least in the short run, the literal commands of the case.¹⁴³ He is confident that, in the long run, *Vermont Yankee* will be repudiated and reviewing courts will then be able to rely upon "administrative common law" as a justification for the judicial imposition of whatever procedures are considered necessary to insure procedural fairness and effectiveness.¹⁴⁴ Unfortunately, this notion of an "administrative common law" has so far eluded any clear definition.¹⁴⁵ Perhaps that is the idea. But without some further delineation of its source and scope, reliance upon such an amorphous concept does not appear to advance the argument, and may

139. See, e.g., *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 536-37 (D.C. Cir.), cert. denied, 103 S. Ct. 79 (1982); *Sierra Club v. Costle*, 657 F.2d 298, 387-91 (D.C. Cir. 1981); *United States Lines, Inc. v. FMC*, 584 F.2d 519, 537-38 (D.C. Cir. 1978).

140. See Davis, *supra* note 7, at 6; Stewart, *supra* note 7, at 1819.

141. See Stewart, *supra* note 7, at 1819.

142. See *id.* at 1820.

143. See Davis, *supra* note 7, at 15-16.

144. See *id.* at 3-10.

145. See *id.* at 3-7.

suffer from the same lack of legitimacy Davis predicts for *Vermont Yankee*.

Professor Stewart also has urged the courts to take a narrow view of *Vermont Yankee*.¹⁴⁶ He has counseled them to seize upon the Supreme Court's recognition of the need for a "rulemaking record" in informal rulemaking as justification for the imposition of "paper hearing" procedures.¹⁴⁷ These procedures would include detailed notices of proposed rules, expansive public access to agency data on the proposed rule, the opportunity to comment on both the agency's proposal and supporting data, as well as the comments of others, and a comprehensive explanation of the agency's final decision.¹⁴⁸ Compliance with such procedures would, in Stewart's view, not only provide courts with adequate records for responsible substantive review, but also improve the quality of agency decisionmaking without hampering the efficiency of the rulemaking process.¹⁴⁹

While Stewart's proposed format surely provides a plausible and reasonable solution to many of the problems identified with notice and comment rulemaking procedures,¹⁵⁰ some questions still remain. For example, Stewart seems to base his "paper hearing" requirements exclusively on the need to insure accountability in rulemaking, focusing primarily on the needs of courts conducting responsible review of agency rulemaking. He does not, however, discuss other procedural values which might either provide an additional basis for his suggestions or justify the imposition of further rulemaking procedures. Would a perceived need to insure effective and fair rulemaking call for the occasional imposition of oral hearings or cross-examination, even when such procedures would not necessarily assist a court's substantive review? And what is the source of the courts' power to impose these "paper hearing" requirements? Reliance upon *Vermont Yankee's* apparent endorsement of the requirement of a "rulemaking record"¹⁵¹ merely begs the question. Why must a rulemaker provide the court with an adequate record? The APA does not, at least on its face, re-

146. See Stewart, *supra* note 7, at 1821.

147. *Id.*

148. See *id.* at 1813 n.36.

149. See *id.* at 1813-14.

150. Compare Stewart's "paper hearing" procedures, *id.*, with the proposed minimum rulemaking procedures outlined and discussed *infra* in the text accompanying notes 284-395.

151. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 547-49 (1978).

quire such a record.¹⁵² Even conceding the contradiction in *Vermont Yankee's* recognition of the need for a "rulemaking record" not mandated by the APA, the case nonetheless demands that the judicial imposition of rulemaking procedures be based either upon the APA or some acceptable limitation on the procedural discretion of the agency.¹⁵³ If judicial imposition of "paper hearing" procedures is to survive *Vermont Yankee*, there must be some further explanation as to how these procedures are linked to the APA or the procedural discretion of the rulemaker. It may well be that a failure to provide a "paper hearing" constitutes an abuse of a rulemaker's procedural discretion. If so, such an approach provides a more satisfying basis for procedural innovation than a fortuitous contradiction on the part of the *Vermont Yankee* Court. But it also leaves unanswered the question of how other procedural values, beyond agency accountability, should inform a rulemaker's procedural discretion.

Commentary by Judges Skelly Wright and Antonin Scalia has described still another method for judicial imposition of rulemaking procedures which might well survive the proscriptions of *Vermont Yankee*.¹⁵⁴ Both Wright and Scalia observe that some courts in the past have sought to alleviate the inadequacies of notice and comment rulemaking by simply giving an expansive interpretation to the statutory requirements of the APA.¹⁵⁵ In effect, this approach to judicial review of rulemaking procedures would be grounded on a functional or instrumental interpretation of the notice, comment, and explanation requirements of the APA's informal rulemaking provisions.

Under this approach, the requirement of section 553 that the notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved"¹⁵⁶ would be interpreted broadly to require public disclosure of all of the data upon which the agency intends to rely in the rulemaking proceed-

152. 5 U.S.C. § 553 (1982); see Stewart, *supra* note 7, at 1816.

153. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 548 (1978).

154. Scalia, *supra* note 6, at 394-96; see generally Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 AD. L. REV. 59 (1977) [hereinafter cited as Wright, *Informal Rulemaking*]; Wright, *supra* note 119; Wright, *supra* note 29.

155. See Scalia, *supra* note 6, at 394-95; Wright, *supra* note 29, at 380.

156. 5 U.S.C. § 553(b)(3) (1982).

ing.¹⁵⁷ In addition, Judge Wright would read the APA's notice provisions to require an initial exposition of the agency's thinking on the basis and purpose of the rule in light of the agency's current data base, followed by continuous disclosure of new data as it is accumulated by the agency.¹⁵⁸ He also seems to feel that the concept of fair notice requires that certain substantial alterations in a rulemaking proposal, perhaps in response to public comment, should be prefaced by a second round of public comment.¹⁵⁹ But while Judge Wright would interpret the APA to require a "genuine dialogue between agency experts and concerned members of the public,"¹⁶⁰ he would not read the APA as a basis for the required use of oral argument or cross-examination in rulemaking.¹⁶¹ Scalia, on the other hand, has suggested that "there may even be room for relatively brazen distortions [of the APA] such as the judicial importation of cross-examination requirements, where an ancient and well-established adjudicatory issue has been kidnapped into rulemaking."¹⁶² Both Wright and Scalia have also noted the growing tendency among reviewing courts to read the APA's call for a "concise general statement" of a final rule's basis and purpose quite broadly, requiring a comprehensive and reasoned explanation of the agency's entire decisionmaking process and an articulation of the agency's response to substantial public criticism of its reasoning or its rule.¹⁶³

Absent some congressional action on the APA's rulemaking provisions or the even more improbable overruling of case precedent restricting judicial imposition of the APA's trial-type rulemaking procedures,¹⁶⁴ an instrumental interpretation of the APA's notice and comment rulemaking procedures provides a simple, expeditious, and sensible answer to the current procedural inadequacies of informal rulemaking. The approach remains true to the Supreme Court's reluc-

157. See Scalia, *supra* note 6, at 380-81 & n.154, 394; Wright, *supra* note 119, at 204; Wright, *supra* note 29, at 380.

158. See Wright, *supra* note 29, at 380-81.

159. See, e.g., *United Steelworkers v. Marshall*, 647 F.2d 1189, 1225-26 (D.C. Cir. 1980) (Wright, C.J.) (suggesting that substantial revisions in a proposed rule may trigger the need for a second round of public comment), *cert. denied*, 453 U.S. 913 (1981).

160. Wright, *supra* note 29, at 381.

161. *Id.* at 381-82.

162. Scalia, *supra* note 6, at 395.

163. See *id.* at 394-95, Wright, *supra* note 29, at 381.

164. E.g., *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

tance to revitalize formal rulemaking,¹⁶⁵ its obsession with the notion that the APA is some sort of procedural constitution,¹⁶⁶ and its demand for statutory authority for procedural innovation in rulemaking.¹⁶⁷ Yet Wright and Scalia have suggested an approach to the APA that responds to the need for a rulemaking procedure which more closely reflects both the practical and political realities of the modern rulemaking context. An expansive judicial construction of the notice, comment, and explanation requirements found in the APA would add a measure of fairness to rulemaking and should increase both the effectiveness and accountability of a decisionmaking process currently far too concerned with procedural efficiency.¹⁶⁸

To be fully effective, however, this approach to judicial review of rulemaking procedures needs further development than that found in the comments and observations of Judges Wright and Scalia. To be fair, neither author has specifically advocated a comprehensive reconstruction of section 553. Indeed, it is not entirely clear that either would welcome such a development.¹⁶⁹ As a consequence, their specific suggestions have been somewhat narrow, even though their approach would seem to have much broader procedural implications. Might it not be possible, for example, to interpret section 553 in such a way as to provide for a public rulemaking docket and a right to rebuttal, to require that ex parte contacts in rulemaking be noted and docketed, or to require the completion and organization of a "rulemaking record"?¹⁷⁰ If, as all but the Supreme Court seem to recognize, notice and comment rulemaking was never intended to be employed with the scope and breadth of current practice, contemporaneous judicial interpretation of the APA seems necessary to insure that its procedures will remain viable and legitimate regulatory tools. A judicial interpretation of the procedural requirements of notice and comment rulemaking which gives life to the procedural values that prompted the drafters of the rulemaking sections of the APA seems a reasonable step toward accommodating rulemaking to its modern regulatory tasks, a step which should be acceptable even to the *Vermont Yankee* Court.

165. See cases cited *supra* note 164.

166. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 523 (1978); Scalia, *supra* note 6, at 375-82.

167. 435 U.S. at 548.

168. See *infra* text accompanying notes 284-396.

169. See Scalia, *supra* note 6, at 366-69; Wright, *supra* note 29, at 381.

170. See *infra* text accompanying notes 284-396.

B. From the Courts

The judicial response to *Vermont Yankee* is more difficult to characterize than the academic reaction. Notwithstanding the protests of some dissenting opinions,¹⁷¹ it is probably fair to say that no court has taken express exception to *Vermont Yankee* and deliberately violated the Supreme Court's ban on judicial imposition of extra-statutory rulemaking provisions. It is certainly clear, however, that a number of courts disagree with the Court's approach to judicial review of agency rulemaking procedures.¹⁷² It is equally true that few, if any, courts have adhered strictly to the letter of *Vermont Yankee's* admonition, and flatly refused even to entertain requests for rulemaking procedures which go beyond those specifically outlined in the APA.¹⁷³ Instead, though somewhat more reluctant to find fatal procedural error in agency rulemaking,¹⁷⁴ reviewing courts have continued to engage in careful, searching analysis of claims that agencies have somehow failed to utilize procedures which guarantee a fair, effective, or accountable rulemaking process.¹⁷⁵

After *Vermont Yankee*, very few courts have found it necessary to set aside informal agency action for failure to employ cross-examination, oral argument, or similar trial-type procedures.¹⁷⁶ And *Vermont Yankee* probably has stifled the judicial imposition of other procedures that might well have been found indispensable to "fair and reasoned decisionmaking" in the pre-*Vermont Yankee* era.¹⁷⁷ By and large,

171. See, e.g., *Natural Resources Defense Council v. NRC*, 685 F.2d 459, 517, 535, 536 & n.126 (D.C. Cir. 1982) (Wilkey, J., dissenting), *rev'd sub nom.* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 103 S. Ct. 2246 (1983).

172. See, e.g., *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978); see also McGowan, *supra* note 7, at 689; Wald, *supra* note 50, at 140.

173. See *American Mining Congress v. Marshall*, 671 F.2d 1251, 1260 (10th Cir. 1982).

174. See, e.g., *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 536 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *Sierra Club v. Costle*, 657 F.2d 298, 391-92 (D.C. Cir. 1981); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1207, 1216-17 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

175. See, e.g., *National Lime Ass'n v. EPA*, 627 F.2d 416, 428-30, 451-53 (D.C. Cir. 1980); *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

176. See, e.g., *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982); *Illinois v. United States*, 666 F.2d 1066 (7th Cir. 1981).

177. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Lead Indus. Ass'n v.*

however, the effect of *Vermont Yankee* on judicial review of informal rulemaking procedures has truly been “modest.”¹⁷⁸ Reviewing courts have paid lip service to the proscriptions of *Vermont Yankee*, but many have effectively ignored the spirit of the opinion’s expansive dictum on procedural review.¹⁷⁹ When confronted with procedural challenges to rulemaking the courts seem to operate on the implicit assumption that literal compliance with the procedural dictates of the APA simply is not adequate to insure legitimate agency rulemaking.¹⁸⁰ As a result, many courts have continued to engage in a procedural review of informal rulemaking more demanding than that outlined in *Vermont Yankee*.¹⁸¹ Deftly maneuvering around or beyond the Supreme Court’s formula for procedural review, a number of courts, employing a variety of techniques, have continued to impose procedures upon rulemakers which exceed those of the APA.¹⁸² Other courts, ultimately satisfied with the agency’s performance, have nonetheless rejected procedural challenges to rulemaking only after concluding that the agency had met procedural requirements that cannot be found in the APA.¹⁸³

Cautioned against the imposition of extra-statutory rulemaking procedures by *Vermont Yankee*, some courts have responded by finding that an agency’s organic statute requires the use of rulemaking procedures more elaborate than the APA’s notice and comment rulemaking format. For example, in *United States Lines v. FMC*,¹⁸⁴ a case decided

EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978); *Environmental Defense Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978).

178. S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 77 (Supp. 1982).

179. *See, e.g.*, *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982); *Sierra Club v. Costle*, 654 F.2d 298 (D.C. Cir. 1981); *National Lime Ass’n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978); *United States Lines v. FMC*, 584 F.2d 519 (D.C. Cir. 1978). *See also* S. BREYER & R. STEWART, *supra* note 178, at 78 & n.78c.

180. *See, e.g.*, *Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 103 S. Ct. 343 (1982); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

181. *See supra* note 175.

182. *See, e.g.*, *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982); *Illinois v. United States*, 666 F.2d 1066 (7th Cir. 1981); *National Lime Ass’n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

183. *See* *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980); *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *Association of Nat’l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

184. 584 F.2d 519 (D.C. Cir. 1978).

soon after *Vermont Yankee*, Judge Skelly Wright seized upon a statutory requirement that the agency act only after “notice and hearing” to sustain an attack on the adequacy of the agency’s procedures. Judge Wright was troubled by the agency’s failure to subject data upon which it had relied to “meaningful adversarial comment” and by the presence of “secret *ex parte* contacts” during the decisionmaking process. Upon analysis he found such practices inconsistent with the congressional “hearing” requirement.¹⁸⁵ If the hearing was to be fair, such practices simply could not be tolerated.¹⁸⁶ While Judge Wright employed a number of other, perhaps more controversial, rationales for finding procedural error,¹⁸⁷ it is significant that he chose to reconcile his remand with *Vermont Yankee* on the ground that “the freedom of administrative agencies to fashion their own procedures . . . does not encompass freedom to ignore statutory requirements.”¹⁸⁸

A number of courts faced with challenges to the scant procedural protections of the APA have explored this loophole in the *Vermont Yankee* opinion and found it to provide fertile ground for continued judicial imposition of more elaborate rulemaking procedures.¹⁸⁹ Of course, the extent of this loophole, and thus the courts’ ability to engage in extensive procedural review, will vary from one organic statute to the next. But vague statutory requirements that the rulemaker hold a “hearing,” a “public hearing,” or provide a “statement of reasons” should provide ample opportunity for judicial creativity.¹⁹⁰

Even where Congress has constructed elaborate rulemaking schemes which go far beyond those of the APA, courts have not hesitated to plug procedural gaps which threaten the fairness, effectiveness, or ac-

185. *Id.* at 535-37.

186. *Id.*

187. See, for example, the court’s reference to the need for adversarial comment as a key to effective judicial review and its reliance on some, apparently nonconstitutional, undefined notion of fairness as bases for its procedural remand. *Id.* at 534-36.

188. *Id.* at 542 n.63.

189. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *Association of Nat’l Advertisers v. FTC*, 617 F.2d 611 (D.C. Cir. 1979).

190. There may already be some limitations on what procedures a court may impose by interpretation of the agency’s organic statute given the Supreme Court’s reluctance to countenance frequent invocation of the APA’s formal rulemaking procedures. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973). But, as Judge Scalia has noted, this “loophole” in the *Vermont Yankee* proscriptions on procedural review is one which only can be narrowed by the Court on a “case-by-case” basis. Scalia, *supra* note 6, at 396.

countability of the rulemaking process. In *Sierra Club v. Costle*,¹⁹¹ the court sought to protect the “integrity” of the rulemaking process by holding the agency to rulemaking procedures specifically outlined in the Clean Air Act or “glean[ed] by inference from the procedural framework provided in the statute.”¹⁹² Though the court ultimately rejected the procedural attacks leveled at the EPA’s notice of proposed rulemaking, its acceptance of comments filed after the close of the official comment period, and its post-comment meetings with non-agency personnel, it did so only after assuring itself that the agency had not violated procedural standards which were “reasonably inferable from [the statutory procedures] or from basic notions of constitutional due process.”¹⁹³

Other courts, apparently finding resort to the agency’s organic statute unavailing, have resorted to *Vermont Yankee’s* own formula for judicial imposition of extra-statutory rulemaking procedures. As noted earlier, the Supreme Court’s restrictions on procedural review of informal rulemaking do not prevent a court from requiring procedures which may be mandated by either constitutional concerns or “extremely compelling circumstances.”¹⁹⁴ While a few courts have ventured into the murky waters of these vague exceptions, the results have done little to clarify their content.

In *Association of National Advertisers v. FTC*,¹⁹⁵ the Court of Appeals for the District of Columbia reversed a district court ruling disqualifying Commissioner Michael Pertschuk from participation in an FTC rulemaking proceeding on grounds of bias. While the court refused to find that Commissioner Pertschuk’s pre-rulemaking conduct required his recusal from the upcoming rulemaking proceeding, it nonetheless held that participants in all agency rulemaking proceedings have a “right to fair and open proceedings [and] that right includes access to an impartial decisionmaker.”¹⁹⁶ Unable to find such a procedural guarantee in either the APA¹⁹⁷ or the FTC’s organic statute,¹⁹⁸

191. 647 F.2d 298 (D.C. Cir. 1981).

192. *Id.* at 396-97.

193. *Id.* at 392.

194. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978).

195. 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

196. *Id.* at 1174.

197. *Id.* at 1168-69 & n.39; 5 U.S.C. § 553 (1982); *see also* *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1179 & n.151 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

the court concluded that due process mandated a rulemaking proceeding free from decisional bias. Though the court was acutely aware that rulemakers could not be held to the same standards of neutrality expected of administrative adjudicators and judges, it found that due process required the recusal of a rulemaker clearly and convincingly shown to have "an unalterably closed mind on matters critical to the disposition of the proceeding."¹⁹⁹

This constitutional test for bias in rulemakers has been utilized in a number of other cases since *Vermont Yankee*,²⁰⁰ continuing the confusing practice of some reviewing courts of resorting to constitutional standards when examining rulemaking procedures.²⁰¹ It has long been a central premise of administrative law that due process has little, if any, relevance to the procedural aspects of informal rulemaking.²⁰² Even *Vermont Yankee's* reference to constitutional constraints on rulemaking was limited to those rare situations in which an agency seeks to disguise an adjudicative purpose in legislative garb.²⁰³ Yet both before and after *Vermont Yankee*, reviewing courts repeatedly have resorted to "basic notions of due process"²⁰⁴ when called upon to resolve certain procedural challenges to informal rulemaking. Unfortunately, none of these courts have ever offered a clear explanation of exactly when and how procedural due process might serve to constrain informal agency rulemakers. Is there, for example, some minimum constitutional stan-

198. While the court noted that it had to devise and apply a standard for disqualification which was "consistent with the structure and purposes of section 18 [of the Magnuson-Moss Act]," 627 F.2d at 1166, its focus on the agency proceeding as a non-formal rulemaking proceeding rather than some sort of *sui generis* type of agency proceeding, *id.* at 1166-70, gives its opinion precedential value beyond the context of FTC "hybrid" rulemaking.

199. *Id.* at 1170.

200. See, e.g., *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1172-80 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1208-10 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

201. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

202. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). See also *Sierra Club v. Costle*, 657 F.2d 298, 392 n.462 (D.C. Cir. 1981).

203. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 542 (1978).

204. See cases cited *supra* notes 195, 200 & 201. See also *Sierra Club v. Costle*, 657 F.2d 298, 392 (D.C. Cir. 1981); *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345 (D.C. Cir. 1978); *United States Lines, Inc. v. FMC*, 584 F.2d 519 (D.C. Cir. 1978).

dard of fair play which must guide administrative rulemakers? Absent a more definitive statement by the Supreme Court concerning the existence or scope of any such constitutional restraints on agency rulemakers, it appears that resort to due process may well provide reviewing courts with yet another rationale for the imposition of extra-statutory rulemaking procedures in the post-*Vermont Yankee* era.²⁰⁵

Only a very few cases have explored the Supreme Court's concession in *Vermont Yankee* that "extremely rare . . . [and] compelling circumstances"²⁰⁶ might well justify the judicial imposition of extra-statutory procedures. While none of these cases provides guidelines as to the full scope of this exception, the courts have interpreted it to allow for remands to agency decisionmakers when the procedures chosen by the agency undermine the courts' ability to conduct an effective substantive review of an agency's decision.²⁰⁷

In *Independent U.S. Tanker Owners Committee v. Lewis*,²⁰⁸ the D.C. Circuit reviewed an informal adjudication by the Maritime Administration (MarAd) lifting certain competitive restrictions on the use of a merchant marine vessel constructed with government subsidies. While purporting to find substantive flaws in MarAd's action, the court's decision setting aside the agency's order was primarily based on procedural grounds.²⁰⁹ Despite the inapplicability of the APA,²¹⁰ the lack of any statutorily mandated procedures,²¹¹ and "the Supreme Court's dictum in [*Vermont Yankee*] that courts may not add to the procedural requirements of the APA except in 'extremely rare circumstances,'"²¹² the court nonetheless felt "justified in demanding some sort of procedures for notice and comment and a statement of reasons as a necessary means of carrying out [its] responsibility for a thorough and searching

205. See *supra* note 204; see also *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

206. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524, 543 (1978).

207. See, e.g., *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982); *Illinois v. United States*, 666 F.2d 1066 (7th Cir. 1981); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). See also *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980).

208. 690 F.2d 908 (D.C. Cir. 1982).

209. *Id.* at 926-31.

210. *Id.* at 922.

211. *Id.*

212. *Id.* at 923.

review.”²¹³ The court noted that “some minimum procedures are necessary to provide a record adequate for the court to perform its review.”²¹⁴ The court went on to find MarAd’s failure to disclose staff reports upon which it had relied and its failure to provide an adequate explanation for its decision to be “totally unacceptable.”²¹⁵ Citing the benefits of adversarial comment to judicial review of agency action and informed agency decisionmaking,²¹⁶ the court directed the agency to “permit a new round of comments [on the previously undisclosed data] and publish a thorough and reasoned explanation for whatever decision is reached.”²¹⁷

In *Illinois v. United States*,²¹⁸ the Seventh Circuit also had occasion to apply *Vermont Yankee*’s “extremely compelling circumstances” exception in reviewing an informal ICC adjudication on the abandonment of a railroad line. Like the D.C. Circuit in *Tanker Owners Committee*, the Seventh Circuit concluded that its own needs as a reviewing court justified a judicial remand for further procedures. The court held that the ICC had abused its procedural discretion in refusing to allow the parties the right of cross-examination with regard to certain supplementary data provided to the agency.²¹⁹ The court based its action primarily upon the fact that authorized cross-examination of similar evidence presented at an initial hearing on the matter had thoroughly discredited that evidence, and upon the fact that the ICC had given no indication as to why mere written procedures were sufficient to resolve serious questions about the reliability of the newly received evidence. The unique circumstances and adjudicative nature of *Illinois v. United States* probably serve to limit its precedential value. But it nonetheless stands as an example of how courts may interpret the “extremely compelling circumstances” exception to *Vermont Yankee* in the context of agency rulemaking. The court remanded for cross-examination with respect to certain factual issues, noting that “[o]nly by knowing that the parties here had the opportunity for cross-examination, can a reviewing court be assured that the ICC was relying on permissible

213. *Id.*

214. *Id.* at 922.

215. *Id.* at 926.

216. *Id.* at 925-26.

217. *Id.* at 931.

218. 666 F.2d 1066 (7th Cir. 1981).

219. *Id.* at 1083.

evidence.”²²⁰

An interpretation of the “compelling circumstances” exception which focuses on the relationship between the procedures used by an agency to resolve certain types of issues and the needs of reviewing courts was also suggested by Judge Skelly Wright in an earlier case involving agency rulemaking. In *Lead Industries Association, Inc. v. EPA*,²²¹ Judge Wright rejected an argument that compelling circumstances justified judicial remand to the EPA for cross-examination of medical and scientific witnesses who had testified in support of proposed air quality standards. The petitioner had argued that “in some situations ‘cross-examination of live witnesses on a subject of critical importance which could not be adequately ventilated under the general procedures’ may be appropriate even though not required by statute.”²²² Petitioners sought to supplement the agency’s rulemaking record with additional information presenting a rebutting view on the technical issues, presumably in an effort to create some doubt in the mind of the reviewing court as to the reliability or sufficiency of the evidence supporting the EPA’s new standards. The court rejected petitioner’s request on the basis of legislative history reflecting “Congress’ judgment that the crucial issues in these standard-setting proceedings can be ‘adequately ventilated’ without providing an opportunity for cross-examination.”²²³ The court went on to assume, however, albeit only “for purposes of argument,”²²⁴ that the need to enhance the rulemaking record on certain issues might constitute an “extremely compelling circumstance” justifying the judicial requirement of cross-examination.²²⁵ While Judge Wright ultimately concluded that petitioner had failed to demonstrate the necessity for cross-examination given the broad comment and rebuttal opportunities actually afforded, his willingness to entertain such an argument is significant. Would the absence of similar comment and rebuttal procedures permit reviewing courts to require cross-examination on crucial factual issues in order to insure an adequate record for judicial review of an agency’s rule?

If these three cases are any indication of how the courts are going to

220. *Id.*

221. 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

222. *Id.* at 1169 (citing *International Harvester Corp. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C. Cir. 1973)).

223. *Id.* at 1170.

224. *Id.*

225. *Id.* at 1170-71 & n.120.

construe the "compelling circumstances" exception to the restrictive dicta of *Vermont Yankee*, it may well be that the exception is destined to swallow the "rule" of *Vermont Yankee*. The opinions in all three cases bear a striking resemblance to many decisions of the last decade which relied solely upon judicial perceptions of the need to insure effective judicial review as justification for the imposition of extra-statutory procedures.²²⁶ The "rule" of *Vermont Yankee* was specifically aimed at discrediting such a free-wheeling approach to procedural review of informal agency action.

Justice Rehnquist's opinion in *Vermont Yankee* may well have inadvertently opened the door to yet another avenue of escape from its limitations on procedural review. While *Vermont Yankee* places severe restrictions on the ability of reviewing courts to order the use of rulemaking procedures in excess of congressional requirements, it nonetheless reconfirms the duty of courts to remand rules which lack sufficient substantive justification to be valid exercises of agency authority.²²⁷ Such substantive remands are often prompted by the inability of a reviewing court to find adequate support in the rulemaking record for the agency's findings and conclusions.²²⁸ Thus, after *Vermont Yankee*, courts have remanded agency rules when, in one student commentator's words:

- (1) [the rulemaking record] does not specifically respond to the challenger's criticisms, (2) . . . does not provide adequate support for the rule, (3) [when] the court needs a more complete record to understand the agency's decisionmaking process, or (4) [when] the agency did not provide all the information it relied on in the record.²²⁹

It has been suggested that such remands, though ostensibly substantive in nature, and thus in conformity with *Vermont Yankee*, are primarily

226. See, e.g., *Natural Resources Defense Council v. NRC*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1264 (D.C. Cir. 1973); *International Harvester Corp. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

227. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549 (1978).

228. See, e.g., *American Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom. Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980); *Associated Indus. v. United States Dep't of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549 (1979) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1973).

229. Note, *Counter Revolution in the Federal Courts of Appeal—The Aftermath of Vermont Yankee*, 15 U. RICH. L. REV. 723, 730 (1981).

intended to induce the use of further or different rulemaking procedures which will supply the court with a "more adequate record" for review.²³⁰ Thus, the argument goes, courts which utilize such remands are indirectly, but inevitably, imposing extra-statutory rulemaking procedures upon agencies in violation of *Vermont Yankee*.²³¹ While it probably goes too far to suggest that all such substantive remands actually represent instances of judicial dissatisfaction with agency procedures,²³² there is certainly evidence that courts can utilize this loophole²³³ in an effort to influence the procedural choices of rulemakers.

One example of this type of remand is *National Lime Association v. EPA*.²³⁴ In *National Lime*, the United States Court of Appeals for the District of Columbia remanded the EPA's air pollution emission limitations for new lime manufacturing plants after finding "inadequate support in the administrative record."²³⁵ While the court's holding seems substantive in nature, its opinion makes it very clear that the court's difficulties with the rules stemmed primarily from perceived shortcomings in the EPA's rulemaking procedures. After an extensive discussion of the substantive problems with the rules, the court pointedly noted that most of these substantive inadequacies could have been avoided had the EPA's notice of proposed rulemaking been more complete,²³⁶ its public hearing procedures more inquisitive,²³⁷ and its explanation for the basis of the rules more responsive to public comment.²³⁸ As it was, the EPA's failure to develop a rulemaking record containing adequate data, analysis, and explanation led the court to conclude that the rulemaking process had been "arbitrary"²³⁹ and far from the "reasoned decisionmaking" expected of rulemakers.²⁴⁰ The court's remand to the agency refrained from directly imposing any

230. *Id.* See also Byse, *supra* note 87, at 1827; Williams, *supra* note 43, at 454.

231. See Note, *supra* note 229, at 732.

232. See, e.g., *Natural Resources Defense Council v. NRC*, 547 F.2d 633, 658 (D.C. Cir. 1976) (Tamm, J., concurring), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1979); cases cited *supra* note 228.

233. See Note, *supra* note 229, at 732.

234. 627 F.2d 416 (D.C. Cir. 1980).

235. *Id.* at 422.

236. *Id.* at 434.

237. *Id.* at 427 n.38, 442-43.

238. *Id.* at 443, 453-54.

239. *Id.* at 444.

240. *Id.* at 430, 451-53 & n.126, 455.

particular rulemaking procedure upon the EPA,²⁴¹ and even acknowledged that the agency could simply prepare a better explanation for the substantive problems identified by the court.²⁴² But the opinion strongly and repeatedly suggests that the EPA's time would be better spent in reopening the rulemaking proceeding rather than attempting to justify the rules on the current state of the record.²⁴³

The court's holding in *National Lime* probably does fall technically within the guidelines for judicial review established by the Supreme Court in *Vermont Yankee*. The court did not, after all, require the use of specific extra-statutory rulemaking procedures upon remand. But the case so clearly links the substantive and procedural aspects of rulemaking that the agency is given no choice but to review and revise its procedural format upon remand in order to conform to the court's notion of the appropriate rulemaking procedures. While the court ostensibly focuses on the substantive adequacy of the rulemaking record, it clearly believes that this facet of a rulemaking record will be significantly influenced by the procedures used to generate that record. The existence of such a relationship between substance and procedure was expressly rejected in *Vermont Yankee*, when the Court stated that "the adequacy of the 'record' in this type of proceeding is not correlated directly to the type of procedural devices employed."²⁴⁴ Nonetheless, the court in *National Lime* noted that its standard for judicial review of rulemaking required a demonstration that the agency had taken a "hard look" at the issues involved before promulgating its rules,²⁴⁵ a

241. *Id.* at 455.

242. *Id.* at 434, 446, 455.

243. EPA had promulgated both a particulate emission and an opacity standard to govern exhaust gas emissions from new or modified lime-manufacturing facilities. The court held that there was inadequate support in the record to demonstrate that either standard could be achieved. *Id.* at 431, 434, 445, 449-50. In its remand the court suggested that neither standard could be justified without "supplementary data," *id.* at 434, or some "amplification of the record," *id.* at 449. Indeed, the court observed that its remand of the particulate emission standard would give the EPA an "opportunity to consider the . . . standard more fully in light of the additional material and more elaborate arguments relating to the achievability of the standard . . . that were first submitted . . . to this court." *Id.* at 446. Presumably the "consideration" was to take place in a re-opened rulemaking proceeding. With respect to the opacity standard, the court's remand flatly suggests a revision. *Id.* The court's prescription for the "reasoned decisionmaking" it expected on remand contained a number of procedural elements which EPA had failed to include in its original rulemaking proceeding. *Id.* at 442, 453.

244. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 547 (1978).

245. 627 F.2d at 451.

“hard look” with both substantive and procedural requirements. Citing earlier cases reviewing administrative rulemaking under this “hard look” standard, the court found

a [judicial] concern that variables be accounted for, that the representativeness of test conditions by [sic] ascertained, that the validity of the tests be assured and the statistical significance of results determined. Collectively, these concerns have sometimes been expressed as a need for “reasoned decision-making” and sometimes as a need for adequate “methodology.” However expressed, these more substantive concerns have been coupled with a requirement that assumptions be stated, that process be revealed, that the rejection of alternate theories or abandonment of alternate courses of action be explained and that the rationale for the ultimate decision be set forth in a manner which permits the public to exercise its statutory prerogative of comment and the courts to exercise their statutory responsibility upon review.²⁴⁶

Such an approach to substantive judicial review of agency rulemaking does not bode well for the rulemaker whose procedural choices have merely tracked the statutory commands of the APA. Strictly interpreted, section 553 simply does not require that the agency’s notice or explanation for informal rulemaking be as comprehensive or detailed as the court in *National Lime* seems to demand. And if, as *National Lime* suggests, rulemaking records must contain “sufficient data to demonstrate a systematic approach to problems,”²⁴⁷ it may well be that this “hard look” substantive review will also force agencies to employ public comment procedures which enhance their ability to gather and evaluate rulemaking data, procedures which go beyond the single round of written comments mandated by the APA.²⁴⁸

In many ways the approach to judicial review of rulemaking taken by *National Lime* resembles Professor Byse’s suggestion that reviewing courts employ a “hard look” substantive review coupled with a *Chenery I*-type remand to induce the use of further agency-chosen procedures rather than engage in a review which imposes judicially specified procedures.²⁴⁹ In *National Lime*, however, the court went beyond Professor Byse’s suggestions and, in the course of its remand, attempted to

246. *Id.* at 452-53.

247. *Id.* at 454.

248. See, for example, the procedures outlined in the text accompanying notes 330-32 *infra*. See also *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); Williams, *supra* note 43, at 445-56.

249. See Byse, *supra* note 88, at 1827.

provide the agency with some guidance as to the procedural improvements which the court felt would help resolve the substantive problems with the rule.²⁵⁰ This procedural addendum to a *Chenery I*-type remand reflects a recognition of a functional relationship between the substantive adequacy of a rulemaking record and the procedures chosen to promulgate the rule, a relationship which *Vermont Yankee* clearly rejects.²⁵¹

Even when coupled with procedural guidance, however, a response to *Vermont Yankee* which places primary reliance on a "hard look" substantive review fails to resolve some difficult issues. There are those, for example, who feel that "hard look" substantive review represents an unwarranted intrusion into the discretion of administrative agencies.²⁵² These observers have called for a more deferential review of substantive rulemaking issues.²⁵³ In addition, even assuming the legitimacy of "hard look" substantive review, the courts employing this type of analysis have failed to provide any clear and workable standard for assessing the substantive adequacy of a rulemaking record,²⁵⁴ raising the spectre of an ad hoc approach to review of agency rulemaking.²⁵⁵ Finally, it is discomfoting to embrace an approach to judicial review of informal rulemaking which attempts to evade the strictures of *Vermont Yankee* by disguising obvious procedural concerns in substantive array. Surely the importance of the issues and problems raised by *Vermont Yankee's* restrictions on judicial review of rulemaking requires a more candid approach.

A number of other courts have taken *Vermont Yankee* at its word that reviewing courts may always require agency compliance with the APA's rulemaking provisions.²⁵⁶ The issue for these courts is determining just what procedures are in fact required by the APA. These courts take a "hard look" at the APA, and, after examining its purposes and goals, give its procedural requirements an expansive and more

250. 627 F.2d at 453.

251. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 547 (1978).

252. See, e.g., Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1833, 1840 (1978); Verkuil, *supra* note 85, at 419, 424.

253. See *supra* note 252.

254. See Stewart, *supra* note 7, at 1819.

255. See *id.*

256. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978).

functional interpretation.²⁵⁷

This approach to procedural review of agency rulemaking is certainly not new. In the years preceding *Vermont Yankee*, several courts took a broad view of the procedural requirements of the APA,²⁵⁸ and *Vermont Yankee* apparently has done little to abate judicial enthusiasm for this technique. Focusing on the notice requirements of section 553, post-*Vermont Yankee* courts have routinely interpreted the APA to require detailed notices of proposed rulemaking,²⁵⁹ agency disclosure of significant post-notice data,²⁶⁰ public access to pertinent *ex parte* communications,²⁶¹ and even a second round of public comment when an agency intends to make some significant and unforeshadowed change in its initial rulemaking proposal.²⁶² *Vermont Yankee* has similarly failed to deter courts from requiring that an agency's statement of the basis and purpose of a rule present a clear, complete, and accurate explanation of how the agency has resolved the factual, legal, and policy issues involved in the proceeding.²⁶³ While these interpretations of the APA's informal rulemaking provisions certainly go beyond the literal commands of the statute, they have become accepted standards in the continued judicial review of agency rulemaking procedures.²⁶⁴

The articulated justifications for these expansive judicial interpretations of the APA vary. Surprisingly few courts have sought support for their constructions in the legislative history of the APA,²⁶⁵ though ar-

257. See, e.g., *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir.), cert. denied, 103 S. Ct. 79 (1982); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

258. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

259. See, e.g., *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir.), cert. denied, 103 S. Ct. 79 (1982); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221-27 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); *Kollett v. Harris*, 619 F.2d 134, 144 & n.13 (1st Cir. 1980).

260. See, e.g., *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028-31 (D.C. Cir. 1978).

261. See, e.g., *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345, 351 (D.C. Cir. 1978); *United States Lines v. FMC*, 584 F.2d 519, 542 (D.C. Cir. 1978); *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659-61 (D.D.C. 1978).

262. See, e.g., *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 643-44 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978).

263. See, e.g., *Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1215-16 (D.C. Cir. 1983); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir.), cert. denied, 103 S. Ct. 79 (1982); *PPG Indus. v. Costle*, 630 F.2d 462, 467 (6th Cir. 1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024 n.11 (D.C. Cir. 1978).

264. See *Scalia*, *supra* note 6, at 394-96.

265. Compare *Batterton v. Marshall*, 648 F.2d 694, 703 n.47 (D.C. Cir. 1980) (citing legislative history of APA on purpose of public participation in rulemaking) and *BASF Wyandotte Corp. v.*

guably such support is plentiful.²⁶⁶ Some courts find such broad interpretations necessary to effectuate the purposes and goals of notice and comment rulemaking. In *Connecticut Light and Power Co. v. NRC*,²⁶⁷ the D.C. Circuit defined the requirements of an adequate notice of proposed rulemaking in very practical and functional terms, noting that [t]he purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of the proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making. In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.²⁶⁸

In addition, the court discussed the APA's requirement for a concise general statement of the basis and purpose of the rule, reminding the agency of its procedural duty to spare a reviewing court the "task of rummaging through the record to elicit a rationale of its own."²⁶⁹ These functional interpretations of the APA view the entire process of notice and comment rulemaking as a method of enhancing the effectiveness of agency decisionmaking, providing the agency with "[s]uggestions from informed sources [which] are especially valuable when [an] agency must implement a complex and technical statute."²⁷⁰

Other courts have justified expansive interpretations of the APA as essential to the assurance of rational agency decisionmaking.²⁷¹ For

Costle, 598 F.2d 637, 642 n.4 (1st Cir. 1979) (citing legislative history of APA on scope of notice in rulemaking) with *Connecticut Power & Light Co. v. NRC*, 673 F.2d 525, 530-34 (D.C. Cir.) (discussing scope of rulemaking notice without any citation to legislative history of APA), *cert. denied*, 103 S. Ct. 79 (1982) and *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024-31 (D.C. Cir. 1978) (discussing the procedural requirements of informal rulemaking without reference to the legislative history of APA) and *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659-61 (D.D.C. 1978) (discussing prohibitions on ex parte contacts in informal rulemaking without reference to legislative history of APA).

266. See, e.g., *infra* text accompanying notes 301-03.

267. 673 F.2d 525 (D.C. Cir. 1982).

268. *Id.* at 530.

269. *Id.* at 535 (citing *United States ex rel. Checkman v. Laird*, 469 F.2d 773, 783 (2d Cir. 1972)).

270. *Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419, 426 (2d Cir. 1982).

271. See *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979), *cert. denied*, 444

these courts, the procedural framework in which rulemaking occurs provides the primary, if not exclusive, guarantee that the agency has acted properly.²⁷² Doubting the efficacy of any substantive judicial review, these courts are

[w]illing to entrust the Agency with wide-ranging regulatory discretion, and even, to a lesser extent, with an interpretive discretion vis-à-vis its statutory mandate, so long as we are assured that its promulgation process as a whole and in each of its major aspects provides a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations.²⁷³

Under this reasoning, the substantive validity of any rule is primarily assessed in terms of the rule's ability to clear procedural hurdles which subject the rule to the careful scrutiny of an informed public.²⁷⁴ Substantive "hard look" review of agency rulemaking by courts is discounted in favor of a "strict" procedural review geared to insure that the *public* has had a meaningful opportunity to take a "hard look" at the rule.²⁷⁵ It is small wonder that, in the eyes of these courts, the rulemaking provisions of the APA must embody a considerable degree of "openness, explanation, and participatory democracy."²⁷⁶

Like the suggestions of Judges Wright and Scalia,²⁷⁷ these broad, instrumental interpretations of the APA's notice and comment rulemaking procedures promise to correct some of the current procedural inadequacies of informal rulemaking. Though one may perhaps take issue with some of the assumptions which underlie these constructions of the APA,²⁷⁸ congressional inertia and the practical realities of rulemaking necessitate this more functional approach to rulemaking procedures. An expansive interpretation of the notice and comment rulemaking provisions is vital for the preservation of the procedural

U.S. 1096 (1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978); *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659-61 (D.D.C. 1978).

272. See *AFL-CIO v. Marshall*, 617 F.2d 636, 651-52 (D.C. Cir. 1979); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978); *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659 (D.D.C. 1978).

273. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

274. See *id.* See also authorities cited *supra* note 59.

275. See, e.g., *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

276. *Id.*

277. See Scalia, *supra* note 6, at 394-95; Wright, *supra* note 29, at 380-81.

278. See, e.g., Byse, *supra* note 88, at 1827.

values which legitimize agency rulemaking.²⁷⁹

IV. A SUGGESTED APPROACH TO JUDICIAL REVIEW OF INFORMAL RULEMAKING PROCEDURES

It is not surprising that neither the lower courts nor the academic community have found it possible to adhere to the formula for judicial review of informal rulemaking procedures outlined in *Vermont Yankee*. If the literal requirements of section 553 of the APA really do mark the extent of the procedures which can be imposed upon rulemakers by reviewing courts, modern rulemaking will face formidable challenges to its very legitimacy as a regulatory tool.²⁸⁰ When viewed in light of the normative values which underlie informal rulemaking, use of the bare-boned procedural format of section 553 will rarely prove adequate in a modern regulatory context. Thus, by one method or another, courts and commentators alike have sought to require or induce agencies to supplement the APA's informal rulemaking procedures. Some have suggested that *Vermont Yankee* should be ignored,²⁸¹ and a number of courts seem to have done just that.²⁸² This is surely an unacceptable response to an issue of such importance to the administrative process. There must be some attempt to accommodate the concerns of *Vermont Yankee* with the need for more adequate rulemaking procedures. As has been demonstrated, however, the search for a comprehensive and consistent theory for judicial review of agency rulemaking procedures continues. The various approaches offered so far seem either incomplete, underdeveloped, or inadequate. Until such a theory presents itself, judicial intrusion into the procedural choices of rulemakers will continue to suffer legitimate criticism as either disguised, ad hoc, or inappropriate judicial meddling.

To survive *Vermont Yankee* unscathed by such criticism, a theory of procedural review must present a rationale for a required uniform rulemaking procedure which will be flexible enough to meet the demands of a melange of regulatory contexts, yet precise enough to offer

279. See *infra* text accompanying notes 284-396.

280. See *supra* text accompanying notes 76-77. See also S. REP. NO. 305, 97th Cong., 1st Sess. 6-9 (1981).

281. See Davis, *supra* note 7, at 17.

282. See, e.g., *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir.), cert. denied, 103 S. Ct. 79 (1982); *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

rulemakers some certainty that their efforts will not be constantly remanded for procedural error. In addition, and perhaps most importantly, any such theory of judicial review of rulemaking procedures must find its origin at least in the spirit, if not the letter, of the APA. If, as *Vermont Yankee* has decreed, the APA establishes firm boundaries for the procedural review of rulemaking, then any theory of active judicial supervision of rulemaking procedure must turn inward from those boundaries and trace its roots to the statute, its legislative history, its purposes, and its values.

This section suggests such a theory. It draws from the ideas, intimations, and rationales of others, but represents an attempt to draw these separate strands together into a balanced and comprehensive approach to judicial review of informal rulemaking procedures. The theory rests upon four premises. First, while strict allegiance to the literal commands of the APA's procedural requirements of section 553 will, in most situations, provide an administratively efficient framework for rulemaking, it will jeopardize the fairness, effectiveness, and accountability of that process. Second, reliance on substantive judicial review, no matter how intensive, cannot compensate for the normative deficiencies which result from a literal approach to the APA's rulemaking procedures. Third, except to the extent that certain procedures may be required by law, rulemakers should have the discretion to employ those rulemaking procedures which they feel are best suited to both the particular rulemaking context and the agency's available resources. Last, reviewing courts have not only the responsibility to impose those rulemaking procedures required by a normative interpretation of the APA's rulemaking provisions, but also the authority to review the procedural judgments of agencies with respect to the need for additional discretionary rulemaking procedures.

Judicial review of rulemaking procedures should afford deference to the procedural expertise of rulemakers. It should, however, also seek to preserve the integrity of agency rulemaking by insuring that both required and discretionary rulemaking procedures reflect the normative values which should characterize all administrative rulemaking. The following section begins with an outline of those procedures which would be required by a normative interpretation of section 553 and which consequently should be considered standard procedure in all informal rulemaking situations. The section concludes with a suggested framework for judicial review of the procedural discretion of

rulemakers.²⁸³

A. Procedures Required by Law in all Informal Rulemaking Proceedings

1. Notice

Section 553(b) of the APA requires that:

[g]eneral notice of proposed rulemaking . . . shall include

(1) a statement of the time, place, and nature of public rulemaking proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.²⁸⁴

Properly interpreted in light of the procedural values of informal rulemaking, this provision of the APA would require a rulemaker to publish a detailed notice of her proposed rulemaking, to provide for continuous disclosure during the proceeding of all data or argument relevant to the proposed rulemaking, and to establish a public docket or file for each rulemaking proceeding.

a. The Content of the Rulemaking Notice

The notice of proposed rulemaking which is published in the *Federal Register* should contain a clear and comprehensive statement of the purpose of the rulemaking proceedings, that is, a statement of the issues sought to be resolved and the agency's current objectives.²⁸⁵ The published notice also should contain any draft of the specific rule which the agency proposes to adopt; a summary of the factual data, research methods, studies, and reports which the agency has already relied upon or intends to rely upon during the proceeding; a statement outlining the legal interpretations or policy considerations which the agency believes are relevant to the rulemaking; and an explanation of how the agency has arrived at its initial findings and proposals in light of its data, the relevant law, and agency policy.²⁸⁶ If the agency has already consid-

283. See *infra* text accompanying notes 396-428.

284. 5 U.S.C. § 553(b) (1982).

285. See S. REP. NO. 305, 97th Cong., 1st Sess. 21 (1981); see also *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).

286. See S. REP. NO. 305, 97th Cong., 1st Sess. 21-23 (1981); S. REP. NO. 284, 97th Cong., 1st Sess. 117 (1981). See also *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C.

ered and rejected other proposals or other approaches to the issues, the notice should so state and provide, at least by reference, some explanation for the agency's conclusions.²⁸⁷ Finally, the notice should specify the statutory authority and procedures for the rulemaking,²⁸⁸ together with information detailing how the public may inspect or copy any documents and materials summarized or referred to in the notice.

While such a detailed notice requirement has been incorporated into the rulemaking sections of recent regulatory statutes²⁸⁹ and many of the proposed revisions to the APA,²⁹⁰ a judicially imposed duty to provide such notice need not be based upon legislative amendment to the APA. Even after *Vermont Yankee*, a reviewing court legitimately can require such procedures simply by interpreting the textual requirements of the APA in a way which is sensitive to the purposes of notice and comment rulemaking and the procedural values which should characterize such rulemaking.²⁹¹ Courts should find that in most rulemaking contexts such detailed notice is required if the proceeding is to be not only efficient, but effective and fair as well.²⁹²

While detailed notice of rulemaking can promote and enhance the effectiveness of rulemaking in a number of ways,²⁹³ in at least one respect such notice may be vital to the effectiveness of rulemaking. If the

Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1982); Wright, *Informal Rulemaking*, *supra* note 154, at 63; Wright, *supra* note 29, at 380-81.

287. See *National Lime Ass'n v. EPA*, 627 F.2d 416, 453 (D.C. Cir. 1980); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 738-39 (D.C. Cir. 1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, J., concurring).

288. 5 U.S.C. § 553(b) (1982).

289. See, e.g., *Clean Air Act*, § 307, 42 U.S.C. § 7607(d)(3) (1982).

290. See, e.g., S.1080, § 3, 97th Cong., 2d Sess., 128 CONG. REC. S2713-14 (daily ed. Mar. 24, 1982).

291. See Wright, *supra* note 29, at 380-81; Wright, *Informal Rulemaking*, *supra* note 154, at 63. See also S. REP. NO. 305, 97th Cong., 1st Sess. 15 (1981).

292. See S. REP. NO. 305, 97th Cong., 1st Sess. 15, 21, 23 (1981); S. REP. NO. 284, 97th Cong., 1st Sess., 120 (1981).

293. A requirement of detailed notice of informal rulemaking will provide an incentive to the agency to conduct the preliminary, nonpublic stages of the rulemaking process in a careful and disciplined fashion. A notice requirement which forces the agency to publicly disclose the reasoning which has led to its proposed rule will encourage comprehensive investigation, careful choice and use of methodological techniques, and a clear and organized approach toward the regulatory problem. It may be that much of the regulatory delay attributed to public rulemaking proceedings and judicial review thereof is caused by agencies beginning the rulemaking process with only a very tentative appreciation of the nature and scope of the issues involved. A detailed notice of informal rulemaking requires the agency to demonstrate a rational and effective institutional approach to each rulemaking process.

purpose of public rulemaking is to allow the public to inform and educate the rulemaker, the public should be made fully aware of the agency's current thinking on the problem.²⁹⁴ An agency requests public comment on a particular issue or rule in order to elicit information confirming or criticizing the agency's proposed solution to the problem or suggesting alternative approaches.²⁹⁵ Presumably, the notice of proposed rulemaking invites a broad range of independent public analysis in an effort to reach not just a rational solution to the regulatory problem, but the best solution to that problem. Public rulemaking thus assumes that agency expertise is never infallible. It is entirely possible that a proposed rule may be based upon incomplete or inaccurate data, or that the agency's analysis of that data may be somehow flawed. Moreover, the agency's factual or legal inferences may be questionable and its reasoning faulty or short-sighted. Left uncorrected, such errors would threaten not only to skew the agency's initial perception of the issues, but also to color its evaluation of the public's comments on the proposed rule. Under these circumstances the agency's rule certainly cannot be expected to reflect the best solution, and may not even represent a rational solution to the problem. Effective rulemaking, in order to minimize such risks, requires notice of rulemaking that clearly outlines the agency's objectives, its proposed rule, the factual and legal basis for that rule, and the agency's reasons for rejecting alternative proposals. Without such notice the agency deprives itself of the valuable opportunity to have its initial efforts scrutinized by members of the public with interest and expertise in the issues. Only with such detailed notice can those affected by the rule be relied upon to point out flaws in the agency's rejection of alternative approaches or in the factual or legal foundation for the agency's actual proposal. The public cannot offer informed or relevant comment on data or reasoning that is undisclosed or only vaguely revealed. And any potential threat to reg-

294. See *Council of Commuter Orgs. v. Gorsuch*, 683 F.2d 648, 655-56 (2d Cir. 1982); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980); *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

295. See *supra* note 294; Wright, *Informal Rulemaking*, *supra* note 154, at 63; Wright, *supra* note 27, at 380-81. See also *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977); *South Terminal Corp. v. EPA*, 504 F.2d 646, 660 (1st Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 170-71 (6th Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631-32 (D.C. Cir. 1973).

ulatory efficiency posed by such detailed notice seems a reasonable price to pay for the very real benefits to be gained from more informed public comment.²⁹⁶

The practical relationship between rulemaking notices and the public's statutory right to comment on proposed agency rules would seem to require this detailed notice in order to insure procedural fairness in notice and comment rulemaking. The statutory right to comment guarantees the public an opportunity to participate in the formulation of rules, an opportunity to inform and influence the rulemaking process. Without adequate notice of what the agency proposes to do, that opportunity is jeopardized.²⁹⁷ A fair notice of proposed rulemaking seeks to effectuate and protect the opportunity for public comment and accomplishes that task only when it fully and accurately informs interested persons of the purpose, substance, and basis for the proposed agency rule. A notice which forces interested persons to reconstruct or guess at the factual or legal basis for an agency's proposal imposes unfair burdens on the interested public. There is simply no assurance that those affected by the rule will have the time, money, or expertise to ferret out vague or undisclosed assumptions, inferences, or findings that may underlie an agency's proposal. Without detailed notice, the ability to frame meaningful comment or criticism concerning the basic premises of the agency's rule is unnecessarily and unfairly constrained.²⁹⁸

296. Such detailed notice may open the door to public attacks on the agency's factual or legal analysis merely to delay regulatory action. But an agency need not consider or respond to irrelevant, insignificant or frivolous attacks. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) ("[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern."), *cert. denied*, 417 U.S. 921 (1974). There will undoubtedly be instances, however, where public groups will raise at least colorable objections to the agency's proposals in order to force a time consuming, though ultimately successful, agency defense of its proposal. Where the risk of such a delay would unduly hamper the agency's ability to carry out its duties or seriously impede emergency agency action, the APA allows the agency to forego all public procedure. Section 553(b)(B) states that the agency need not provide notice of or begin a public rulemaking proceeding "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1982). *See also* *National Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377 (2d Cir. 1978). Without "good cause," however, the agency will have to respond to such objections and endure what it may feel are unnecessary delays.

297. *See, e.g., Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

298. *See Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*,

Procedural fairness also requires that an agency's notice identify any significant alternative proposals which the agency may have already considered and explain why the agency may have rejected those proposals.²⁹⁹ Not only would this assist the public in understanding the agency's actual proposal, but it would also reduce the risk that valuable resources would be expended suggesting alternatives already found unacceptable by the agency. It might also provide those who favor such alternatives with their only opportunity to rebut the agency's rejection of that alternative.

Judicial interpretation of section 553 of the APA that requires comprehensive and detailed notices of proposed rulemaking does not distort the intent of the APA's drafters. The legislative history of the APA clearly reflects congressional recognition that an agency's published notice is vital to any rulemaking proceeding.³⁰⁰ Without a clear and definite indication of the nature and scope of the rulemaking, the public's participation in the rulemaking is "likely to be diffused and of little real value either to the participating parties or to the agency."³⁰¹ Congress intended rulemakers to "announce with the greatest possible definiteness the matters to be discussed in the rule making proceedings."³⁰² All that is proposed here is that rulemakers provide the public with as much information as possible about what it is the agency proposes to do, why the agency has made such a proposal, and how that proposal best serves to accomplish the agency's stated objective.

b. The Duty of Continuous Disclosure

An agency's duty to inform those affected by its rulemaking activities does not end with the publication of a detailed notice of proposed rulemaking. Rather, the APA's notice requirement can and should be interpreted to impose upon the agency the duty to provide continuous

103 S. Ct. 79 (1982). As Judge Mikva aptly stated: "To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport." *Id.*

299. See *National Lime Ass'n v. EPA*, 627 F.2d 416, 437-39 (D.C. Cir. 1980); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 738-39 (D.C. Cir. 1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, J., concurring).

300. FINAL REPORT, *supra* note 28, at 108; ATT'Y GEN. MAN., *supra* note 28 at 29-31; LEG. HIST., *supra* note 28, at 18, 200, 258.

301. LEG. HIST., *supra* note 28, at 18 (citing FINAL REPORT, *supra* note 28, at 108).

302. *Id.*

disclosure during the proceeding of all information pertinent to that proceeding. Thus, an agency's failure to notify the public when it contemplates substantial and significant alterations to its original proposal may constitute a violation of the APA's notice provisions.³⁰³ While both the statute and its legislative history are silent about any duty to recycle a rulemaking proceeding under such circumstances, it is unlikely that even the most ardent foes of procedural review in rulemaking would find fault with judicial remands of this sort. When the agency finds that its final rule is substantially different from its initial proposal and that these changes have not been adequately foreshadowed in a previous public notice,³⁰⁴ or during the rulemaking proceeding itself,³⁰⁵ the agency cannot validly promulgate the rule without further notice and comment. To do so would deprive the public of its statutory right to pre-promulgation notice and comment on the final rule,³⁰⁶ and consequently, its right to a fair and effective rulemaking process.

A normative interpretation of the APA would also require that agencies provide continuous disclosure of all data or argument received by the agency during the rulemaking proceeding, together with any relevant information which the agency obtains either outside the public rulemaking proceeding or after its public procedures have concluded. New data generated within the agency after its notice of proposed rulemaking should also be revealed.³⁰⁷ While *ex parte* communications received during rulemaking need not be forbidden under a normative interpretation of the notice provision of the APA, they should be immediately disclosed to the public along with a summary of their contents.³⁰⁸

303. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978); *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976). See generally *Rochvarg*, *supra* note 30, at 34 n.16.

304. See *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1018-21 (3d Cir. 1972); *Rochvarg*, *supra* note 30, at 10-11.

305. See, e.g., *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980).

306. See *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982); *Rochvarg*, *supra* note 30, at 3; Note, *supra* note 30, at 229.

307. See *Pedersen*, *supra* note 11, at 79; *Wright*, *supra* note 29, at 381; *Wright*, *Informal Rulemaking*, *supra* note 154, at 63. See also *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

308. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *Wright*, *Musings on Administrative Law*, 33 AD. L. REV. 177, 180-82 (1981).

The agency need not publish data or argument obtained after its notice of proposed rulemaking but should take care that the public is made aware of and has access to this information. The same analysis which concluded that procedural fairness and effectiveness require the detailed disclosure of pre-notice agency data would also require the agency to make any new, self-generated data available for public scrutiny. And if, as will be discussed later, a fair and effective rulemaking process will always provide interested persons with some opportunity to respond to the data, views, or arguments submitted by others,³⁰⁹ the public should also be given "notice" of all public comment received after the initial notice of proposed rulemaking. One cannot respond to materials of which one is unaware.

c. The Problem of Ex Parte Contacts

Perhaps the most difficult aspect of the duty of continuous disclosure concerns ex parte contacts. The case law and academic commentary on this subject reflect deep disagreement over the necessity and propriety of ex parte contacts in notice and comment rulemaking. Some authorities argue that ex parte contacts compromise the fairness and accountability of agency rulemaking.³¹⁰ Others assert that a total ban on ex parte contacts would seriously undermine the effectiveness of informal rulemaking.³¹¹ This latter group concludes that the realities of the regulatory arena firmly establish the need for continuous contact between the agency and outsiders, making a ban on such contact impractical and unwise.³¹²

A judicial interpretation of section 553 that imposes a duty upon rulemakers to disclose all ex parte communications in at least summary

309. See *infra* text accompanying notes 327-37.

310. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); Wright, *supra* note 308, at 181.

311. See I K. DAVIS, *supra* note 9, § 6:19, at 537; Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1563-64 (1980); Carberry, *Ex Parte Communication in Off-the-Record Administrative Proceedings: A Proposed Limitation of Judicial Innovation*, 1980 DUKE L.J. 65; Nathanson, *Report on Ex Parte Communications*, *supra* note 110, at 397-400. See also *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981).

312. [T]he importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981).

form could effectuate a reasonable accommodation between those who favor and those who oppose a ban on *ex parte* contacts. While it is by no means clear that informal communication during or after the public comment period is as indispensable to effective rulemaking as its proponents claim,³¹³ it does seem inappropriate to prevent all such communication. When, for example, the agency needs clarification or further explanation of data or argument submitted during the public comment period, it should be free to seek that information. While *ex parte* contacts should not be allowed to supplant the public comment procedures of the APA, they may serve as useful supplements to those procedures and should not be prohibited.

At the same time, *ex parte* contacts threaten the integrity of the rulemaking process. If informal rulemaking is to be fair, it must be an open and public process with equal access to the decisionmaker. Unrevealed *ex parte* contacts during informal rulemaking constitute an obvious and serious violation of this norm. Once the decisionmaking process is taken behind doors which are open only to those with some special key, the process becomes tainted. The notion that some participants in a decisionmaking process enjoy special opportunities to inform or influence that process simply offends democratic sensibilities.

Immediate disclosure of the occurrence and content of such contacts cannot completely remove the blemish of unfairness which *ex parte* contacts inevitably cause. Immediate disclosure may, however, allow the agency to allay some of the suspicions which accompany any hint of secrecy or special privilege and to preserve some measure of the openness and even-handedness compromised by *ex parte* contacts. Coupled with a requirement that the agency docket at least a summary of the contents of any such contacts and allow all participants an opportunity to respond to the substance of the *ex parte* communications,

313. Not even the most vociferous critics of *ex parte* contacts in rulemaking have suggested a total ban on the exchange of technical information or policy views between agency personnel and outsiders. *See, e.g., Wright, supra* note 308, at 180. Objections arise only when such exchanges take place in private. *Id.* In addition, there may be alternative ways of achieving the benefits often attributed to *ex parte* communications. *Sierra Club v. Costle*, 657 F.2d 298, 400-02 (D.C. Cir. 1981). The APA's provisions allowing the public to petition for reconsideration of a promulgated rule would enable an interested party to bring newly obtained information, unavailable during the rulemaking, to the attention of the rulemaker without undue delay or threat to the efficiency or effectiveness of the rulemaking process. 5 U.S.C. § 553(e) (1982). Both statutory and discretionary delays on the effective date of a final rule should allow the regulated community sufficient time to adjust to a new rule before enforcement of the rule. *Id.* § 553(d).

immediate disclosure should salvage the fairness of a rulemaking proceeding.

This disclosure procedure would also preserve other normative rulemaking requirements which are jeopardized by *ex parte* communications. To the extent that unrevealed *ex parte* contacts deprive the agency of critical analysis of the substance of those contacts by other interested participants, the effectiveness of the rulemaking proceeding will suffer. Public disclosure of and comment on *ex parte* communications will significantly reduce the risk that the agency may rely upon incomplete or inaccurate data and arguments which are submitted *ex parte*. And, as Judge Wright has noted,³¹⁴ timely disclosure and public analysis of the contents of *ex parte* contacts preserves agency accountability by providing reviewing courts not only with the full record of the agency's decisionmaking process but also with further assurance of the fairness and rationality of the agency's decision.

d. Public Rulemaking Dockets

Finally, the concept of adequate notice in rulemaking should require the agency to create a public file or docket for each rulemaking proceeding. This docket should contain all of the relevant information in an organized and indexed format.³¹⁵ This file would include the full text of materials summarized or referenced in the agency's published rulemaking notice, further relevant information generated from within the agency after its notice of rulemaking, and all information submitted to the agency by the public at any time prior to the promulgation of the final rule.³¹⁶ While elsewhere it will be argued that this docketing requirement is necessary in order to provide reviewing courts with a record of the rulemaking process,³¹⁷ in this context the public docket or file serves to effectuate the public's right to fair notice of all information pertinent to the rulemaking proceeding. Because the public's right to participate in rulemaking is inevitably and entirely dependent upon the adequacy of the agency notice,³¹⁸ some means must be found to provide this notice in an effective fashion.

314. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54-55 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977); Wright, *supra* note 308, at 180.

315. See Pedersen, *supra* note 11, at 79-82.

316. See *id.* at 79.

317. See *infra* text accompanying notes 376-95.

318. See cases cited *supra* note 297.

Common sense and due regard for the efficiency of the rulemaking process must guide the choice of a means to implement the right to notice. Establishing a central, public repository containing all of the documents and materials submitted to or considered by the rulemaker will provide interested persons with full and accurate notice of information which could not reasonably be published or provided to each participant by the agency. A public file assures the public of timely and equal notice of ongoing developments in the rulemaking proceeding and convenient access to all information considered by the rulemaker. This docket should also provide an efficient method for the exchange of information, thereby eliminating much of the expensive and time-consuming discovery practices which frequently characterize informal rulemaking proceedings.³¹⁹ Use of a central docket will relieve the agency of the enormous problems associated with providing continuous, adequate notice to all parties by creating a mechanical, self-executing notice process. In a sense, the burden of insuring adequate notice will be shifted from the agency to the rulemaking participants themselves, who will now have to monitor the docket index in order to keep abreast of the progress of events. While this burden may be difficult for some participants,³²⁰ it seems justified by the benefits associated with this expanded notice procedure and the need for administrative efficiency.

2. *The Opportunity to Participate*

Section 553(c) of the APA requires that:

the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . . When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.³²¹

This section of the APA has always provoked the most controversy in the case law and commentary on informal rulemaking. The vagueness of the section's language has always presented a formidable challenge to judicial attempts to define the specific scope of the procedural rights it grants. Although the Constitution does not provide the public with

319. See Pedersen, *supra* note 11, at 83-88.

320. See *id.* at 79 n.150.

321. 5 U.S.C. § 553(c) (1982).

any right to be heard by rulemakers,³²² Congress clearly has decided that the public must be given some opportunity to participate in informal rulemaking. Unfortunately, Congress has not been very clear as to the *nature* of this right to participate.

Analysis of the statute itself leads to the conclusion that absent some explicit statutory proviso, the public need not be afforded a trial-like hearing on the merits of substantive regulations. The APA establishes a separate formal rulemaking procedure which calls for a trial-like format only in situations designated by Congress.³²³ Congress apparently has decided that judicial decisionmaking processes are rarely suitable for the resolution of the types of issues that most frequently confront rulemakers³²⁴ and, accordingly, has reserved for itself and its agents the discretion to decide when such formal processes will be utilized in rulemaking. The Supreme Court has acceded to that congressional decision and has limited mandatory trial-like rulemaking procedures to the rarest of circumstances.³²⁵

Beyond this restriction on the use of full-blown trials in rulemaking, the only other limitations on public participation found in the text or legislative history of section 553 deal with the mode of participation. The statute gives agencies authority to limit the public to the submission of written data, views, or arguments. Oral presentations of such information are to be allowed only at the discretion of the agency. The legislative history of section 553 provides that the agency may, in its discretion, consult with those who are affected by the rule, holding conferences and even public hearings if it feels that such procedures will be helpful or useful to the agency or public.³²⁶ But again, while various modes of public participation are suggested, no clear picture of the nature of that participation emerges. Is public participation in informal rulemaking, whatever its format, limited to comment upon the agency's proposed rule? Or should rulemaking participants be allowed to comment on the comments of other participants? Is public participation designed only to provide further information supporting or criticizing the agency's initial efforts at rulemaking, perhaps suggesting, in addi-

322. *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

323. 5 U.S.C. § 553(c) (1982), *construed in* *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

324. See FINAL REPORT, *supra* note 26, at 109-11. See also authorities cited *supra* note 45.

325. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

326. See LEG. HIST., *supra* note 28, at 20, 200-01, 259; FINAL REPORT, *supra* note 28, at 103-11; ATT'Y GEN. MAN., *supra* note 28, at 29, 31.

tion, alternative approaches to the regulatory problem at hand? Or should the participation of an interested and expert public be used also as a tool for the testing of all accumulated data and suggested alternatives? Is the opportunity to participate in rulemaking merely limited to a dialogue between the agency and the affected public? Or should informal rulemaking procedures be designed to accommodate the fact that rulemakers most often face a public of diverse and usually competing interests which seldom speaks with one voice?

The purported purpose of public participation in informal rulemaking is to educate the agency and to protect the public from unwise and uninformed agency action.³²⁷ If those goals are to be accomplished in an efficient, effective, and fair manner, the APA should be interpreted to guarantee a right to participate in the accumulation and evaluation of information relevant to the proposed agency rule and an impartial forum in which to exercise those rights. Such an interpretation will require that, at a minimum, the public be allowed to submit written comments, not only on the agency's proposed rule, but also on the written comments submitted by all participants in the rulemaking process. In other words, the opportunity to participate should be read to include, as a procedural minimum, some opportunity to rebut or respond to the data, views, and arguments of others. In addition, these participatory rights should be protected by some realistic mechanism which preserves the impartiality of the rulemaking process and eliminates, or at least reduces, the risk of bias in regulatory decisionmaking.

a. The Right to Submit Rebuttal Comments

The suggestion of rebuttal rights in informal rulemaking is bound to conjure up notions of adjudicatory procedures in the minds of some, so perhaps it would be prudent to allay such fears at the outset. The agency itself should have the freedom to decide upon the most appropriate structure and format for the public's right to respond. Rebuttal rights need not be implemented by means of a trial-like hearing, or even a disputed-issues hearing with limited cross-examination or appellate-type oral argument. Such procedures have limited utility in the rulemaking context and are frequently inefficient.³²⁸ All that would be

327. See LEG. HIST., *supra* note 28, at 20; FINAL REPORT, *supra* note 28, at 103-11; ATT'Y GEN. MAN., *supra* note 28, at 31. See also *Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980); *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

328. See authorities cited *supra* note 44.

necessary, as a procedural minimum, would be the assurance of appropriate notice and an adequate opportunity to file at least written comments responding to any data or arguments submitted by others during a designated initial comment period. This minimum procedural requirement would not threaten the procedural efficiency of a rulemaking proceeding and is essential to the effectiveness and fairness of informal rulemaking.

An effective rulemaking procedure is designed to enhance the agency's opportunity to formulate not only a rational rule, but a rule which best implements Congress' regulatory policy.³²⁹ Given the importance Congress has attached to public participation in rulemaking,³³⁰ agencies should fully involve the public not only in the initial data-accumulation stage of rulemaking but also in the equally important evaluative stages of the rulemaking process. If the public's ability to provide supplementary or critical information regarding an agency's initial regulatory suggestions is valued, should not rulemakers also value the public's expertise in evaluating the information, including public comment, which the agency is required to consider in the formulation of regulatory policy? While the evaluative capabilities of agency personnel are often significant and deserving of respect, nothing in the APA, its legislative history, or administrative practice suggests that these abilities are either singularly unique or infallible. An interpretation of the public's right to participate in informal rulemaking which includes the right to analyze and respond in writing to initial public comment provides a simple and efficient vehicle for the use of public expertise in the evaluation of rulemaking data.

A right to submit rebuttal comments is certain to enhance the substantive effectiveness of the process while preserving the procedural efficiency so highly prized in rulemaking.³³¹ If public participation includes the right both to comment and respond, it will not only provide the agency with critical analysis of preliminary staff work but may also reduce the risk of agency reliance on inaccurate, incomplete, or inappropriate materials which may have been submitted by other participants. A second round of responsive comment will allow the agency to discover inadequacies in or resolve challenges to rulemaking data during the rulemaking proceeding itself, rather than in later actions for

329. *See supra* text accompanying notes 25-28.

330. *See* LEG. HIST., *supra* note 28, at 20, 257.

331. *See* S. REP. NO. 305, 97th Cong., 1st Sess. 25-26 (1981).

administrative amendment or judicial review of the rule. Failure to provide the interested public with some rebuttal opportunity will insulate the rulemaker from increasingly indispensable public assistance in the decisionmaking process and will invite regulatory delay.

The inclusion of a structured rebuttal procedure may also be necessary to insure that the rulemaking process is fair. An informal rulemaking process which does not allow the public to point out errors, misstatements, or inconsistencies in the data that will be considered by the agency and that may form the basis for significant developments or changes in regulatory policy is unlikely to be perceived as an open, accessible, or acceptable decisionmaking process. When the agency fails to provide a separate structured procedure for rebuttal comment, some participants may gain procedural advantages which unfairly enhance their ability to influence the rulemaking process. By allowing only one round of comment, the agency puts a premium on the delayed submission of materials. Late submission allows some participants to examine the earlier submissions of others, to shape their comments as both expository and rebutting, and to insulate their own arguments from repudiation by others. A second responsive comment period eliminates these special advantages and insures all participants an equal opportunity to inform the agency's ultimate decision.³³²

Finally, given the changes in the timing and nature of judicial review of informal rulemaking, it is imperative that participants in notice and comment rulemaking be given some opportunity to challenge all data upon which an agency's rule is based. Until relatively recently, most judicial review of informally promulgated rules took place during enforcement actions brought in the federal district courts.³³³ When seeking to enjoin or defend against such an action, those adversely affected by an agency's rule were routinely given the opportunity to discover and challenge the complete factual and legal basis for the rule, including any public comment which may have been relied upon by the agency in promulgating the rule.³³⁴ Now, however, the rationality of agency rulemaking is primarily tested during pre-enforcement review

332. *See id.*

333. Auerbach, *supra* note 106, at 24-25 (citing LEG. HIST., *supra* note 28, at 214, 279-80); Nathanson, *Probing the Mind*, *supra* note 110, at 755.

334. *See* Nathanson, *supra* note 7, at 189-91 & n.34.

actions in the federal courts of appeal.³³⁵ These courts base their limited review of agency rulemaking exclusively on the record of the agency's informal rulemaking proceeding.³³⁶ Thus, if an adverse party is to be given a meaningful opportunity to challenge the validity of a rule by attacking its factual or legal basis, in fairness that opportunity should be afforded during the informal rulemaking proceeding itself, where rebuttal argument can be made part of the record and thus properly available for later judicial review. Professors Auerbach and Nathanson contend that, given these changes in the judicial review of informal rules, the right to submit rebuttal comments during notice and comment rulemaking may well be required to insure that the proceeding meets constitutional tests for fairness.³³⁷ It is suggested here that, whatever the merits of this constitutional argument, the right to submit rebuttal comments should be required as a matter of statutory right in order to effectuate the congressional intent that informal rulemaking proceedings be fair.

b. The Problem of Bias in Rulemaking

While there is general agreement among courts and commentators on the need to insure that notice and comment rulemaking is free from the taint of decisional bias,³³⁸ only minimum safeguards currently exist. Federal law prohibits rulemakers from participating in proceedings in which they have a substantial personal interest. In addition, all agencies have regulations governing a rulemaker's participation in proceedings in which she has a personal interest.³³⁹ More difficult problems arise, however, when the question of bias in rulemaking goes beyond conflicts of interest.

335. See Auerbach, *supra* note 106, at 26-28. See also *Investment Co. Inst. v. Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977).

336. 28 U.S.C. §§ 2112, 2341-2351 (1982). See *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). See also Auerbach, *supra* note 106, at 26-38.

337. See Auerbach, *supra* note 106, at 40; Nathanson, *Probing the Mind*, *supra* note 110, at 757-58.

338. See, e.g., *United Steelworkers v. Marshall*, 647 F.2d 1189, 1209-10 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1172-80 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981); Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990 (1980).

339. See Strauss, *supra* note 338, at 1000-09.

Most authorities can agree that a rulemaker's prejudgment on substantive issues critical to the rulemaking may serve as the basis for questioning her participation in the proceeding or the validity of the final rule.³⁴⁰ Beyond this general rule, however, consensus deteriorates. The case law and commentary reflect very different views on whether prejudgment in rulemaking is forbidden as a matter of constitutional due process or statutory law,³⁴¹ whether the prohibition extends to issues of law and policy, as well as specific factual issues,³⁴² and what level of prejudgment must be demonstrated before a rulemaker's participation in any particular proceeding becomes questionable.³⁴³

It seems unnecessary, and probably unavailing,³⁴⁴ to resort to constitutional argument in order to guarantee an unbiased notice and comment rulemaking process. On its face, the text of section 553 does not require an impartial decisionmaking process, nor does it provide either a substantive standard by which to measure a rulemaker's alleged bias or any procedure for the disqualification of a biased rulemaker.³⁴⁵ But here again the limitations of a literal approach to questions of procedure in rulemaking become obvious. The very structure of the APA's informal rulemaking process reveals a congressional intent to have most rulemaking decisions made only after the public has had an opportunity to inform and influence that decision. Substantial prejudgment by a rulemaker before the receipt of public comment would violate this structural precept. Whether one focuses on the APA's guar-

340. See authorities cited *supra* note 338.

341. Compare *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1165-74 (D.C. Cir. 1979) (suggesting that recusal of a biased rulemaker may be required by due process), *cert. denied*, 447 U.S. 921 (1980) and *Gellhorn & Robinson*, *supra* note 338, at 222 (same) with *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1185-88 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (suggesting that recusal is required as a matter of statutory law, not constitutional law), *cert. denied*, 447 U.S. 921 (1980) and *Gellhorn & Robinson*, *supra* note 338, at 225-29 (same) and *Strauss*, *supra* note 338, at 1032-35 (same). See also *infra* text accompanying notes 345-47.

342. Compare *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1168-69 (D.C. Cir. 1979) (rejecting "bias" on policy issues as a basis for the recusal of a rulemaker), *cert. denied*, 447 U.S. 921 (1980) with *id.* at 1185-92 (MacKinnon, J., dissenting) (suggesting that bias on "legislative facts" may require the recusal of a rulemaker).

343. Compare *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1196-98 (MacKinnon, J., dissenting) (requiring a showing of substantial bias by a preponderance of evidence) with *id.* at 1170 (requiring a clear and convincing showing that the rulemaker has an unalterably closed mind).

344. See *Strauss*, *supra* note 338, at 1032-35.

345. 5 U.S.C. § 553 (1982). See also *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1179 n.151 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

antee to the public of an “opportunity to participate” in the rulemaking process³⁴⁶ or its assurance that a rulemaker will promulgate a rule only “[a]fter consideration of the relevant matter presented,”³⁴⁷ the result is the same—the APA sets implicit limitations on the ability of a rulemaker to formulate final judgments on issues prior to the receipt of public input.

In addition, any interpretation of the APA’s rulemaking provisions which seeks to preserve the fairness and effectiveness of that process certainly would require the recusal of a rulemaker, or the invalidation of any rule promulgated by a decisionmaker, whose words or conduct evidenced a substantial prejudgment of significant factual or policy issues in any proceeding. Whatever else it may compel, the fairness which Congress demanded of rulemakers surely requires that their decisions be made openly and only after they have given good faith consideration to all data and competing arguments. The integrity of informal rulemaking stems in large part from the public’s confidence that rulemaking decisions can be influenced by public participation and that an opportunity to inform the rulemaker’s decision will always be made available. A rulemaker who fails to consider publicly submitted data and reaches a decision entirely on the basis of some private predisposition turns notice and comment rulemaking into a sham. The public’s participation becomes a meaningless and futile exercise which succeeds only in making the biased rulemaker’s efforts at post-hoc rationalization a bit more difficult. By allowing for public participation in notice and comment rulemaking, Congress sought to protect private interests from precipitous agency action.³⁴⁸ The public cannot be fairly protected when the outcome is preordained by some bias on the part of the decisionmaker.³⁴⁹

A biased rulemaker also impedes the effectiveness of notice and comment rulemaking. Congress’ call for public participation in the infor-

346. 5 U.S.C. § 553(c) (1982).

347. *Id.*

348. See LEG. HIST., *supra* note 28, at 20, 201, 259; FINAL REPORT, *supra* note 28, at 103; ATTY GEN. MAN., *supra* note 28, at 31.

349. See Gellhorn & Robinson, *supra* note 338, at 217. When notice and comment rulemaking procedures are properly interpreted to include some right of rebuttal, *see supra* text accompanying notes 327-37, that is, when the agency approaches rulemaking with the realistic assumption that the public interest in any regulatory issue is rarely, if ever, uniform and monolithic, the need for openness and objectivity in rulemaking becomes even more pronounced and important to the fairness of rulemaking.

mal rulemaking process presupposes that agencies often lack the expertise needed to arrive at the most appropriate implementation of regulatory policy. Public participation was intended to supplement the rulemaking process with informed public opinion and analysis. The APA assumes that, beyond a few carefully delineated situations,³⁵⁰ effective substantive rulemaking requires public participation. Regulatory decisions will, it is presumed, more effectively reflect congressional policy when they are made after a period of public participation and not before. A rulemaker whose decision has been informed only by her own factual, legal, or political perceptions violates this congressional judgment. Thus, a rulemaker who fails to give good faith consideration to all relevant public comment, or who evaluates public comment according to the source or philosophical orientation of that comment rather than its content, undermines the effectiveness of rulemaking and violates the APA's rulemaking procedures. Similarly, a rulemaker whose words or conduct present a strong predisposition with respect to the factual or policy issues involved in an upcoming proceeding jeopardizes the effectiveness of that proceeding by inhibiting or discouraging public participation.

But a normative interpretation of the APA which would require impartiality must also contend with the realities of the regulatory process. Any standard of impartiality, and even the procedure for disqualification, must recognize the unique characteristics of the rulemaking process. The decisionmaking process in rulemaking cannot be equated with legislative or judicial models. The standards and procedures used in those contexts to resolve questions of bias cannot be imported wholesale into the context of rulemaking.³⁵¹ The political nature of the regulatory arena, the institutional character of most rulemaking decisions, and the type of issues that must be resolved by rulemakers call for an approach to decisional bias which may be more forgiving than that employed in judicial settings and more stringent than that found in legislative decisionmaking.³⁵²

350. 5 U.S.C. § 553(a), (b)(A)-(B) (1982). See generally LEG. HIST., *supra* note 28, at 18, 200, 258.

351. See *Sierra Club v. Costle*, 657 F.2d 298, 400-01 & n.503, 405-08 (D.C. Cir. 1981); *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1165, 1168-69 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

352. For an excellent discussion of the restraints on legislators and judges and why standards of bias in those contexts may not be appropriate in an administrative rulemaking setting, see Strauss, *supra* note 338, at 997-1048.

The Supreme Court has long held that the integrity of the administrative process requires that administrative officials be presumed to be objective and "capable of judging a particular controversy fairly on the basis of its own circumstances."³⁵³ Of course, rulemakers will always entertain and exhibit some subjective predispositions toward issues which they will encounter during rulemaking proceedings. When Congress delegates authority to an agency head or when the President appoints an officer to an agency, it must be assumed that the official will form some ideas with respect to the appropriate implementation of her authority. The very process of modern rulemaking contemplates that agencies will come forward with regulatory initiatives which reflect particular policy orientations. These initiatives are then subjected to public scrutiny and comment which may present a different policy orientation. A rulemaking proceeding is a crucible in which opposing viewpoints are exposed and argued in an effort to inform and persuade the ultimate decisionmaker. But there must be some catalyst for this policy discussion and that catalyst is the regulatory proposal of the agency, a proposal which must, of necessity, reflect at least an initial position as to the appropriate solution to the regulatory problem at hand. For these reasons, a standard for bias in rulemaking should not chill a rulemaker's legitimate attempt to espouse or explain policy initiatives in public forums outside the rulemaking process.³⁵⁴

What seems required by a normative interpretation of the APA is a procedure which protects the public from rulemakers whose philosophical bias or policy orientation inhibits public participation in rulemaking or prevents consideration of contrasting views in a fair and even-handed fashion. What is needed is a standard for disqualifying bias which assures the public that a rulemaker who holds strong views on certain issues is nonetheless open to persuasion. As the case law demonstrates, the problems inherent in devising an exact standard for bias which is both enforceable and justifiable are many³⁵⁵ and cannot be dealt with in depth in this Article. It is sufficient here to note that the

353. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

354. *See Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1168-69 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

355. *See id.*; *see also United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). *See generally Gellhorn & Robinson, supra* note 338, at 215-37; *Strauss, supra* note 338, at 1027-48.

normative values inherent in rulemaking require courts to meet and address such issues when evaluating the adequacy of an agency's notice and comment rulemaking procedures.

3. *The Statement of the Basis and Purpose of Agency Rules*

Section 553(c) states that “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”³⁵⁶ This section requires rulemakers to explain their decisions, providing the public and reviewing courts with information about the scope, objectives, and justifications for agency rules.³⁵⁷ It was thought this information would be helpful in allowing the public to conform its conduct to new regulatory standards and would assist the courts in interpreting and reviewing agency regulations.³⁵⁸ Over the years, the courts have given an expansive reading to this language and have required rulemakers to give rather detailed explanations, but this judicial gloss seems at odds with the statute's demand for only a “concise” and “general” statement of a rule's basis and purpose.³⁵⁹

These broad judicial constructions of section 553 are justified. An interpretation of the APA which focuses on the function of the basis and purpose statement and the normative values which must inform informal rulemaking would require an agency to compile a complete and organized record of its rulemaking process. This rulemaking record should include the notice of proposed agency rulemaking, all of the materials included in the agency's rulemaking docket,³⁶⁰ the text of the agency's final rule, and the agency's statement of the basis and purpose of that rule.³⁶¹ This final explanatory statement must include an identi-

356. 5 U.S.C. § 553(c) (1982).

357. See LEG. HIST., *supra* note 28, at 20, 201, 259; ATT'Y GEN. MAN., *supra* note 28, at 32, 128.

358. See *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); ATT'Y GEN. MAN., *supra* note 28, at 32.

359. See, e.g., *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024 n.11 (D.C. Cir. 1978); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

360. See *supra* text accompanying notes 315-21.

361. See Pedersen, *supra* note 11, at 78-82; Wright, *supra* note 29, at 395. See the discussion of congressional endorsement of such a record in the Clean Air Act in *Sierra Club v. Costle*, 657 F.2d 298, 392-95 (D.C. Cir. 1981). See also S.1080, § 3(f), 97th Cong., 2d Sess., 128 CONG. REC. S2713-21 (daily ed. March 24, 1982).

fication of the factual and legal issues addressed in the proceeding. It should also contain a summary of any factual findings made and relied upon by the rulemaker and an explanation of the rulemaker's fact-finding process which points to the material in the rulemaking record which forms the basis for those findings. The agency should identify the relevant legal criteria or policy considerations and provide a detailed exposition of how the agency arrived at its final rule given these criteria and its factual findings. Finally, the agency should indicate its reasons for rejecting significant objections to the rule raised by the public's comments. The preparation of this record should be considered mandatory in all notice and comment rulemaking and should constitute the exclusive basis for judicial review of such rulemaking.

These rather elaborate record-making and explanation requirements, though seemingly in excess of the statute's actual textual demands, nonetheless find support in the APA's legislative history. When one examines the legislative history it comes as no surprise that reviewing courts, including perhaps the Supreme Court,³⁶² have found that the statute's description of an informal rulemaker's explanatory duties is considerably misleading.³⁶³ Both the House and Senate explicitly indicated that a rulemaker should provide the public with a statement of basis and purpose which would be not only "fully explanatory of the complete factual and legal basis"³⁶⁴ for any rule as well as "the real object or objects sought" to be accomplished by the rulemaker,³⁶⁵ but also would indicate the relationship between the agency's rule and the data presented by the public during the rulemaking proceeding.³⁶⁶ There probably are instances of rulemaking when such an explanation can be framed in a concise and general fashion. But to suggest, as the Attorney General did after the APA was passed, that Congress did not intend the agency's explanation to include the "findings of fact . . . conclusions of law . . . or . . . the considerations upon which the rules were issued"³⁶⁷ seems contrary to every congressional comment on the

362. See Scalia, *supra* note 6, at 394-95 (noting the *Vermont Yankee* Court's failure to even address the fact that the lower court had asked the agency to prepare a statement of basis and purpose far more detailed and comprehensive than required by the text of the APA).

363. See, e.g., *Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1215-16 (D.C. Cir. 1983); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024 n.11 (D.C. Cir. 1978).

364. LEG. HIST., *supra* note 28, at 20. See also *id.* at 201, 259.

365. *Id.* at 20.

366. *Id.* at 201, 259.

367. ATT'Y GEN. MAN., *supra* note 28, at 32.

matter.

The legislative history of the APA, though somewhat sparse on this issue, also supports the contention that agencies must compile a record of their informal rulemaking processes. It is clear from that history that Congress did not intend that informal rules would be made or reviewed solely on the basis of evidence or argument introduced and recorded at some trial-type rulemaking hearing.³⁶⁸ No hearings, let alone trial-type hearings, were required in informal rulemaking situations.³⁶⁹ It is also clear that informal rulemakers would not be barred from relying upon data or argument gathered from sources other than publicly submitted rulemaking comments.³⁷⁰ But neither of these observations is particularly relevant to the question of whether an agency engaged in informal rulemaking must compile a record of all the data it has considered during the rulemaking process, regardless of the source of that data or the procedural format of the proceeding. In fact, a requirement that an agency reach and justify its decision solely on the basis of a comprehensive rulemaking record seems quite consistent with the House report on the APA, which specifically required that informal rulemakers “keep a record and analyze and consider all relevant matter presented prior to the issuance of rules.”³⁷¹ It is hard to imagine that Congress did not intend that informal rulemakers would compile some record of their decisionmaking process when it subjected such rules to the possibility of judicial review. The reviewing court must have something other than the text of the rule if it is to assess even the legal validity of that rule, let alone its factual underpinnings.³⁷²

368. *Id.* at 31-32.

369. 5 U.S.C. §§ 553(c), 556(a) (1982); FINAL REPORT, *supra* note 28, at 102-10; ATT'Y GEN. MAN., *supra* note 28, at 31.

370. See LEG. HIST., *supra* note 28, at 225.

371. *Id.* at 259. Cf. FINAL REPORT, *supra* note 28, at 229 (“Records of such [informal rulemaking] hearings may be kept”) (additional views and recommendations of Messrs. McFarland, Stasen, and Vanderbilt).

372. As some have noted, the drafters of the APA expected that most judicial review of informal rulemaking would take place in a federal district court where “the facts pertinent to any relevant question of law [would] be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere.” LEG. HIST., *supra* note 28, at 279-80, *quoted in* Auerbach, *supra* note 106, at 25; see LEG. HIST., *supra* note 28, at 370. This congressional expectation of *de novo* judicial review of informal rules can be interpreted to reflect more of a concern for the adequacy of the agency’s fact-finding process rather than a confirmation of the contention that informal rulemakers are relieved of any record-keeping requirement. See Auerbach, *supra* note 106, at 25.

While it probably would be going too far to suggest that the absence of a rulemaking record and a detailed explanation of the basis and purpose of an informally promulgated rule would fatally compromise the fairness of informal rulemaking, their presence will certainly enhance the fairness of the process. By providing the public with complete and accurate information about what the agency decided and why and how it came to that decision, these procedures have an obvious and significant impact on other post-promulgation procedural rights of the public. The right to petition for agency reconsideration³⁷³ or judicial review³⁷⁴ of final rules can be exercised most effectively only when the public is fully and accurately apprised of the scope, basis, and purpose of the rulemaker's decision. Recordmaking and explanation procedures also provide mechanisms to police the procedural fairness of the rulemaking process. A mandatory requirement that agencies fully explain and document their decisions may well reveal that the agency has failed to consider relevant public comment or has relied upon information or materials which were not subjected to public notice and comment. In addition, a published explanation and documentation of the agency's decision enhances at least the appearance of fairness by opening up the decisionmaking process to public scrutiny.

Similarly, the required preparation of a rulemaking record including a full explanation by the rulemaker, while perhaps not vital to the effectiveness of the rulemaking process, will both improve and discipline the evaluative stages of the agency's decisionmaking process. While the requirement that rulemakers publicly document their deliberative process cannot guarantee careful and thorough consideration of the issues, it should provide a powerful incentive for such scrutiny.³⁷⁵ Because such procedures serve to police important procedural values in rulemaking, in this instance the effectiveness of the process, perhaps they should be considered vital to the achievement of that procedural value.

Even if a rulemaking record and a full explanation are not considered essential for the fairness and effectiveness of rulemaking, it seems clear that agency accountability is unacceptably compromised in the absence of both. While Congress has a number of methods for holding

373. 5 U.S.C. § 553(e) (1982).

374. *Id.* § 702.

375. *See* Dunlop v. Bachowski, 421 U.S. 560, 572 (1975); *see also* W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 74, at 363-64.

agencies accountable for their actions,³⁷⁶ and continues to explore new techniques to enhance this accountability,³⁷⁷ it has placed its primary reliance on judicial review of agency action.³⁷⁸ Without a complete and organized rulemaking record and a detailed explanation of the basis and purpose of agency rules, courts cannot properly perform the role they have been assigned in the administrative process.

The courts have been charged with insuring that agency rules represent rational implementations of congressionally prescribed regulatory policies. While courts were once to presume the rationality of agency decisionmaking,³⁷⁹ reviewing courts now have been instructed that responsible judicial supervision of all agency decisionmaking must be "thorough, probing, and in depth."³⁸⁰ A presumption of regularity still attaches to all agency action and the role of reviewing courts is limited to a determination that the agency's decision is rational, but courts are required nonetheless to subject the entire decisionmaking process of even informal agency action to careful and searching inquiry.³⁸¹ When courts review rules, the agency's factual perceptions, together with its judgment about the legal significance of those perceptions, are to be closely examined.³⁸² While the court is not to substitute its own judgment for that of the agency, neither is it to assume that the agency's judgment is rational.³⁸³ Instead, agencies are to be held accountable by the review of a court which must satisfy itself that the agency's rule is the rational product of a rational decisionmaking process.³⁸⁴

While it is possible to describe the scope of this judicial review of informal rulemaking and even its general limited nature without arousing too much controversy, administrative theorists are currently at odds

376. See generally W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 74, at 103-26.

377. See, e.g., S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2713-21 (daily ed. Mar. 24, 1982); see generally McGowan, *Congress, Courts and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977).

378. 5 U.S.C. §§ 701-706 (1982). See LEG. HIST., *supra* note 28, at 217, 281.

379. See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

380. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

381. See *id.* at 415-16.

382. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 11-37 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).

383. See *id.*; see also Wald, *supra* note 50, at 137-41.

384. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1145-48 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *National Lime Ass'n v. EPA*, 627 F.2d 416, 429-30 (D.C. Cir. 1980); *Weyerhaeuser Co. v. EPA*, 590 F.2d 1011, 1024-28 (D.C. Cir. 1978); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).

over both the measure of rationality demanded of rulemakers³⁸⁵ and the methods to be employed by courts in testing for rational agency decisionmaking.³⁸⁶ The interpretation of section 553 which is offered here is not intended to contribute to either of these debates. Requiring informal rulemakers to supply courts with the kind of detailed documentation and explanation outlined above does not substitute procedural requirements for substantive judicial review or imply that courts should scrutinize agency rules with any particular degree of intensity. It merely seeks to provide courts with the tools necessary to engage in the limited review which Congress has required.

If reviewing courts are to provide any reasonable barrier to arbitrary decisionmaking, they cannot be expected to guess at or entirely reconstruct the decisionmaking process.³⁸⁷ They must be provided with a complete and organized rulemaking record and a detailed explanation of the basis and purpose of an agency's rule. Courts simply do not have the expertise, let alone the time and resources, to wander through a huge and unwieldy rulemaking record guided only by vague and simplistic indications of what the agency thought it had accomplished.³⁸⁸ As Judge McGowan noted a few years ago:

[I]t is appropriate for us . . . to caution against an overly literal reading of the statutory terms "concise" and "general." These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the

385. Compare Wright, *supra* note 29, at 391-94 (suggesting that rulemakers should be subject to only the most rudimentary commands of rationality) and Verkuil, *supra* note 85, at 420-24 (suggesting that current substantive review of rules may be too intrusive) with Rodgers, *supra* note 53, at 701-09 (espousing a "hard look" substantive review which requires courts to make a "searching and careful" review of agency rulemaking decisions) and Stewart, *supra* note 7, at 1811 (same) and Wald, *supra* note 50, at 150-54 (same).

386. Compare Bazelon, *supra* note 59, at 823 (suggesting that reviewing courts may do more to insure reasoned decisionmaking by means of an intensive review of rulemaking procedures than by engaging in a substantive review of the agency's ultimate decision) and McGowan, *supra* note 7, at 687 (same) and Wald *supra* note 50, at 140 (same) with *Ethyl Corp. v. EPA*, 541 F.2d 1, 69 (D.C. Cir. 1975) (Leventhal, J., concurring) (rejecting an intensive procedural review of rulemaking in favor of a careful substantive scrutiny of the rulemaking decision), *cert. denied*, 426 U.S. 941 (1976) and Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 AD. L. REV. 183, 188 (1981) (same) and Wright, *supra* note 29, at 388-91 (same).

387. See *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 534-35 (D.C. Cir.), *cert. denied*, 103 S. Ct. 79 (1982).

388. See *id.*

agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by section 4 [section 553] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.³⁸⁹

Other courts have made similar pleas for organized rulemaking records that clearly demonstrate the process by which the agency reached its factual and legal conclusions³⁹⁰ and outline the agency's response to significant challenges to those conclusions.³⁹¹ While courts must defer to the reasonable exercise of agency expertise in most rulemaking matters, they can do so only when the agency provides some indication that it has utilized that expertise.³⁹²

The Supreme Court also has recognized the need for administrative assistance in responsible judicial review. In a number of cases, the Court has demanded that agencies supply reviewing courts with records that detail the agency's findings and conclusions and demonstrate a process of reasoned decisionmaking.³⁹³ Even in *Vermont Yankee*, the Court left undisturbed the judicially imposed requirement that the agency prepare an organized rulemaking record and full explanation of its entire decisionmaking process.³⁹⁴ Interestingly, it has never seemed to bother the Court that neither the APA nor any organic statute explicitly required these agencies to assemble a record or to prepare findings of fact or conclusions of law supporting their decisions. Contemporaneous documentation and a complete explanation of the

389. *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (citation omitted).

390. *See, e.g.*, *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974); *Texas v. EPA*, 499 F.2d 289, 308 n.31 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1976); *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973).

391. *See, e.g.*, *Western Coal Traffic League v. United States*, 677 F.2d 915, 927 (D.C. Cir. 1982); *Alabama Power Co. v. Costle*, 636 F.2d 323, 384-85 (D.C. Cir. 1979); *PPG Indus. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

392. *See Wright, supra* note 154, at 62.

393. *See, e.g.*, *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

394. *See National Resources Defense Council v. NRC*, 547 F.2d 633, 646, 652-53 (D.C. Cir. 1976), *rev'd. on other grounds sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

agency's decisionmaking process was deemed necessary if judicial review of informal decisionmaking was to be at all effective.³⁹⁵ An interpretation of the APA's notice and comment rulemaking provisions which requires such procedures seems consistent with these decisions and necessary to preserve the accountability of informal agency rulemaking.

B. Judicial Review of the Procedural Discretion of Informal Rulemakers

The preceding section outlined those procedures which, under a normative interpretation of the APA, must be employed by all informal rulemakers subject to that act. In some informal rulemaking contexts, however, these statutorily prescribed minimum procedures may not be adequate, and an agency may find that certain additional procedures are necessary to preserve the fairness, effectiveness, or accountability of a rulemaking proceeding. Both the APA and its legislative history explicitly recognize that, in certain circumstances, informal rulemakers may find it either necessary or expedient to utilize procedures beyond those required by the statute. In section 553(c), for example, rulemakers are given the authority to allow interested persons an "opportunity for oral presentation" during informal rulemaking in addition to the required written procedures.³⁹⁶ Both the House and Senate reports on the APA encourage informal rulemakers to employ more elaborate public procedures when the statute's minimum procedures prove somehow inadequate.³⁹⁷ Administrative practice demonstrates that agencies frequently take advantage of this procedural authority and, rather than limit public participation to the submission of written comments, expand their procedural formats to include legislative-type public hearings or even limited trial-type hearings, complete with opportunities for direct and cross-examination.³⁹⁸

This section deals with the question of whether and to what extent the agency's decision to employ (or not employ) such additional rulemaking procedures may be challenged on judicial review. In *Vermont Yankee*, the Supreme Court seemed to indicate that while such agency decisions might be subjected to judicial scrutiny, the scope of

395. See *Dunlop v. Bachowski*, 421 U.S. 560, 571-72 (1975).

396. 5 U.S.C. § 553(c) (1982).

397. See LEG. HIST., *supra* note 28, at 200-01, 259.

398. See authorities cited *supra* note 11.

any such review was to be quite narrow.³⁹⁹ Once informal rulemakers have complied with the APA's required procedures they "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."⁴⁰⁰ Apparently, reviewing courts may find procedural abuse only in extraordinary situations where "constitutional constraints or extremely compelling circumstances" may justify judicial intrusion.⁴⁰¹

As the Supreme Court has pointed out, there are sound reasons for restricting judicial review of the procedural discretion of informal rulemakers. A judiciary free to substitute its own notions of procedural propriety for those of the agency might cripple the rulemaking process.⁴⁰² Rulemaking proceedings would be routinely subjected to procedural attacks at the hands of those adversely affected by the substance of the rule, often simply to delay the effect of that rule. To protect their rules from possible invalidation on procedural grounds, informal rulemakers would be forced to employ every conceivable procedural device lest the failure to include some protection be deemed an abuse of the agency's procedural discretion by a reviewing court.⁴⁰³

However, *Vermont Yankee's* discussion of the need for limited review of an informal rulemaker's procedural discretion left a number of questions unresolved. For instance, what circumstances are to be considered so "extremely compelling" that a judicial remand for additional procedures or invalidation of the agency's rule will be justified?⁴⁰⁴ And in those circumstances, how should a court evaluate the procedural judgments of informal rulemakers? What criteria should guide a court in measuring those judgments? At least two commentators have sought to provide answers to these questions and, in the process, have proposed a model for judicial review of alleged abuse of procedural discretion which provides an excellent framework for analysis.⁴⁰⁵ The following discussion adopts that model but emphasizes the

399. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524-25 (1978).

400. *Id.* at 543-44 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

401. *Id.*

402. See *id.* at 547.

403. See *id.*

404. See *id.* at 543.

405. See Barr, *Judicial Review of Informal Rulemaking Procedure: When May Something More Formal Be Required*, 27 AM. U.L. REV. 781, 812-17 (1978); Williams, *supra* note 43, at 445-46. See generally Hahn, *supra* note 20.

criteria to be used by courts in analyzing claims of alleged procedural abuse. Not surprisingly, these substantive criteria are the same criteria which should inform a judicial interpretation of the APA's minimum procedural requirements.⁴⁰⁶ Thus, it is suggested that an agency abuses its procedural discretion when it fails to employ procedural devices necessary to ensure the fairness, effectiveness, efficiency, or accountability of a particular rulemaking procedure.

While some may have doubted even the ability of the courts to review the procedural discretion of informal rulemakers,⁴⁰⁷ the legislative history of the APA and past Supreme Court precedent confirm the legitimacy of such review.⁴⁰⁸ Any remaining doubt was surely put to rest by the Court in *Vermont Yankee*. While the scope of such review is to be narrow, its existence is nonetheless confirmed by the Court's opinion.⁴⁰⁹

406. See *supra* text accompanying notes 17-61.

407. See Byse, *supra* note 88, at 1826.

It may be answered that although the decision concerning utilization of additional procedures in section 553 rulemaking proceedings is initially or primarily a matter for the agency, the court may review the agency's decision. But on review, the court must first determine whether and to what extent the decision is committed to the agency's discretion. It is a generally accepted principle of administrative law that agencies should be free to fashion their own rules of procedure.

Id. (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). Professor Byse's curious use of the phrase "committed to the agency's discretion" recalls the statutory language of the APA precluding all judicial review of agency action "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). Thus, it is not clear whether Byse would shield the discretionary procedural choices of rulemakers from all judicial review. Given the extremely narrow scope of the statutory preclusion of judicial review, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), it seems doubtful that all judicial review of an agency's procedural choices is prohibited. Indeed, Byse implies in a later article that limited judicial review of an agency's procedural decision would be permissible. He quotes with approval Professor Jaffe's observation that "the exercise of discretion is relevant to the making of procedural decisions . . . in the absence of a clear legal prescription, a reasonable decision should withstand judicial interference; and . . . reasonableness should be considered in terms of the responsibility of the agency for a total program, allowing for the fact that the agency's resources are limited." Byse, *supra* note 386, at 188 (quoting L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 567 (1965)). See also Barr, *supra* note 405, at 812 n.168.

408. See, e.g., LEG. HIST., *supra* note 28, at 199, 217, 258, 278 (although agency may, in its discretion, dispense with all notice and public procedures for "good cause," courts are to review such determinations). See also *FPC v. Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 333-34 (1976) (a reviewing court may dictate additional procedures to an agency where substantial justification exists); *SEC v. Chenery*, 332 U.S. 194, 202-03 (1947) (setting forth a balancing test for courts to utilize in deciding whether an agency's choice of individual ad hoc litigation to develop policy constitutes an abuse of discretion). See generally Jaffe, *Judicial Review of Procedural Decisions and the Philco Case: Plus Ça Change?*, 50 GEO. L.J. 661 (1962).

409. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435

In line with the Court's demand for limited review, it is appropriate to place a substantial burden on those seeking to have an informal rule set aside on the grounds that the agency failed to provide some procedural protection not minimally required by the APA or the agency's organic statute.⁴¹⁰ To trigger such review, petitioners should be required to show that a request for additional procedures was timely made, that the request outlined with specificity what procedures were sought and why those procedures should have been employed by the rulemaker, and finally, that the agency's denial of petitioner's request was either unexplained or unreasonable.⁴¹¹

Certainly petitioners should not be heard to complain of alleged procedural harm which might well have been avoided had a timely request for additional procedures been made during the rulemaking proceeding. Reviewing courts have long attempted to preserve the integrity of the administrative process by affording agencies at least some opportunity to correct their own errors or omissions before resort to judicial review.⁴¹² That principle should also hold true in the context of procedural challenges to informal rulemaking. If decisions on the need for extra-statutory procedures are to remain with the agency, at least in the first instance, the agency must be given an opportunity to make those decisions. Absent a timely request for additional procedural protection directed to the agency by affected parties, the agency is deprived of that opportunity and should not find its rulemaking efforts jeopardized as a result.

A reviewing court should refuse to entertain broad or very generalized requests for additional procedures which fail both to demonstrate the inadequacy of the APA's mandated procedures and to explain how petitioner's requested procedures would serve to alleviate those inadequacies. Thus, the bare contention that a rulemaker should have supplemented the APA's paper procedures with an "oral hearing" in order

U.S. 519, 542-45 (1978) (judicial review of agency's procedural choices permitted in extremely compelling circumstances or to vindicate constitutional procedural rights). *See also* Barr, *supra* note 405, at 800.

410. *See* Barr, *supra* note 405, at 815; Williams, *supra* note 43, at 445-46.

411. *See* Barr, *supra* note 405, at 813-17; Williams, *supra* note 43, at 445-46.

412. *See, e.g.*, NBC v. United States, 319 U.S. 190, 227 (1943); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); *see also* Barr, *supra* note 405, at 815; Williams, *supra* note 43, at 424.

to “ventilate” the issues should evoke little judicial sympathy.⁴¹³ An “oral hearing,” even when specifically defined as a trial-type hearing with the opportunity for direct and cross-examination, is no talisman of procedural propriety in rulemaking.⁴¹⁴ A particular procedural device has no value in and of itself. Rather, it takes on value only when viewed in an instrumental fashion as a means toward the accomplishment of fair, efficient, effective, or accountable rulemaking. Without a demonstration by the petitioner that these practical and political goals are jeopardized in the absence of further rulemaking procedures, the agency’s decision to utilize only those procedures which are generally protective of those goals is entitled to judicial deference and respect. Indeed, without such a demonstration it is unclear how any reviewing court would be able to evaluate whether the failure to employ further procedures constituted an abuse of the agency’s procedural discretion.

When, however, a petitioner has made a *prima facie* showing of the need for further rulemaking procedures, the burden should then fall upon the agency either to adopt the requested procedures or to explain its refusal to do so.⁴¹⁵ Should the rulemaking record fail to reveal a clear and complete explanation by the agency for its denial of the additional procedures, the court may and should remand the matter to the agency for further clarification.⁴¹⁶ Subsequent review would then be based upon the explanation generated by that remand.

When reviewing the merits of the issue, reviewing courts should find that a rulemaker has abused her discretion only when it is clear that the agency has failed to utilize a rulemaking procedure which, in the context of the particular proceeding, is *necessary* for the assurance of fairness, effectiveness, efficiency, or accountability. If the agency’s rulemaking record demonstrates a reasoned examination of the need for the requested procedures and a rational decision to meet those needs by means of other procedures, the courts should sustain that de-

413. See, e.g., *American Airlines v. CAB*, 359 F. 2d 624, 632-33 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); see also Barr, *supra* note 405, at 815; Williams, *supra* note 43, at 445-46.

414. See Barr, *supra* note 405, at 818 n.178. See also *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1170-71 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); *American Public Gas Ass’n v. FPC*, 498 F.2d 718, 723 (D.C. Cir. 1974); *American Airlines v. CAB*, 359 F.2d 624, 632-33 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

415. See Barr, *supra* note 405, at 816.

416. See, e.g., *SEC v. Chenery*, 318 U.S. 80, 94-95 (1943).

cision.⁴¹⁷ Thus, even though a reviewing court may feel that the additional procedures would be a better or even the best method of assuring normative propriety in a particular informal rulemaking proceeding, it should not substitute its procedural judgments for those of the agency.⁴¹⁸ Only when the additional procedure is, in the particular context, absolutely essential for the preservation of the normative values of informal rulemaking should a court find that the agency's failure to employ that procedure is arbitrary, capricious, or an abuse of its discretion.

This narrow approach to judicial review of the procedural discretion of informal rulemakers need not rest on debatable conclusions about the relative procedural expertise of courts or agencies.⁴¹⁹ It is not a question of institutional competence but rather of institutional integrity which compels restrictive procedural review by courts. A limited procedural scrutiny is necessary to prevent undue judicial intrusion into an area clearly reserved by Congress to the discretion of its rulemaking agents.⁴²⁰ The courts' responsibilities in the rulemaking process, at least with respect to its procedural aspects, extend only to the preservation of those normative values which Congress has decided should characterize all informal rulemaking. In these "extremely compelling circumstances," where the very existence of those values is threatened by a rulemaker's procedural choice, judicial correction is not only appropriate, but necessary. Where, however, the courts seek not to preserve those values but rather to expand their scope in a particular rulemaking context, they overstep the bounds of their responsibilities.

This is not to say that even limited judicial review cannot be an effective tool to police and correct the procedural choices of informal rulemakers. The enormous regulatory landscape upon which informal rulemakers must operate makes it highly unlikely that the APA's mandated procedures, even when normatively interpreted, will always suffice to preserve fairness, efficiency, effectiveness, and accountability.

417. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 567 (1965); Byse, *supra* note 386, at 187-90.

418. See Byse, *supra* note 386, at 188-90.

419. Compare Byse, *supra* note 386, at 186-87 (administrators rather than judges are the experts in administrative rulemaking procedure) with McGowan, *supra* note 7, at 685-86 (justifying an intensive judicial review of rulemaking procedures on the basis of a general judicial expertise in matters of decisionmaking procedure).

420. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978). See also LEG. HIST., *supra* note 28, at 19, 200-01, 259.

There will almost certainly be instances when a rulemaker cannot reasonably refuse to afford additional procedural opportunity or protection to those affected by the rulemaking.⁴²¹ It may be necessary, for example, for the agency to alter its decisionmaking process when its proposed arrangement combines the agency's decisionmaking and advocacy functions to such a degree that the normative values of informal rulemaking are seriously threatened.⁴²² The APA does not require the separation of these different agency functions in the context of rulemaking proceedings even when rulemaking is conducted in a formal trial-like fashion.⁴²³ In the past, attempts to impose such requirements on rulemakers have failed.⁴²⁴ But an agency may abuse its procedural discretion when decisionmaking responsibilities are assigned to employees previously involved in the advocacy of a proposed rule or employees subject to the supervision or direction of those advocates.⁴²⁵

Similarly, post-comment period consultations between an agency's staff advocates and its decisionmakers on questions of fact or policy should be given careful scrutiny by courts.⁴²⁶ This combination of functions presents a serious threat to the fairness of informal rulemaking in much the same way as would a biased rulemaker. When the final decisionmaking process is exposed to the unopposed and hidden advocacy of the proposal's in-house proponents, the rulemaker may be left with a skewed approach to the issues which undermines the effectiveness of the rulemaking process. The particular circumstances of each case will undoubtedly play a large role in determining whether an instance of combined agency functions in rulemaking has compromised the normative values which must characterize that process, but

421. See *Illinois v. United States*, 666 F.2d 1066, 1082-83 (7th Cir. 1981); *International Harvester Corp. v. Ruckelshaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973). See generally *Williams*, *supra* note 43, at 445-46.

422. See *United Steelworkers v. Marshall*, 647 F.2d 1189, 1215-16 & n.29 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). See also *Hercules Inc. v. EPA*, 598 F.2d 91, 124, 127-28 (D.C. Cir. 1978); *Environmental Defense Fund v. EPA*, 598 F.2d 62, 75-76 (D.C. Cir. 1978). These cases seem to leave open the possibility that, in certain circumstances, the courts might well find fault with an unfair combination of advocacy and decisionmaking in rulemaking.

423. 5 U.S.C. § 554(d) (1982). See *United Steelworkers v. Marshall*, 647 F.2d 1189, 1212-13 & n.21 (D.C. Cir. 1980) (citing *ATT'Y GEN. MAN.*, *supra* note 28, at 15), *cert. denied*, 453 U.S. 913 (1981).

424. See cases cited *supra* note 422.

425. See *id.*

426. See *id.*

where those values are so threatened, an agency abuses its procedural discretion.

In some circumstances an informal rulemaker's failure to allow for oral presentation or cross-examination might be unreasonable.⁴²⁷ While the particular rulemaking context will be significant, there may be instances when needed information cannot be readily obtained through the use of written procedures either because the material is not susceptible to written presentation or because of the inability of affected persons to express their concerns in writing. In both instances, the fairness and effectiveness of the agency's rulemaking efforts may depend upon the use of oral hearings to such an extent that a failure to utilize those procedures becomes unreasonable. As others have ably demonstrated, oral hearings with direct and cross-examination are sometimes necessary to fairly and effectively resolve certain types of factual issues.⁴²⁸ The mere fact that such issues surface in the context of informal rulemaking should not serve to excuse the employment of those procedures when they are needed to preserve the normative values of informal rulemaking.

It is neither possible, nor really necessary, to examine every type of challenge which might be raised to the procedural discretion of rulemakers, or for that matter, even to predict with any confidence the outcome of disputes over the need for oral procedures or separation of functions in informal rulemaking. Such conclusions on the scope of an informal rulemaker's procedural discretion will always present reviewing courts with difficult decisions. In any event, such conclusions should only be made after a contextual analysis. What is more important is the development of a consistent approach toward judicial review of the procedural discretion of informal rulemakers. In this respect, the Supreme Court's opinion in *Vermont Yankee* can be a two-edged sword. To the extent that the opinion forbids routine and heavy-handed judicial intrusion into the procedural discretion of rulemakers, it preserves the integrity of both the administrative and judicial processes. On the other hand, the opinion should not stand as a barrier to the recognition that courts can and should review the procedural choices of rulemakers, subjecting those choices to a careful and searching examination for a rationality that safeguards the normative values

427. See authorities cited *supra* note 421.

428. See *Illinois v. United States*, 666 F.2d 1066, 1082-83 (7th Cir. 1981); Williams, *supra* note 43, at 445-46.

of informal rulemaking. What is suggested here is an approach to judicial review of procedural discretion which combines both judicial restraint and a judicial sensitivity to these normative values. Properly utilized it may not only protect the integrity of the rulemaking process but preserve its legitimacy as well.

CONCLUSION

This Article has attempted to present a theory for judicial review of the adequacy of informal rulemaking procedures in the modern regulatory context. The theory seeks to preserve the procedural values which underlie the rulemaking provisions of the federal Administrative Procedure Act. The need for such a theory seems clear. Congress has repeatedly failed to confront the fact that the modern regulatory arena bears little resemblance to that which confronted the drafters of the APA forty years ago. While the procedural values which should govern the rulemaking process surely retain their validity, the procedural framework for rulemaking found in the APA no longer serves to effectuate those values. This "crisis" has been exacerbated by the Supreme Court's conception of the APA and the Court's restrictive approach to judicial review of informal rulemaking procedures. Absent congressional amendment of the APA's notice and comment rulemaking provisions or the adoption of a new formula for procedural review, the efficacy and acceptability of informal rulemaking as a regulatory tool can and should be questioned. The theory of judicial review presented here accords due deference to the procedural discretion of agency rulemakers while seeking to protect procedural values which will preserve the integrity of informal rulemaking. The theory recognizes the power of courts to review the procedural decisions of rulemakers and to require the use of procedures essential to fair, effective, efficient, and accountable rulemaking. It presents a comprehensive re-interpretation of the APA's required rulemaking procedures in light of these procedural values and suggests an approach to judicial review of a rulemaker's discretionary procedural choices premised on these same values. Properly implemented, this theory of judicial review should assist in preserving the legitimacy of informal rulemaking.