University of Dayton Law Review

Volume 4 | Number 1 Article 4

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Recommended Citation

Ogden, Gregory L. () "Reducing Administrative Delay: Timeliness Procedures, Judicial Review of Agency Procedurees, Procedural Reform, and Legislative Oversight," *University of Dayton Law Review*: Vol. 4: No. 1, Article 4.
Available at: https://ecommons.udayton.edu/udlr/vol4/iss1/4

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Cover Page Footnote

Professor Ogden would like to gratefully acknowledge the skillful editorial and research assistance of Daryl Fisher-Ogden, Esq., his wife, on this article and a prior article, "Judicial Control of Administrative Delay," 3 U. DAY. L. REV. 345 (1978).

This article is available in University of Dayton Law Review: https://ecommons.udayton.edu/udlr/vol4/iss1/4

REDUCING ADMINISTRATIVE DELAY: TIMELINESS STANDARDS, JUDICIAL REVIEW OF AGENCY PROCEDURES, PROCEDURAL REFORM, AND LEGISLATIVE OVERSIGHT.

*By Gregory L. Ogden**

I. INTRODUCTION

Delay in administrative decisionmaking[1] is a serious problem[2] that can be resolved only by the combined efforts of the courts,[3] the agencies, and the legislatures that have created the agencies. The gravity of the delay problem at the federal agency level is indicated by the recent statement of the Senate Committee on Governmental Affairs, in a major study, that "[m]ost federal regulatory proceedings are characterized by seemingly interminable delays."[4] Agency delay adds additional costs and imposes additional burdens on both the regulated industries and the consuming and taxpaying public.[5] This article analyzes the problem of agency delay by examining procedural standards for timeliness, judicial review of agency procedures, procedural reforms, and the role of the legislatures in establishing administrative agencies and in controlling administrative delay.[6]

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1. The Adminsitrative Procedure Act (A.P.A.) defines "agency action." It states: "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." 5 U .S.C. § 551(13) (1976). For purposes of this article, "decisionmaking" will be used in this sense.

2. *See* STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOLUME FOUR, DELAY IN THE REGULATORY PROCESS, S. DOC. NO. 72, 95th Cong., 1st Sess. (1977) [hereinafter cited as RIBICOFF REPORT, VOL. FOUR].

3. This article is part of an ongoing study by the author. The judicial role was examined in Ogden, *Judicial Control of Administrative Delay,* 3 U. DAY. L. REV. 345 (1978). For a more extensive discussion of the nature of the delay problem, see text and footnotes of that article at notes 1-15.

4. RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at (V).

5. RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 8-10. Some of the introductory material in this article has been taken from the introductory text and footnotes of Ogden, *supra* note 3, at 345.

6. On the subject of administrative delay, *see* Prettyman, *Reducing the Delay in Administrative Hearings,* 39 A.B.A.J. 966 (1953); Kaufman, *Have Administrative*

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The first three sections of the article — standards, procedural review, and reforms — focus on the interrelationship between delayed decisionmaking and the procedures used by agencies to carry out the decisionmaking processes mandated by the enabling statutes which establish particular agencies.[7] They will deal with procedural standards, such as those contained in the federal Administrative Procedure Act (A.P.A.),[8] and will focus specifically on those standards that seek to ensure prompt agency action. Alternative ways to frame such standards will be discussed and will be evaluated for effectiveness.

Judicial review of agency procedures, when those procedures are challenged because of undue delay, will then be examined. Two somewhat contradictory themes will emerge. One theme is that judicial reluctance to invalidate agency-devised procedures,[9] or to impose judicial procedures on agencies,[10] often serves the goal of prompt agency decisionmaking. The other theme is that the opposite often occurs. The same judicial reluctance leads to no judicial remedy for parties who claim undue delay because of agency pro-

Agencies Kept Pace With Modern Court-Developed Techniques Against Delay?—A Judge's View, 12 AD. L. BULL. 103 (1959-60); Rothman, *Four Ways to Reduce Administrative Delay,* 28 TENN. L. REV. 332 (1961); Gellhorn, *Administrative Procedure Reform: Hardy Perennial,* 48 A.B.A.J. 243 (1962); Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down,* 49 A.B.A.J. 833 (1963); Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings,* 72 YALE L. REV. 574 (1963); Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record,* 115 U. PA. L. REV. 145 (1966); Goldman, *Administrative De'ay and Judicial Relief,* 66 MICH. L. REV. 1423 (1968); Comment, *Judicial Control of Administrative Inaction: Environmental Defense Fund, Inc. v. Ruckelhaus,* 57 VA. L. REV. 676 (1971); Cramton, *Causes and Cures of Administrative Delay,* 58 A.B.A.J. 937 (1972); and K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 8.08 (1976).

7. The author approaches this task with some trepidation because of the tremendous number of judicial decisions on the general subject of administrative procedure. Davis, in his administrative law text, indicates the volume of such decisions when he states:

> On specific questions of what is fair procedure, courts in the name of due process commonly substitute judgment, as they are always inclined to do whenever they think that what the agency has done is procedurally unfair to a particular party. The accumulation of such decisions is a huge body of judge-made law of administrative procedure.

K. DAVIS, ADMINISTRATIVE LAW TEXT § 8.01, at 195 (3d ed. 1972). The scope of this inquiry will necessarily be limited to the narrower question of the relationship between delayed agency decisionmaking and administrative procedures.

8. 5 U.S.C. §§ 551-706 (1976).

9. *See* FTC v. J. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964) and Younger Brothers, Inc. v. United States, 238 F. Supp. 859 (S.D. Tex. 1965) discussed more fully in text accompanying notes 178-82 *infra.*

10. *See* FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); K. DAVIS, *supra* note 7, § 8.01. *But see* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), and K. DAVIS, *supra* note 7, § 8.10 which discusses the "Ashbacker Doctrine."

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cedures.[11] Recent cases will also be discussed. In one case the OSHA safety violation procedures survived a constitutional attack that was premised on the failure to provide for a trial by jury for the assessment of civil monetary penalties.[12] In the second case, an ICC "flagging procedure," which resulted in an interstate common carrier's inability to obtain necessary ICC certificates for an extended period of time, was invalidated by a court.[13]

Reforms of agency procedures,[14] proposed to alleviate delayed administrative decisionmaking, including those advocated by the Senate Committee on Governmental Affairs[15] and by scholars, will be analyzed. Additionally, federal administrative legislation such as the specific deadline for certain agency actions in the Freedom of Information Act (F.O.I.A.),[16] will be examined. Finally, reforms advocated or utilized in criminal litigation,[17] civil litigation, or the administration of justice generally,[18] will be examined to determine if by analogy and cross-fertilization of ideas some of those reforms can be used to alleviate delayed administrative decisionmaking.

The final section of the article will focus on legislative efforts to control agency delay through oversight and through the imposition of agency-developed generic standards. Legislative proposals for the reform of agency procedures will be discussed in the section on agency procedural reform.

II. TIMELINESS STANDARDS

A. *Introduction*

Procedural requirements for administrative agencies are established in administrative procedure acts[19] and enabling acts creating par-

11. *See* Buckeye Cablevision, Inc. v. United States, 438 F.2d 948 (6th Cir. 1971), and text accompanying notes 95-99, 196 *infra.*

12. Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977), discussed more fully in text accompanying notes 200-09 *infra.*

13. North American Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D. Ind. 1976), discussed more fully in text accompanying notes 210-21 *infra.*

14. Most of the discussion in this and the legislature section will focus on federal regulatory agencies. However, the conclusions in this section are equally applicable to non-federal and non-regulatory agencies.

15. *See* RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at XIII-XXII, discussed more fully in text accompanying notes 223-35.

16. 5 U.S.C. § 552(a)(6)(A) (1976).

17. *See, e.g.,* The Speedy Trial Act, 18 U.S.C. §§ 3161-3171 (1976).

18. *See, e.g.,* THE POUND CONFERENCE, 70 F.R.D. 79 (1976) where former Attorney General Edward H. Levi stated: "[T]he immediate phenomenon of concern is that the number of suits submitted for judicial resolution has increased dramatically. In addition, it is said litigation has become increasingly complex. . . . Because of the volume of suits and their complexity, delays in the administration of justice have occured." E. LEVI, THE BUSINESS OF COURTS: A SUMMARY AND A SENSE OF PERSPECTIVE, 70 F.R.D. at 212.

19. The A.P.A. is one such act. *See also* MODEL STATE ADMINISTRATIVE PRO-

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ticular agencies.[20] Additionally, enabling acts provide administrative agencies with the authority to write their own procedural rules.[21] The protections of procedural due process impose additional procedural requirements on administrative agencies.[22] Specific standards of timeliness or prompt decisionmaking are provided in the sources of administrative procedure law. The relevant inquiry here is how effective these standards are in achieving the goal of prompt decisionmaking, as measured by statistical data on agency decisionmaking processes. Finally, the inquiry will turn to what is the optimally effective standard?

B. *Definitions*

The A.P.A. provides explicit timeliness standards, in sections 555(b) and 558(c), and a judicial remedy for unreasonably delayed action, in section 706(1).[23] Similarly, specific enabling statutes have been

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CEDURE ACT printed in 13 U.L.A. (1978 Pamphlet); PA. STAT. ANN. tit. 71, §§ 1710.1-1710.51 (Purdon 1977 Supp.); CAL. CODE CIV. PROC. § 1094.5 (1973 & Supp. 1978); CAL. GOV'T CODE §§ 11370-11445, 11500-11528 (1973 & Supp. 1978).

20. *See, e.g.,* Social Security Act, 42 U.S.C. § 405(g) (1976), which provides for judicial review of final decisions of the Secretary of HEW regarding eligibility for social security benefits.

21. *See, e.g.,* Social Security Act, 42 U.S.C. § 405(a) (1976) which states: "The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions. . . ." For an example of procedural rules and regulations enacted pursuant to statutory authority *see* Practice and Procedure for Hearings to States on conformity of Public Assistance Plans to Federal Requirements, 45 C.F.R. §§ 213.1-213.33, which regulations were authorized by 42 U.S.C. § 1302 (1976). The A.P.A. defines "rule" to include "describing the organization procedure or practice requirements of an agency." 5 U.S.C. 551(4) (1976).

22. Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare agency); Goss v. Lopez, 419 U.S. 565 (1975) (school district). For analyses of the ten elements of due process required for a fair administrative hearing, at least in the public assistance context, *see* Burrus and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience,* 16 AM.U.L. REV. 199, 218 (1967), and Comment, *California Welfare Fair Hearings: An Adequate Remedy*? 5 U.C.D. L.REV. 542 (1972). *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) in which the Social Security Administration was not required by procedural due process to provide notice and opportunity to be heard prior to termination of Social Security disability benefits. *But see* Bishop v. Wood, 426 U.S. 341 (1976), and cases discussed in Note, *Democratic Due Process: Administrative Procedure After Bishop v. Wood,* 1977 DUKE L.J. 453 (1977). This note develops the thesis that "[w]ith *Bishop v. Wood* and several recent related decisions, the Court has effectively eliminated the due process clause as an independent source of administrative procedure." *Id.* at 454.

23. 5 U.S.C. § 555(b) (1976), in part, states: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. . . ." 5 U.S.C. § 558(c) (1976) states: "When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely af-

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interpreted as requiring reasonably timely agency action.[24] Furthermore, due process of law is increasingly being utilized as a substantive standard to remedy unreasonably delayed administrative action.[25]

Many of the substantive standards for timeliness are articulated in very general terms such as "within a reasonable time" or without "unreasonable delay."[26] This is in marked contrast to the approach of using specific time periods (measured in numbers of days) within which a particular action or decision must be completed. Specific examples of the latter approach are contained in the federal Speedy Trial Act,[27] the F.O.I.A.,[28] the federal Privacy Act,[29] and the federal Government in

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fected persons and within a reasonable time, shall set and complete proceedings . . . and shall make its decision." 5 U.S.C. § 706 (1976), in part, states: "[T]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed . . . ."

See Ogden, *supra* note 3, for an analysis of case law interpreting the A.P.A. as both a substantive standard (at 357-61) and a remedy for delayed administrative decisionmaking (at 380-83).

24. The Social Security Act § 405(b) was interpreted to require scheduling a social security disability hearing "within a reasonable time" in White v. Mathews, 559 F.2d 852 (2d Cir. 1977). See discussion of *White* in Ogden, *supra* note 3, at 350, 356, 361, 377.

25. *See* cases discussed in Ogden, *supra* note 3, at 364-75. *See also* Fitzgerald v. Procunier, 410 F. Supp. 1186 (N.D. Cal. 1976), in which the court held that a sixty day delay by prison authorities in reviewing an administrative classification of an inmate in a state penitentiary does not violate procedural due process.

26. The A.P.A. standards, *supra* note 23, are so defined. The Social Security Act was so interpreted in White v. Mathews, *supra* note 24. However, in *White*, the court of appeals quoted the Social Security Administration Commissioner's testimony before Congress in which he indicated that social security disability hearings could be disposed of within ninety days of the request for a hearing. 559 F.2d at 860, n. 10.

The court of appeals thus had a specific yardstick by which to measure "a reasonable time." It utilized this yardstick to affirm the imposition by the district court on the Social Security Administration of timetables for the completion of disability hearings. 559 F.2d at 860-61. *See* discussion of *White* in Ogden, *supra* note 24.

27. 18 U.S.C. §§ 3161-3174 (1976). The Speedy Trial Act applies to this discussion by analogy only because it governs criminal litigation. Section 3161(b) states in relevant part: "Any information or indictment charging an individual with the commission of an offense shall be filed *within thirty days from the date on which* such individual was arrested or served with a summons in connection with such charges . . . ." (emphasis added).

28. The F.O.I.A. requires an agency covered by the act to "determine *within ten days* (excepting Saturdays, Sundays, and legal public holidays) *after the receipt of any such request* whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor . . . ." (emphasis added). 5 U.S.C. § 552(6)(A)(i) (1976). The Act also provides, similarly, that an agency covered by the Act must "make a determination with respect to any appeal *within twenty days* (excepting Saturdays, Sundays, and legal public holidays) *after the receipt* of such appeal . . . ." (emphasis added). 5 U.S.C. § 552(6)(A)(ii) (1976).

29. Similar provisions are contained in the federal Privacy Act.

Agencies covered by the act must permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal and

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the Sunshine Act.[30]

Specific time period standards are of two kinds: those with escape clauses and those without escape clauses. Escape clauses can be defined as statutorily sanctioned reasons which justify agency noncompliance with the statutory deadline, or, which allow the agency to extend the particular deadline. A variation of this theme excludes the time taken up by the sanctioned reason for delay from being counted as part of the required time period. The "reasons justifying noncompliance" type of escape clause is illustrated in the F.O.I.A.[31] The "deadline extension" type of escape clause is illustrated in the F.O.I.A.[32] and the Privacy Act.[33] The Speedy Trial Act illustrates the "time exclusion" type of clause.[34] A no escape clause specific time period is illustrated in

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> *not later than 30 days* (excluding Saturdays, Sundays, and legal public holidays) *from the date* on which the individual requests such review, *complete such review* and *make a final determination unless, for good cause shown*, the head of the agency *extends such 30-day period* . . . . (emphasis added).

5 U.S.C. § 552a(d)(3) (1974).

30. The newly enacted Government in the Sunshine Act provides, in part, that "[e]ach agency subject to the requirements of this section shall, *within 180 days after* the date of enactment of this section [enacted September 13, 1976] . . . promulgate regulations to implement the requirement of subsections (b) through (f) of this section. . . ." 5 U.S.C. § 552b(g) (1976). For a discussion of the Act, *see* Note, *The Government in the Sunshine Act—an Overview,* 1977 DUKE L.J. 565 (1977).

31. 5 U.S.C. § 552(a)(6)(C) (1976) states:

> Any person making a request under paragraph (1), (2) or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request *if the agency fails to comply with the applicable time limit provisions of this paragraph.* If the Government can show *exceptional circumstances exist* and *that the agency is exercising due diligence* in responding to the request, the court *may retain jurisdiction* and allow the agency additional time *to complete its review of the records. . . .*" (emphasis added).

The reasons here are "exceptional circumstances" and the agency is judicially supervised and must establish due diligence in its efforts to comply with the request. For a discussion of cases relating to the "exceptional circumstances" escape clause and the related "unusual circumstances" extension type of escape clause, see Note, *Developments Under the Freedom of Information Act-1976*, 1977 DUKE L.J. 532, 533-41 (1977).

32. 5 U.S.C. § 552(a)(6)(B) (1976) states:

> *In unusual circumstances* as specified in this paragraph, *the time limits prescribed . . . may be extended* by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. *No such notice shall specify* a date that would result in *an extension for more than ten working days.* (emphasis added).

33. 5 U.S.C. § 552a(d)(3) (1976) provides in part: "unless, for good cause shown, the . . . agency extends such 30-day period." Unlike the extension clause discussed in note 32 *supra* which specifies a maximum deadline extension of ten working days, the Privacy Act is ambiguously worded so that it is not clear whether the agency can extend the 30-day deadline indefinitely or can *only* extend it for an additional 30 days.

34. The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the

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the Government in the Sunshine Act.[35]

C. *Evaluating Solutions to the Problem*

Analyzing the merits of the various delay control or timeliness standards requires a brief statement of the problem of delayed decisionmaking, utilizing what statistical data is available.[36] According to the Senate Committee on Governmental Affairs,[37] undue delay is a serious problem[38] in the regulatory agency decisonmaking processes of licensing,[39] adjudication,[40] ratemaking,[41] and enforcement.[42] Even *notice and comment* rulemaking[43] is sometimes slower than agency ad-

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> time within which the trial of any such offense must commence: . . . (3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

18 U.S.C. §§ 3161(h)-(h)(3)(A) (1976).
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35. 5 U.S.C. § 552b(g), discussed at note 31 *supra*, states a flat 180-day time period for promulgation of regulations to implement the requirements of the Act.

36. The statistical data is available for the federal regulatory agencies. This article's conclusions are applicable to delayed decisionmaking in all administrative agencies whether federal, state, or local.

37. RIBICOFF REPORT, VOL. FOUR, *supra* note 2.

38. *Id.* at 6-7, 26-32. Notes 38-44 and accompanying text are taken almost verbatim from Ogden, *supra* note 3. They are repeated here to provide continuity.

39. The APA defines licensing as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. § 551(9) (1976). "License" is defined in 5 U.S.C. § 551(8) (1976). The RIBICOFF REPORT, VOL. FOUR, *supra* note 3, surveyed licensing at the Civil Aeronautics Board [CAB] and at the Interstate Commerce Commission [ICC]. The survey was based on information obtained by the Administrative Conference of the United States for formal agency proceedings for fiscal year 1975. The study concluded that licensing proceedings averaged 19 months. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 6-7.

40. The A.P.A. defines "adjudication" to be "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1976). "Order" is defined in 5 U.S.C. § 551(6) (1976). The average number of days elapsed for adjudicatory proceedings in which there was a decision by an administrative law judge followed by agency review ranged from 475 days for the CAB to 1,057 for the Federal Communications Commission [FCC] in fiscal years 1973 and 1974. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 27.

41. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 6-7. The ratemaking process was studied for the CAB, the Federal Maritime Commission [FMC], the Federal Power Commission [FPC], and the ICC. Ratemaking proceedings averaged 21 months. *Id.*

42. *Id.* The enforcement process was studied at the Federal Trade Commission [FTC] and the Securities Exchange Commission [SEC]. Enforcement proceedings averaged over three years. *Id.*

43. The A.P.A. defines "rulemaking" to be "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1966). "Rule" is defined in 5 U.S.C. § 551(4) (1976). "Notice and Comment" rulemaking is defined in 5 U.S.C. § 553 (1976).

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judication.[44] The backlog of Social Security disability hearings requested but unscheduled, or, scheduled and held, but in which a decision is pending, challenged in *White v. Mathews*[45] and *Caswell v. Califano,*[46] indicates that delayed decisionmaking is also a problem for federal nonregulatory agencies.

Although it is not possible (based on current statistics) to state that there is a cause-and-effect relationship between the problems of delayed administrative decisionmaking and any particular agency procedure or any particular standard of timeliness, it is possible to analyze the various alternative standards and to at least articulate the questions that ought to be asked before a standard of promptness is adopted as a benchmark for administrative action. When considering the alternatives (a general "reasonable time" standard as opposed to a specific time period, with or without an escape clause) the following questions should be considered: (1) which approach has a better emphasis? (2) which approach is a more effective remedy for delayed action? (3) who should participate in the selection process? (4) what should be considered? (5) should there always be escape clauses if specific standards are chosen? and (6) should judicially reviewable standards be developed for all promptness problems?

1. Which Approach Has a Better Emphasis?

A general "reasonable time" standard,[47] by not defining specifically how much time is permissible for a particular action, provides no

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44. *See* RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 26-32. It concludes that the rulemaking process is quicker than adjudication *for policy decisions. Id.* at 26. For example, rulemaking proceedings averaged 224 days for the CAB in fiscal year 1974 as contrasted with 475 days for CAB adjudication proceedings. *Id.* at 27. Similarly, FCC rulemaking proceedings averaged 383 days in fiscal year 1974 as opposed to 1,057 days for FCC adjudication proceedings. *Id.* However, in a report by the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, rulemaking and adjudicatory proceedings were studied at the Consumer Product Safety Commission [CPSC], the FCC, the FTC, the ICC, and the SEC. The survey results showed that for the CPSC the average disposal time for rulemaking proceedings was greater than for adjudicative proceedings: average disposal time was 16.1 months for rulemaking and 3.3 months for adjudicative proceedings in fiscal year 1975. Similarly, at the FCC, rulemaking proceedings averaged 6.4 months in fiscal year 1975 (down from 14.1 months in fiscal year 1971) while application hearings averaged 4.5 months (down from 10.1 months in fiscal year 1971). STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2d SESS., FEDERAL REGULATION AND REGULATORY REFORM 581-85 (Comm. Print, 1976).

45. 559 F.2d 852 (2d Cir. 1977). In *White,* the time between request for hearing and final decision for most cases was supposed to be 90 days. However, between January 1973 and March 1975 the average time nationally was 195.2 days and the average time in Connecticut was 211.8 days. *Id.* at 860, n.10.

46. 435 F. Supp. 127 (N.D. Me. 1977).

47. *See, e.g.,* 5 U.S.C. § 555(b) *supra* note 23.

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guidelines by which an administrative agency can measure itself, nor does it provide any goals toward which an agency can strive. However, a general standard does provide a measure of flexibility. In contrast, a specific time period provides both guidelines and goals. Furthermore, a specific time period (without an escape clause) constrains an agency more effectively by making it harder for an agency to avoid prompt decisionmaking. Specific time periods without any escape clauses, however, can be rigid and too inflexible.[48] Unfortunately, the addition of escape clauses, while adding flexibility, provides an opportunity for the exception to swallow the rule.[49] Thus each approach has both advantages and disadvantages. Whether flexibility outweighs the risks inherent in escape clauses cannot be decided without looking at which type of standard provides the most effective remedy.

2. Which Approach Most Effectively Remedies Delayed Action?

A general "reasonable time" or "unreasonable delay"[50] standard requires judicial definition. The Administrative Procedure Act remedial section[51] has been construed to require proof of untimeliness, proof of unreasonable (in the sense of unjustifiable) action on the agency's part,[52] and proof of prejudice to the party claiming undue

48. In a letter to Senator Edward M. Kennedy, Chairman of the Senate Conferees considering the FOIA amendments, President Ford stated: "I . . . believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act." 120 CONG. REC. S17,829 (daily ed. Oct. 1, 1974).

Note, *Developments Under the FOIA-1976*, 1977 DUKE L.J. 532, 533 at n. 16.

The author goes on to point out that President Ford's objections resulted in the addition of the "unusual circumstances" and "exceptional circumstances" escape clauses. *Id.* at 533-34.

49. *Id.* at 534-36.

[T]he existence of 'exceptional circumstances' may be *presumed*, at least with regard to FBI requests. As long as the Bureau can show that it is exercising due diligence in processing FOIA requests, it appears that for the foreseeable future those requesting information under the FOIA will have to resort to court action in order to secure compliance anywhere near the statutory time limits.

Id. at 536, citing Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

50. *See* the A.P.A., 5 U.S.C. § 706(1) (1976).

51. A court may "compel agency action unlawfully withheld or unreasonably delayed." *Id.*

52. *See* Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972). The Court of Appeals for the Fifth Circuit construed the A.P.A. section 706 standard of "unreasonably delayed" administrative action to require proof that the *delayed action was not only untimely but also unreasonable*. The court defined unreasonable, in part, to include delayed agency action *caused* by "slothfulness, lethargy, inertia or caprice."

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delay,[53] before a court will provide judicial relief.[54]

The judicial imposition of "unreasonable action"[55] and "prejudice" proof requirements, on top of a showing of untimeliness, seriously dilutes the effectiveness of the A.P.A. general standard. Establishing that the agency acted in an untimely manner should be sufficient because the gravamen of the complaint under section 706 is abnormally delayed action.[56] If a party is unable to establish unreasonablenss, in the sense of untimely action,[57] then he ought to be allowed, as an alternative, to establish unreasonableness in the sense of unjustified action.[58]

Requiring proof of unreasonableness allows the agency to escape responsibility for delaying action when it can make a threshold showing of some justification, such as insufficient personnel or too many

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Id. at 748. *Accord*, EEOC v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976). In *Exchange Security*, a forty month delay by EEOC in investigating a claim of employment discrimination was held to be insufficient to block an EEOC subpoena of employer's records because, *inter alia*, there was no statutory time limitation and employer did not prove a "'dilatory attitude on the part of the Commission or its staff.'" *Id.* at 1216-17, quoting Chromcraft, 465 F.2d at 748.

53. Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972). In *Chromcraft*, the court held that section 706 requires a finding of prejudice as a prerequisite to judicial relief. The court based this conclusion on the following language of section 706: "'In making the determinations, the court shall review the whole record or those parts of it cited by a party, and *due account shall be taken of the rule of prejudicial error.'" Id.* at 747 (emphasis added). Because the employer in *Chromcraft* was unable to prove that it was prejudiced by the Commission's delayed action, the court of appeals reversed the district court order "setting aside the Commission's demand for production of evidence for use in an investigation of Title VII charges filed against the Company." *Id.* at 746-47. *Accord*, Irish v. SEC, 367 F.2d 637 (9th Cir. 1966) (no proof of prejudice from delay in revocation proceedings); and EEOC v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976) (employer failed to prove it was prejudiced because of the delay).

54. For an extensive discussion of the cases construing the A.P.A. unreasonable delay standard, *see* Ogden, *supra* note 3, at 357-61.

55. 465 F.2d at 748.

56. FTC v. J. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 904 (1964). In *Weingarten*, the Court of Appeals for the Fifth Circuit, in rejecting a claim that the mere passage of time constitutes the wrong proscribed by section 706, stated that an unreasonable delay claim cannot be established "absent proof of the normal time necessary to dispose of a similar proceeding." *Id.* at 691. *Accord*, Kent v. Hardin, 425 F.2d 1346 (5th Cir. 1970) (in which a 14-month delay by USDA hearing examiner in issuing decision suspending for 90 days petitioner's license to trade in the commodities futures markets does not violate A.P.A. "reasonable dispatch" standard without proof of a normal time for such decisions to be issued).

57. The plaintiffs were not able to establish untimely action in *Weingarten* or *Kent*.

58. 336 F.2d at 687-91; 425 F.2d at 1350. Both *Kent* and *Weingarten* hold that it is sufficient to prove facts establishing a "dilatory attitude" on the part of the administrative agency or its employees *as an alternative* to proving the normal time period for the type of action that has been delayed.

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cases.[59] Logically, such a proof requirement may also preclude judicial relief for the party who cannot prove the normal or usual time period.[60] This is because the test requires proof of unreasonableness in both senses of the word—unjustified action *and* abnormal time.

Requiring proof of prejudice to the party claiming delay impairs the effectiveness of the A.P.A. remedy because prejudice has been defined to be some harm to the party above and beyond the mere passage of time.[61] Prejudice, as so defined, is an impediment because the focus of the section 706 remedy is shifted unwisely from the costs of untimely decisionmaking *per se*[62] to the much narrower, and harder to prove, litigation impairment test. Furthermore, in so defining prejudice, the courts are allowing tardy agencies to escape responsibility for delay by seemingly precluding proof of the type of prejudice that occurs when the normal or usual time period for agency decisionmaking is exceeded (*e.g.,* increased expenses to the party affected, lost profits if a business certificate is delayed, and increases in the cost of engaging in such business because of inflation). Finally, to the extent that a broader prejudice definition is not recognized, the true cost of delayed decisionmaking in money, time, and energy remains less susceptible to judicial remedy because it is not judicially cognizable.

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59. This is exactly what happened in Chromcraft Corp., 465 F.2d 745. The circuit court concluded that 19 employees in an EEOC regional office were greatly overburdened when there were 810 active cases in their office with 100 new cases filed each month.

60. *See* note 57 *supra*; *but see* EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976), in which the court held that an eighteen-month unexplained delay by the EEOC in filing suit on behalf of an employee claiming employment discrimination when there was no backlog or other justification constituted conduct illustrating a "dilatory attitude" on the part of the EEOC.

61. EEOC v. Metropolitan Atlanta Girls Club, Inc., 416 F. Supp. 1006 (N.D. Ga. 1976). The court held that the employer was not prejudiced by a 272-day delay in filing a complaint, because it neither disposed of relevant records nor did it seek to withdraw from voluntary adjustment negotiations with EEOC within four months prior to filing of the complaint. Bryant Chucking Grinder Co. v. NLRB, 389 F.2d 565 (2d Cir. 1967). In *Bryant*, the court held that a fifteen-month delay by the NLRB general counsel in issuing a complaint did not justify the relief requested by the employer because "[m]ere delay in the issuance of the complaint is insufficient ground for the denial of relief." *Id.* at 568.

In EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976), the court found that the employer was prejudiced by a five year delay between the time the employee filed the complaint and the time that the EEOC filed suit because relevant time cards had been destroyed, and witnesses were no longer employed by the employer and their whereabouts were unknown. *See also* EEOC v. Bell Helicopter Co., 426 F. Supp. 785 (N.D. Tex. 1976), in which the court held that prejudice was established by a nine-year delay in which records were destroyed, witnesses became unavailable, and available witnesses' memories had faded. *Accord,* EEOC v. Am. Nat'l Bank, 420 F.Supp. 181 (E.D. Va. 1976).

62. *See* FPC v. Hunt, 376 U.S. 515, 526-27 (1964), wherein the court speaks about the costs inherent in delayed FPC decisionmaking as to natural gas certificates.

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A specific time period standard, based on the normal, usual, or even optimum period of time within which to complete a type of agency action, is far more effective from a remedies standpoint when there is no escape clause. In both *White v. Mathews*[63] and *Caswell v. Califano,*[64] a critical aid to the courts' imposition of a remedial timetable on the Social Security Administration was Commissioner Cardwell's testimony that, after the requested hearing date in disability benefits cases,[65] ninety days was the "optimum median time" for completion of final decisions (for scheduling of hearings in *Caswell*). Both the *Caswell* court and the *White* court construed the Social Security Act to require the scheduling and completion of disability hearings within a reasonable time, and defined reasonable in terms of a specific ninety-day time period.[66]

Both courts rejected the insufficient personnel and too-many-new-cases excuses proffered by the Social Security Administration.[67] Thus, these courts are defining "reasonable" purely in terms of time elapsed and optimum time elapsed when such a benchmark is available, and not in terms of unreasonable action in the sense of slothfulness. Indeed, there was evidence in *White* that the Social Security Administration was making very diligent efforts to reduce the hearing backlog by, for example, importing administrative law judges from other regions of the country.[68]

Finally, both courts articulated the test for prejudice in its broad sense by focusing on the consequences of delay to persons eligible to receive disability benefits. Eligible recipients were deprived of benefits to which they were legitimately entitled because of administrative delay and they were therefore forced to resort to other means of support including public assistance benefits.[69]

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63. 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 1458 (1978).

64. 435 F. Supp. 127 (N.D. Me. 1977).

65. 559 F.2d 852, 860 at n.10; 435 F. Supp. 127, 135 (hearing to be *scheduled* within 90 days of request). The district court in *Caswell* was further aided by 90-day time periods stated in analogous sections of the Social Security Act. *Id.*

66. 559 F.2d at 859-60 n.10; 435 F. Supp. at 135. The *Caswell* court was very specific in stating "[i]n concluding that 90 days is a reasonable time from request to hearing." *Id.*

67. 559 F.2d at 859; 435 F. Supp. at 135.

68. White v. Mathews, 434 F. Supp. 1252, 1256-57 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 98 S.Ct. 1458 (1978).

69. 435 F. Supp. at 131. The *Caswell* court stated graphically that "[t]hus, as a result of these lengthy delays, nearly half of [the] plaintiff class is subjected to prolonged deprivation of benefits to which they are legitimately entitled." *Id.*

The court in *White* noted that "[t]he statute was intended to make it unnecessary for an eligible worker to resort to the sometimes demeaning procedure of asking for local relief, as plaintiff White was compelled to do here." 559 F.2d at 860.

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By quantifying reasonableness in terms of a specific time period, *White* and *Caswell* supplied the critical element for the imposition of timetables upon the Social Security Administration for both the scheduling of hearings and for post-hearing disposition of disability claims.[70] The imposition of specific timetables,[71] with concomitant judicial supervision, is a far more effective means of ensuring that an agency such as the Social Security Administration will hear and decide its cases in a timely manner.

Similarly, in order to obtain judicial relief in *White* or *Caswell*, applicants for disability benefits were not required to prove that establishment of their claim to entitlement was in some way impaired (the narrow prejudice definition). The courts focused on the direct costs and consequences of delaying hearings and decisions. This broader definition of prejudice not only eases the delayed party's burden of proof but it also focuses the court's attention, when fashioning a remedy, and the agency's attention, when seeking to promply hear and decide its caseload, on the evils of untimeliness *per se.*[72]

From the remedial standpoint, the ability to quantify a specific time period allows the fashioning of highly effective judicial remedies. Although it is not essential to enshrine a quantitative goal in the governing statute of an agency,[73] the specific time period standard is a better remedial measure than a general "reasonable time" standard. The addition of an escape clause[74] to a specific time period may tip the balance in favor of the general standard when the escape exception swallows the specific rule.[75] If a specific time period is utilized, it is important to determine who should select the precise time period for the

70. In *White*, the district court imposed remedial timetables of 180 days (by July 1, 1977), 150 days (by December 31, 1977) and 120 days (by July 1, 1978) within which disability hearings requested in the District Court of Connecticut shall be scheduled and final decisions rendered by an administrative law judge. 434 F. Supp. 1252, 1261-62 (D. Conn. 1976). Imposition of these timetables was affirmed by the court of appeals in White v. Mathews, 559 F.2d 852, 859-60 (2d Cir. 1977), *cert. denied*, 98 S.Ct. 1458 (1978).

71. In *Caswell*, the district court imposed similar timetables for the scheduling of social security disability hearings in Maine, but not dispositions of claims in which a hearing is held within 120 days (by December 31, 1977) and 90 days (by July 1, 1978). 435 F. Supp. at 136.

72. *See* note 69 *supra*.

73. The Social Security Act, 42 U.S.C. § 405(b) (1970), has neither a specific nor a general "reasonable time" standard for the scheduling and disposition of social security disability hearings.

74. *See* text accompanying notes 31-36 for definition of escape clause and discussion of types of escape clauses.

75. *See* note 49 *supra*.

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kind of decision or action and what factors should be considered in that selection.

3. Who Should Participate in the Selection Process?

The timeliness standards considered so far, with the exception of those in the Social Security Act,[76] are legislatively defined and imposed. Another alternative is judicial definition and imposition of a specific standard, as seen in *White v. Mathews*[77] and *Caswell v. Califano,*[78] in which the court construed section 205(b) of the Social Security Act[79] to require a ninety-day limit. A third alternative is to require the agencies to establish their own timeliness standards.[80] The advantages and disadvantages of each alternative will be explored, followed by a discussion of the factors to be considered in selecting a standard.

The judicial alternative is necessarily remedial and reacts to problems of tardy decisionmaking that are severe enough to trigger litigation.[81] Because of the remedial nature of judicial power, judicially defined and imposed standards have several disadvantages: 1) the standard expires when the problem ends; 2) the agency, while obeying the courts' dictates, may feel that an external standard is not one of their own choosing, and, therefore, not one they will adopt when the court-remedied problem ends;[82] and 3) the court has neither the authority nor the competence to fashion the kind of detailed, all-encompassing, prospective, planned standards suitable for the variety of decisionmaking required of agencies.[83] The major advantage of the judicial alter-

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76. 42 U.S.C. § 405(b) (1970) states, in relevant part, that "he [the Secretary] shall give such applicant . . . reasonable *notice* and *opportunity for a hearing* with respect to such decision . . . ." (emphasis added).

77. 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 1458 (1978).

78. 435 F. Supp. 127 (N.D. Me. 1977).

79. 42 U.S.C. § 405(b) (1970).

80. RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 145-47, recommends that agencies set, publish, and enforce deadlines for the accomplishment in a timely manner of the agencies' business. The report recommends against congressionally determined time limits, preferring to require the agencies to set their own time limits.

81. See the discussion of hearing "backlog" in the Social Security Administration's disability benefits program that led to litigation in White v. Mathews, 559 F.2d 852 (2d Cir. 1977), and Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977).

82. RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 147 states that agency personnel often feel that legislatively imposed deadlines tie their hands. The report states also that external legislatively imposed standards also weaken whatever impetus the agency may have toward developing its own standards. By analogy, the report's observation as to attitudes and impetus are probably also applicable to the courts and maybe even more so than to Congress. This is because the agencies have periodic budgetary and oversight contact with the legislature, while judicial contact is less frequent and often under the less pleasant circumstances of litigation.

83. *See* Ad Hoc Committee on Judicial Administration v. Commonwealth of Mass., 488 F.2d 1241 (1st Cir. 1973), *cert. denied*, 416 U.S. 986 (1974), discussed in

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native is the opportunity to monitor an agency's compliance with the judicially ordered standards designed to ensure that the agency will act in a timely manner.[84] A corollary advantage is the ability of the court to impose monetary and other sanctions on the agency for noncompliance.[85]

Legislative imposition of standards for timeliness has two advantages: it indicates the legislature's commitment to timely agency decisionmaking; and it provides a clear, articulable substantive standard easily usable by oversight committees at agency and budget review time. Litigants seeking a judicial remedy for delayed decisionmaking can also use these standards. However, in the opinion of the Senate Committee on Governmental Affairs, the disadvantages of legislative imposition of "deadlines" militate against the use of that approach.[86] The Committee stated that "while Congress must maintain consistent and comprehensive oversight of regulatory activities, overly specific legislative guidelines with respect to deadlines and management generally may constrain agency discretion and sap agency initiative and responsibility."[87] The report goes on to note that "deadline setting" is an important part of caseload planning and management which should be performed by the agency itself. Congress' role should be to require agencies to set their own deadlines (perhaps by amending the A.P.A.) and to evaluate, via oversight, the agencies achievement of their internal goals.[88]

Ogden, *supra* note 3, at 375-76 & nn.205-13 (1978). The court notes that, *inter alia*, fashioning a remedy for delayed judicial administration challenged on constitutional grounds would require a court to consider all of the relevant scheduling, management, and procedural devices to fashion an appropriate remedy. The court concluded that fashioning such a remedy would be so complicated as to be not *justiciable*. 488 F.2d at 1245-46. The court's conclusions are applicable by analogy to judicial remedial intervention into complicated decisionmaking processes of administrative agencies.

84. *See, e.g.*, Caswell v. Califano, 435 F. Supp. 127, 136 (N.D. Me. 1977), in which the court ordered the Social Security Administration to report to the courts every three months on its progress in achieving the time limits ordered by the court *until* those time limits have been achieved.

85. *See, e.g.*, White v. Mathews, 434 F. Supp. 1252, 1261-62 (D. Conn. 1976), in which the district court ordered, as a sanction for noncompliance, payment of benefits to applicants whose hearings were not completed within the mandated time periods until the decision on the applicant's case was rendered after a hearing. This order was affirmed on appeal. 559 F.2d at 860.

86. RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 145-47.

87. *Id.* at 146.

88. The Committee stated specifically that:

> Deadlines are a fundamental tool for agency managers to get regulatory work done promptly and in accordance with articulated priorities. The length of deadlines set and the agency's success living within them can also provide crucial indicators in oversight for evaluating the agency's performance. To stimulate the

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Agency definition and implementation of timeliness standards has several advantages. Agencies are encouraged to plan courses of action. As the Senate Committee on Governmental Affairs has stated, "[S]etting deadlines should be an integral part of this planning process [of the agencies], by which goals and priorities are translated into budgets, schedules, and action."[89] Agencies can establish more accurate and more realistic estimates of how long a particular type of decision will take than can legislative bodies.[90] An agency's responsibility for timeliness and its discretion to act to unclog decisionmaking processes is also enhanced by having agencies set their own standards.[91] The disadvantages of delegating to agencies the responsibility for setting their own timeliness standards are: (1) agencies could establish lengthy specific time periods for the accomplishment of their tasks so as to look good, in the eyes of Congress or the public, because they can claim that they met or exceeded their self-set deadlines; (2) agencies could provide too liberal escape clauses from their deadlines; and (3) agencies could condition responsibility for meeting their deadlines on additional personnel or budget and attempt to shift the blame for undue delay to the legislature if the additional budget or personnel are not forthcoming.

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attention of both the agencies and Congress to the importance of systematic management, it is appropriate for Congress to require that deadlines be set. We have recommended previously that such general requirement be effected through an amendment to the Administrative Procedure Act.

However, for Congress itself to specify those deadlines would be a mistake. A fundamental weakness of regulatory agencies is their reluctance to plan their activities. Setting deadlines should be an integral part of this planning process, by which goals and priorities are translated into budgets, schedules, and action.

Deadlines fixed in statutory stone might discourage the very sort of agency planning and management that should be fostered. Agencies with numerous statutory deadlines can claim, with some justification, that they are not responsible for how they spend their time and resources because they are only trying to do what Congress demands. An agency manager has noted that "each deadline imposed by statute reduces management's prerogatives and management's flexibility in coping with changing situations and areas of greatest need."[46] Also, agencies—being far more familiar than Congress with the details of their own regulatory processes—are in a far better position than Congress to set realistic deadlines. Nor does Congress have the time, inclination, or wherewithal to set deadlines for each step of each agency's decisions.

Since Congress cannot do the agencies' planning for them, it should place the responsibility for planning clearly on agencies' shoulders, and then insist that it be done. One aspect of this approach is for Congress to require that agencies schedule their proceedings, but refrain from trying to do the scheduling for them.

Id. at 146-47.

89. *Id.* at 147.

90. *Id.*

91. *Id.*

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On balance, probably the most effective approach is to require the agencies to establish timeliness standards with some supervision by the legislature to insure that each agency's estimate of the amount of time required for its decisionmaking processes are not too ambitious, or too liberal. However, because of their expertise, agencies, as opposed to the courts and the legislature, are in the best position to determine what promptness standards they can live with and realistically hope to achieve. Agency expertise, combined with the lack of time available to courts and legislatures[92] to immerse themselves in agency day-to-day planning, tip the balance in favor of the agencies as the primary setters of "deadlines."

4. What Factors Should Be Considered?

Assuming the agency sets its own standards for promptness, what factors should it consider and what types of standards should it utilize? When developing timeliness standards, a threshold question is whether or not an agency can define a decisionmaking process and quantify the usual or average time the particular process takes. An inability to quantify such usual or average time requires the agency to guess in selecting a timetable or to resort to a general reasonableness standard, lacking goals or guidelines. The ability to define and quantify can be aided by the use of economics[93] or computer science.[94]

Assuming that the average time for a particular decisionmaking process could be ascertained, an agency would then want to determine and quantify the personnel, money, and level of cooperation on the part of all parties involved, necessary to achieve that average time. It should also determine whether that average time represents both the usual time and the optimum time for the decisonmaking process. This is important because a sample caseload used to evaluate average time may reflect a high or low average due to factors that may or may not be beyond the agency's awareness or control.

Once the optimum or desirable time period is selected, the agency must decide whether or not it wishes to adopt that time period, and if

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92. *Id.* The Committee notes: "Nor does Congress have the time, inclination, or wherewithal to set deadlines for each step of each agency's decision." *Id.*

93. On timetables and economics, *see* Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. LEGAL STUDIES 399, 445-46 (1973).

94. *See* Prendergast, *The Use of Data Processing in Litigation*, 10 LOY. L.A.L. REV. 285 (1977), for an introduction to data processing for lawyers and the application of data processing to litigation. Although not directly applicable, some of the author's ideas about information control and information storage are applicable by analogy to complicated administrative hearings with large records.

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so, whether it wishes to add any escape clauses so that the time period is not binding when extraordinary events occur, such as the death of either a litigant's lawyer or the presiding officer of the agency.

The decision to adopt the selected optimum or desirable time period as a specific standard is a critical one. This is because adoption of such a standard indicates a commitment on the agency's part to achieve that standard and, more importantly, provides an easy benchmark or guideline for review by the agency itself or by the appropriate legislative oversight committee. Because of the consequences to the agency of failure to meet goals articulated by internally selected timeliness standards (such as budget cutting when a legislative oversight committee reviews the agency's performance), the agency should integrate the timeliness goals with its substantive policy goals to avoid conflicts and should consider whether or not it will include "escape clauses" in its timeliness standards.

The importance of integrating timeliness goals with other policy goals is illustrated in the case of *Buckeye Cablevision, Inc. v. United States*[95] in which a Community Antenna Television (CATV) licensee had petitioned the FCC to allow an expansion of its CATV service by increasing "the amount of cable carrying Detroit-Windsor signals to its subscribers in Toledo."[96] While Buckeye's request was being heard by the FCC, the Commission announced that it was beginning rulemaking proceedings to adopt new uniform rules for the entire CATV industry. Until the rulemaking process was completed, Buckeye's hearing and all other similar hearings were frozen.[97] In fact, as a result of the FCC "freeze," the hearing on Buckeye's petition was never completed.[98] The rulemaking proceeding in *Buckeye* is an example of the type of policy-implementation goal (regulatory uniformity) that could conflict with a timeliness standard (completing CATV hearings within 120 days of filing that request with the FCC). In fact, there was a two and one-half year delay by the FCC in acting on the Buckeye petition.[99] The type of conflict illustrated in *Buckeye*, resulting in the sacrifice of timeliness for uniformity, should be explicitly confronted by the agency and priorities among conflicting goals should be established and communicated to the regulated industry.

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95. 438 F.2d 948 (6th Cir. 1971); *see also* Harvey Radio Laboratories, Inc. v. United States, 289 F.2d 458 (D.C. Cir. 1961).

96. 438 F.2d at 949-50.

97. *Id.*

98. *Id.* at 951.

99. *Id.* at 954.

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5. Should Escape Clauses Be Included?

One type of escape clause an agency may wish to consider is that of the "delay caused by or requested by one of the parties."[100] In fashioning remedies, courts have been receptive to excluding delays caused by the party objecting to agency tardiness.[101] The agency may

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100. *See, e.g.,* The Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)-(5) (1976) which states:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

In United States v. Howard, 440 F. Supp. 1106 (D. Md. 1977), the court indicated, in dicta, that these provisions were unconstitutional.

101. *See, e.g.,* White v. Mathews, 559 F.2d at 860, where the Court of Appeals for the Second Circuit affirmed a district court order requiring payment of benefits to applicants whose hearings were delayed beyond a time limit imposed by the court, *but excluding payment when a delayed decision was the result of the applicant's own action.*

See also Aiello v. City of Wilmington, 426 F. Supp. 1272 (D. Del. 1976), in which the court listed as one factor in determining whether delayed agency decisionmaking violated due process of law "the extent to which the individual suspended contributed

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also wish to consider creating "unusual circumstances" or "exceptional circumstances" escape clauses to allow the agency needed flexibility to cope with unanticipated problems.[102] The agency should consider what type of escape clause to include. The preferred clause is a tightly defined "deadline-extension" clause[103] because it avoids wholesale abrogation of the deadline through expansive interpretation of the exception.[104] Finally, as previously discussed, the agency must explicitly relate its promptness goals, with or without escape clauses, to its overall policy goals and to the means chosen to effectuate those goals.[105]

6. Should Standards For Judicial Review Be Developed For All Types of Delay Problems?

The agency must consider the question of whether judicially reviewable standards should be developed to resolve all claims of unreasonable delay. *Quaere,* are some promptness issues not justiciable and therefore more appropriately left to agency discretion[106] rather than judicial review?[107]

Steven Goldman in an article on this subject, suggests that judicial review of claims of undue delay resulting from agency procedures may be inappropriate on justiciability grounds[108] when a court is asked to

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to or otherwise knowingly and willfully acquiesced in the delay." 426 F. Supp. at 1291 (footnote omitted).

102. The analogy here is to the FOIA exceptions discussed in text accompanying notes 31-32 *supra.*

103. *See* text accompanying notes 31-34 *supra* for a discussion of the various types of escape clauses.

104. *See* discussion at note 49 *supra.*

105. *See* Blumrosen, *Toward Effective Administration of New Regulatory Statutes,* 29 AD. L. REV. 87 (1977) (advocating "broad interpretation" by agencies implementing regulatory statutes); Blumrosen, *Toward Effective Administration of New Regulatory Statutes—Part II,* 29 AD. L. REV. 209 (1977) (discussing, *inter alia,* the relationship between the policies chosen to implement regulatory legislation and the procedures adopted to carry out those policies). He states that:

> The broadest substantive interpretations of the new law will go for naught unless they are infused into effective organization, operations and procedure. General policy statements are not automatically integrated into the operations of the agency. Many forces, conscious and unconscious, operate to prevent this integration, and the result can be charges of incompetence or of 'administrative nullification' of congressional intent.

Id. at 209-10.

106. *See* Goldman, *Administrative Delay and Judicial Relief,* 66 MICH. L. REV. 1423-31 (1968) [hereinafter cited as Goldman].

107. *See* 5 U.S.C. § 701(a) (1976) for an example of a nonreviewability standard. It states that "[t]his chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law."

108. *See* Poe v. Ullman, 367 U.S. 497 (1961), for a definition of justiciability. Mr. Justice Frankfurter writing for the majority in *Poe* states:

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review the wisdom of an informed agency decision in assigning priorities to the processing of competing applications.[109] Similarly, he suggests that it may not be appropriate for a court to resolve a claim of delay resulting from an agency's procedures, when the legal issues raised require the court either: (1) to assign a "judicial priority," in the sense of ordering the agency to "accelerate" the priority granted the litigant by the agency, or (2) to assess judicially the "efficiency" of the agency's decisionmaking process when a litigant claims the agency is slow and it should take only half as long as the agency claims it takes to complete the decisionmaking process in question.[110]

In all of these cases, the courts would be required to: (1) decide the " 'managerial' problem of allocating priorities to limited agency resources";[111] (2) weigh other competing applications on the agency's calendar and engage in a balancing of costs and benefits to be derived from shifting priorities;[112] and (3) determine, without guidance, the specific amount of time required for an agency decisionmaking process to be completed under optimum conditions.[113] Mr. Goldman suggests that courts may not, in certain circumstances, be competent to decide these questions and therefore they ought not (as a matter of justiciability) consider the efficiency, judicial priority and agency priority issues.[114]

Mr. Goldman's observations lead to two conclusions. First, justiciability problems may explain, in part, the flexible review standard applied by courts when resolving issues of agency procedure. This will be discussed more fully in subsection III. Second, agency articulation, adoption, and implementation of specific time period standards (with or without escape clauses) would facilitate judicial review of complaints of undue delay.

Articulated timeliness standards would allow the courts to engage in a process which they do well, judicial interpretation and application of a general standard to the facts of a particular case.[115] Thus courts

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> Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.

Id. at 508-09.

109. Goldman, *supra* note 106, at 1427.

110. *Id.* at 1428-30.

111. *Id.* at 1427 (to decide the agency priorities issue).

112. *Id.* at 1428 (to decide the judicial priorities issue).

113. *Id.* at 1429 (to decide the efficiency issue).

114. *Id.* at 1427-30.

115. *See* K. LLEWELLYN, THE BRAMBLE BUSH, 41-55 (1960), and E. LEVI, AN INTRODUCTION TO LEGAL REASONING, 1-19, 72-74 (1948) for a discussion of the judicial reasoning process. One of Lewellyn's famous four assumptions on which judicial

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might be able to fashion more effective remedies for the type of dilemmas faced by litigants such as Buckeye Cablevision, Inc.,[116] whose administrative claims are delayed because timeliness is sacrificed in order to achieve another policy goal of the agency.

In conclusion, there are alternative ways of framing administrative procedure standards for ensuring timely agency decisionmaking. A number of questions have to be considered before any of these promptness standards are adopted. The question of whether all claims of unreasonable delay are judicially reviewable should be raised. This requires analysis of the relationship between agency procedures and delayed decisionmaking, as illustrated in the discussion of judicial review of agency procedures when those procedures are challenged as the cause of undue delay.

III. Judicial Review of Agency Procedures and Administrative Delay

A. *Introduction*

This section will treat judicial review of agency procedures when challenged because a litigant claims that an administrative agency has unduly delayed processing his case. First, case law generally on the subject of judicial review of agency procedures will be examined. Next, cases in which the courts' unwillingness to invalidate agency procedures or to impose judicial procedures on agencies enhanced the goal of prompt agency decisionmaking, will be reviewed, followed by a discussion of those cases in which that same unwillingness had the opposite effect. In the latter cases, agency procedures were generally directly challenged as the source of undue delay. Finally, two recent cases *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission,*[117] and *North American Van Lines, Inc. v. United States,*[118] will be examined. The purpose of this discussion is to relate judicial review of agency procedures to the goal of prompt agency decisionmaking in order to determine if the current review standards serve that goal, and if not, how such standards could be altered to serve the timeliness goal.

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reasoning is based is his statement that "*[t]he court can decide the particular dispute only according to a general rule which covers a whole class of like disputes.*" LLEWELLYN, *supra* at 42. The agency-articulated timeliness standard would function as the "general rule" which the courts would interpret and apply to resolve an "efficiency" issue. Although Levi does not buy the immutable general rule approach, he uses the idea of "legal concepts" which courts apply to specific cases. The "legal concept" would be the timeliness standard.

116. *See* text accompanying notes 95-99 *supra*.

117. 430 U.S. 442 (1977).

118. 412 F. Supp. 782 (N.D. Ind. 1976).

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B. Limited Procedural Review: The Vermont Yankee Case

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,[119] decided in 1978, reaffirmed the limited procedural review standard enunciated in *FCC v. Pottsville Broadcasting Co.,*[120] in 1940. That standard was that, since agencies are primarily responsible for devising their procedures, courts are not free to dictate agency procedures or to invalidate agency decisions simply because of the court's dislike of the procedures, so long as the minimum procedural requirements, such as those imposed by the A.P.A.,[121] are satisfied. In the *Vermont Yankee Nuclear Power Corp.* case, Mr. Justice Rehnquist, writing for the Court, discusses this doctrine and reviews relevant past case authorities. His analysis will be used to develop the general discussion of judicial reviewability of agency procedures.

In *Vermont Yankee Nuclear Power Corp.*, the Supreme Court reversed[122] two decisions of the Court of Appeals for the District of Columbia Circuit. The first reversed case involved an agency decision which granted a nuclear power plant operating license[123] to Vermont Yankee Nuclear Power Plant Corporation;[124] the other involved a nuclear reactor construction permit granted to the Consumers Power Company.[125] The court of appeals had remanded the agency decisions to the Nuclear Regulatory Commission[126] because of inadequate administrative procedures.[127]

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119. 435 U.S. 519 (1978).

120. 309 U.S. 134 (1940).

121. 5 U.S.C. §§ 551-706 (1976). The A.P.A. was enacted in 1946, well after the *Pottsville* decision.

122. 435 U.S. 525.

123. The Court noted:

> Under the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. § 2011 *et. seq.*, the Atomic Energy Commission was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. See 42 U.S.C. §§ 2133, 2232, 2235, 2239.

Id. at 525-26.

124. Natural Resources Defense Council Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council Inc., 435 U.S. 519 (1978). This court of appeals decision will be referred to as *Vermont Yankee*. The Supreme Court case will be referred to as *Vermont Yankee Nuclear Power Corp.*

125. Aeschliman v. United States Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council Inc., 435 U.S. 519 (1978). This court of appeals case will be referred to as *Consumers Power*.

126. The Atomic Energy Commission performed these "licensing functions" prior to the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1976). *See* 435 U.S. at 526 n.2.

127. This is the court's characterization. Mr. Justice Rehnquist noted that with

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At issue in *Vermont Yankee* were rulemaking procedures used by the Commission to consider "the question of . . . environmental effects associated with the uranium fuel cycle in the individual cost benefit analyses for light water-cooled nuclear power reactors."[128] In *Vermont Yankee,* a Vermont utility company obtained Commission approval of a construction permit for the erection of a nuclear power plant in 1967. The company later applied for a license to operate the plant and the licensing proceeding was held in 1971.[129] One of the issues raised by the Natural Resources Defense Council, Ind. (NRDC), intervening in that proceeding, was the question of "the environmental effects of operations to reprocess fuel or dispose of wastes resulting from the reprocessing operations."[130] The Commission board ruled this issue would not be considered in licensing proceedings. However, in 1972, the Commission instituted rulemaking proceedings to establish a rule for consideration of the same issue. Two alternative rules were proposed, both based on a Commission study, "Environmental Survey of the Nuclear Fuel Cycle."[131] Following rulemaking hearings, which the court of appeals later held procedurally inadequate, the Commission, in 1974, adopted the second alternative,[132] but declined to require

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regard to the *Vermont Yankee* decision, "the majority of the Court of Appeals struck down the rule because of the *perceived inadequacies* of the procedures employed in the rulemaking proceedings." 435 U.S. at 541 (emphasis added).

128. *Id.* at 528.

129. 435 U.S. at 527-28.

130. *Id.* at 528. The Commission is required to prepare environmental impact statements (as part of the proceeding) by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1976). The court noted here that:

> The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA), . . . 42 U.S.C. § 4321 *et seq.,* and prepares a draft environmental impact statement, which after being circulated for comment, 10 CFR §§ 51.22-51.25 (1977), is revised and becomes a final environmental impact statement. § 5126. Thereupon a three member Atomic Safety and Licensing Board conducts a public adjudicatory hearing, 42 U.S.C. § 2241, and reaches a decision which can be appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. 10 CFR §§ 2.714, 2.721, 2.786, 2.787 (1977). The final agency decision may be appealed to the courts of appeals. 42 U.S.C. § 2239; 28 U.S.C. § 2342. The same sort of process occurs when the utility applies for a license to operate the plant, 10 CFR § 50.34(b), except that a hearing need only be held in contested cases and may be limited to the matters in controversy. See 42 U.S.C. § 2239(a); 10 CFR § 2.105 (1977); 10 CFR pt. 2, App. A, V(f) (1977).

435 U.S. at 526-27 (footnotes omitted).

131. 435 U.S. at 528.

132. *Id.* at 529-30. The court described the alternatives as follows:

> The notice of proposed rulemaking offered two alternatives, both predicated on a report prepared by the Commission's staff entitled Environmental Survey of the Nuclear Fuel Cycle. The first would have required no quantitative evaluation of the environmental hazards of fuel reprocessing or disposal because the

application of the rule to the Vermont Yankee licensing proceeding.[133] It then upheld the grant of the operating license.[134]

The procedure at issue in *Consumers Power* was the requirement that energy conservation alternatives presented by intervenors must pass a "threshold test" before the Commission would reopen licensing proceedings.[135] This test requires evidence, " 'sufficient to require reasonable minds to inquire further,' "[136] that there are in fact viable unexplored alternatives. In *Consumers Power,* a utility company applied for a nuclear reactor construction permit in 1969. The permit was ultimately granted in 1972 after hearings and after intervenors, who opposed the construction of the reactors, raised numerous environmental issues including issues of "energy conservation."[137] Meanwhile, the Council on Environmental Quality acted to require, in final environmental impact statements filed after January 28, 1974, consideration of "energy conservation as one of the alternatives to a proposed project."[138] Later, in 1973, the Commission decided, in an unrelated case, that "all evidence of energy conservation issues should [not] be barred at the threshold" from reactor licensing proceedings.[139]

The intervenors thereafter sought a reopening of the *Consumers Power* licensing proceeding. The Commission denied the intervenors request to reopen the proceedings for three reasons. The Commission decided that it was required to look at "energy conservation alternatives" that were "reasonably available," reasonably provable, and which would establish that the plant was unnecessary.[140] It then decid-

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> Environmental Survey had found them to be slight. The second would have specified numerical values for the environmental impact of this part of the fuel cycle, which values would then be incorporated into a table, along with the other relevant factors, to determine the overall cost-benefit balance for each operating license. *See id.,* at 356-357.

Id. at 528.

133. *Id.* at 530. The court described the Commission decision as follows:

> Finally, the Commission ruled that to the extent the rule differed from the Appeal Board decisions in Vermont Yankee "those decisions have no further precedential significance," . . . but that since "the environmental effects of the uranium fuel cycle have been shown to be relatively insignificant, . . . it is unnecessary to apply the amendment to applicant's environmental reports submitted prior to its effective date or to Final Environmental Statements for which Draft Environmental Statements have been circulated for comment prior to the effective date."

Id. (citations omitted).

134. *Id.*

135. 435 U.S. at 533-34. The Court characterized this test as an "agency procedure." *Id.* at 554.

136. 435 U.S. at 554 (quoting the Commission App. 344 n.27).

137. *Id.* at 532.

138. *Id.* at 533.

139. *Id.*

140. *Id.*

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ed that the intervenors' "contentions" did not rise to this level and that the intervenors had made no evidentiary showing on the issues at the time of the licensing proceedings even though the opportunity was there.[141] Finally, the Commission recognized the licensing board's obligation to deal with "environmental issues." However, it decided that because energy conservation was, at that time, a novel and quickly changing subject, the board must have "workable procedural rules" which ensure that intervenors will "state clear and reasonably specific energy conservation contentions in a timely fashion" and which require intervenors to "have a burden of coming forward with some affirmative showing if they wish to have these novel contentions explored further."[142]

In reversing the court of appeals' decisions and remanding the two cases to that court, the Supreme Court concluded that the court of appeals had both "improperly intruded into the agency's decisionmaking process, [and had] seriously misread or misapplied . . . statutory or decisional law cautioning reviewing courts *against* engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress."[143] In so concluding, Mr. Justice Rehnquist stated: "[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."[144] Illustrative of this emphasis, according to the Court, were the cases of *FCC v. Pottsville Broadcasting Co.*[145]

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141. *Id.*

142. *Id.* at 534-35.

143. *Id.* at 525 (emphasis added).

144. *Id.* at 524.

145. 309 U.S. 134 (1940). In *Pottsville Broadcasting Co.*, the FCC's denial of a radio station broadcasting license application was overturned by the court of appeals and the case was remanded to the Commission. On remand, the Commission consolidated Pottsville's application with two others for the same geographical area, which other applicants had filed after Pottsville. Pottsville obtained a writ of mandamus from the court of appeals compelling the Commission to decide Pottsville's application without consolidating its application with the two other ones. *Id.* at 139-40. The Supreme Court reversed the court of appeals granting of the writ of mandate because appellate courts could not give "priority" to one applicant for Commission consideration, only Congress could. *Id.* at 145-46. In so holding the court stated that

> the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.

Id. at 138.

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and *FCC v. Schreiber.*[146]

Similarly, Mr. Justice Rehnquist noted, regarding rulemaking proceedings, that the Court had interpreted section 553 of the A.P.A.[147] in *United States v. Allegheny-Ludlum Steel Corp.,*[148] and *United States v. Florida East Coast Railroad Co.,*[149] as establishing:

> the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.[150]

This language was quoted by Mr. Justice Rehnquist in *Vermont Yankee,* 435 U.S. at 525. The court in *Pottsville* recognized the "differences in origin and function" between courts and administrative agencies and noted that

> [t]hese differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," *Interstate Commerce Commission v. Baird,* 194 U.S. 25, 44, 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. Compare *New England Divisions Case,* [Akron, C.& Y. R. Co. v. United States] 261 U.S. 184.

309 U.S. at 143.

146. 381 U.S. 279 (1965). In *Schreiber,* the Court upheld an FCC subpoena duces tecum and order requiring the appearance of a television industry executive and the production of documents by that executive relating to network television programs produced by his company at a public hearing held by the FCC to investigate the industry. The FCC had, pursuant to its own procedural standards for disclosure and nondisclosure, rejected the executive's request that the documents not be made public. 389 U.S. at 282-85. When the executive refused to comply with the order, the FCC obtained enforcement of the order by the district court, but enforcement was *conditioned* by the court on nondisclosure to the public of his testimony and of the documents unless, after its investigation was over, the FCC could satisfy the court that there was valid reason for disclosing this information to the public. 381 U.S. at 286-88. The court of appeals affirmed the order conditioned on confidentiality holding that "the District Court had not abused its discretion in [so] conditioning its order." 381 U.S. at 288. In modifying the district court order, so as to remove the confidentiality requirement, and remanding to the district court to enforce the order without that requirement, 381 U.S. at 288, 300, the Court concluded that the district court had improperly imposed its own confidentiality procedural standards in place of the Commission's own rule. 381 U.S. at 291.

147. 5 U.S.C. § 553 (1976).

148. 406 U.S. 742 (1972).

149. 410 U.S. 224 (1973).

150. 435 U.S. at 524.

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This limited judicial role was also emphasized in *Schreiber* when the Court stated:

> To permit federal district courts to establish administrative procedures de novo would, of course, render nugatory Congress' effort to insure that administrative procedures be designed by those most familiar with the regulatory problems involved. Thus, in providing for judicial review of administrative procedural rulemaking, Congress has not empowered district courts to substitute their judgment for that of the agency. Instead, it has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution.[151]

Applying these standards to the decision of the court of appeals in *Vermont Yankee,* the Court first concluded that the court of appeals had overturned the "spent fuel cycle rule" "because of the perceived inadequacies of the procedures employed in the rulemaking proceedings."[152] The court of appeals found this inadequacy to exist "despite the fact that it appeared the agency employed all the procedures required by 5 U.S.C. § 553 (1976 ed.) and more . . . ."[153] Rejecting the court of appeals' view that procedural inadequacy was a valid basis for overturning the rule, when the A.P.A. minimum has been satisfied, the Court held that:

> In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the

151. 381 U.S. at 290-91.

152. 435 U.S. at 541. The precise inadequacy isolated by the Court centered on the intervenor's claim "that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process." *Id.* (citations omitted). The Court went on to state that the basis of the decision of the court of appeals was clearly procedural inadequacy. The Court stated:

> The court [of appeals] then went on to frame the issue for decision thus: "Thus, we are called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues." . . . The court conceded that absent extraordinary circumstances it is improper for a reviewing court to prescribe the procedural format an agency must follow, but it likewise clearly thought it entirely appropriate to "scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided. . . ." The court also refrained from actually ordering the agency to follow any specific procedures, . . . but there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate. This conclusion is particularly buttressed by the fact that after the court examined the record, particularly the testimony of Dr. Pittman, and declared it insufficient, the court proceeded to discuss at some length the necessity for further procedural devices or a more "sensitive" application of those devices employed during the proceedings.

Id. at 541-42 (citations omitted).

153. 435 U.S. at 535.

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> statutory mandate under which the Commission operates permitted the court of review to overturn the rulemaking proceedings on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case.[154]

In so holding, the Court reasoned that, absent a constitutional issue[155] or "extremely compelling circumstances,"[156] "agencies 'should be free to fashion their own rules of procedure' "[157] and courts should not impose additional procedural requirements on the agencies above and beyond those mandated by the relevant statutes.[158]

The Court remanded the *Vermont Yankee* decision to the court of appeals to review the rulemaking proceeding according to the proper standard of review.[159] The Court also overturned the decision in *Consumers Power* and rejected both the appellate court's conclusion that the Commission's "threshold test" procedure was "arbitrary and capricious,"[160] and the appellate court's order to the licensing board to send back "the ACRS [Advisory Committee on Reactor Safeguards] report to ACRS for further elaboration, understandable to a layman, of the reference to other problems."[161]

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154. *Id.* at 548.

155. *Id.* at 543. The Court stated that there was no constitutional claim pressed by NRDC that would compel additional rulemaking procedures. *Id.* at 542 n.16.

156. *Id.* at 543. The Court indicated without deciding that such a circumstance might be "a totally unjustified departure from well-settled agency procedures of long standing. . . ." *Id.* at 542.

157. *Id.* at 543 (citations omitted).

158. 435 U.S. at 549 n.21. The Court rejected the view that NEPA required additional or different procedures in this case from those mandated by the A.P.A. *Id.* at 548-49. The Court said: "Thus, it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." *Id.* at 548.

159. *Id.* at 549. The Court said specifically:

> We accordingly remand so that the Court of Appeals may review the rule as the Administrative Procedure Act provides. We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." *Camp v. Pitts,* 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed. 2d 106 (1973). *See also* SEC v. Chenery Corp., 318 US.. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.

Id.

160. *Id.* at 549-50.

161. *Id.* at 556. ACRS stands for "the Advisory Committee on Reactor Safety . . . , a group of distinguished experts in the field of atomic energy." *Id.* at 526.

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The Court's decision and reasoning in *Vermont Yankee* has tremendous implications for the goal of prompt agency decisionmaking insofar as decisionmaking is affected by the standards of judicial review of agency procedures. One of the rationales of the Court for rejecting the doctrine that courts can require agencies engaging in rulemaking proceedings to use procedures in addition to the section 553 threshold requirements of the A.P.A.,[162] is the Court's concern that agencies will resort to the use of "full adjudicatory procedures" for all rulemaking proceedings[163] with the result that "all the inherent advantages of informal rulemaking would be totally lost."[164] This would lead to "administrative paralysis"[165] and a large increase in the time required to complete rulemaking proceedings.[166]

The Court's concern, however implicit it may be, with paralyzing agency decisionmaking processes by excessive judicial scrutiny of the agencies' procedural choices was further illustrated when the Court upheld the "threshold test" procedural standard. The Court felt it was not unfair to impose some burden on intervenors to show that energy conservation was a feasible alternative, in view of the rapid change in national perspective on energy conservation that occurred in 1973 after the hearings were completed in *Consumers Power*.[167] To retrospectively label such action as " 'arbitrary or capricious' in light of the facts then available"[168] ignores the "time gap" always present in administrative proceedings which, if not ignored, would result in no administrative proceedings ever being completed.[169] Finally, the court

162. *Id.* at 548-49.
163. *Id.* at 546-47.
164. *Id.* at 547, *citing* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 378, 387-88 (1974).
165. Wright, *supra* note 164, at 388, states: "[s]eeking administrative variety, we would obtain administrative paralysis."
166. RIBICOFF REPORT, Vol. Four, *supra* note 2, found one of the "principal causes of excessive delay at regulatory agencies . . . [to be] agency procedures are excessively judicial in nature; there is far too much emphasis on trial-type procedures." *Id.* at IX and 26-35. Because of this, the Report advocates "greater use of informal rulemaking procedures" by agencies, *Id.* at XIII, and 37-38, and "modification" of "formal adjudicatory procedures" required by the A.P.A. to speed up some types of regulatory cases (*e.g.*, rate regulation cases). *Id.* at XIII, and 37-53.
167. 435 U.S. at 552-55. This was because of "the drastic oil shortages imposed upon the United States in 1973 . . . ." *Id.* at 552.
168. *Id.* at 554.
169. To support this conclusion the Court re-stated:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated (and, we might add, the time the decision is judicially reviewed) . . . . If upon the coming down of the order litigation might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative

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labelled as "kafkaesque" the remand of the Consumers Power permit decision because the ACRS report was incomplete.[170] The Court's concern here was also, in part, undue delay of the permit process for minor, "insubstantial" reasons.[171] The Court's concern with delay seems to be contradicted by the statement in *FPC v. Transcontinental Gas Pipe Line Corp.*,[172] quoted with approval by Justice Rehnquist, that a reviewing court may not dictate "the time dimension of the needed inquiry" to the agency. The quoted statement reads:

> At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, *procedures, and time dimension of the needed inquiry* and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'[173]

However, it is possible to imply that time dimension means the normal "passage of time requisite to the effective functioning of the administrative process"[174] and that "substantial justification" is synonymous with unreasonable delay.

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process could ever be consummated in an order that would not be subject to reopening.

Id. at 554-55 *quoting,* ICC v. Jersey City, 322 U.S. 503, 514 (1944).

170. *Id.* at 557.

171. The Court specifically stated:

> All this leads us to make one further observation of some relevance to this case. To say that the Court of Appeals' final reason for remanding is insubstantial at best is a gross understatement. Consumers Power *first applied in 1969* for a construction permit—not even an operating license, just a construction permit. The proposed plant *underwent an incredibly extensive review.* The reports filed and reviewed literally fill books. *The proceedings took years,* and the actual hearings themselves over two weeks. *To then nullify that effort seven years* later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque.

Id. (emphasis added).

The Court reemphasized the minor nature of the report issue when it stated: "And a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made *after an otherwise exhaustive proceeding.*" *Id.* at 558 (emphasis added).

172. 423 U.S. 326 (1973).

173. 435 U.S. at 544-45 *quoting,* FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. at 333, *quoting,* SEC v. Chenery Corp. 332 U.S. 194, 196 (1947).

174. Goldman, *supra* note 106, at 1423.

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C. *Delay and Procedural Review Standards: A Different Approach*

It is far better from the standpoint of administrative promptness for the Court to explicitly articulate whether different standards of judicial review of agency procedures apply when: (1) the agency devises a procedure explicitly to ensure prompt decisionmaking; (2) the agency devises a procedure without regard to promptness *per se*, but there is no claim of undue delay because of that procedure; and (3) the agency devises a procedure without regard to promptness *per se* and there is a claim of unreasonable delay caused by that procedure. By adopting different standards for each of these situations, courts will be forced to consider the issue of delay caused by agency procedures, separate and apart from the policy considerations underpinning the doctrine of limited judicial review of agency procedures discussed in *Vermont Yankee*. Separating the delayed decisionmaking issues from the other policy issues will allow courts to compare policies[175] and to explicitly balance the countervailing considerations of pressuring agencies to adopt speedy procedures[176] to ensure prompt decisionmaking, and of not paralyzing agencies by requiring additional procedures or usurping agency procedural discretion and expertise.

Explicit balancing offers greater hope because promptness will not be ignored or merely implicitly considered by courts, but will become

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175. Examples are the policies supporting prompt decisionmaking and the policies supporting judicial noninterference with agency procedural discretion.

176. Courts can pressure agencies by imposing stringent timetables for decisionmaking. This was done in White v. Mathews, 559 F.2d 852, where timetables forced the Social Security Administration to devise procedures to process its caseload within the judicially mandated time periods. This author observed one such procedure in his practice before the Social Security Administration (which was not to his knowledge a result of court pressure). After a hearing was requested in disability benefits cases, the Social Security Administration Bureau of Hearings and Appeals (BHA) would screen the requests. Some applicants would be granted benefits, without a hearing, based on the written record. This procedure required a remand to the state medical evaluation agency for certification of disability. Moreover, it often resulted in benefit awards when additional medical evidence of disability was offered by applicant's counsel *after* the second review stage at the state agency level.

This procedure eliminated some of the workload of the administrative law judges. Hearings did not have to be held, transcripts did not have to be reviewed, and decisions did not have to be written when entitlement to benefits was relatively clear based on medical evidence *newly presented*. The number of cases, where new evidence presented after remand is dispositive, might be thought to be small. However, many applicants are uneducated. Furthermore they do not seek legal representation until their application has been twice denied, at the state level, and a hearing is requested before the BHA. Thus, "disability" is often not established at the preliminary levels. When counsel enters the case and presents previously unavailable evidence, such as a psychologist's report showing that a fifty-five year old laborer with degenerative arthritis in his lower spine is functionally illiterate, the "disability" issue might be resolved, and the aggregate time saved by the BHA can be substantial.

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one of the standards for judicial review of agency procedures on a consistent and integrated basis. While it could be argued that such a consistent, integrated standard is provided in the A.P.A. in sections 555(b), 558(c), and 706(1),[177] the cases in which agency procedures were challenged on unreasonable delay or other grounds do not support this conclusion.

As noted in the introduction, one theme present in the cases is that judicial reluctance to invalidate agency devised procedures, or to impose additional procedures on the agency, often serves the goal of prompt administrative decisionmaking. *FTC v. J. Weingarten, Inc.*[178] is ironically illustrative of this theme. In *Weingarten,* the Court of Appeals for the Fifth Circuit invalidated the district court's prohibition of an FTC remand order challenged on unreasonable delay grounds.[179] The court utilized a form of the limited-judicial-review-of-agency-procedure doctrine in so invalidating the district court order and thereby eliminated a judicial remedy for the unreasonable delay claim of J. Weingarten, Inc.[180] In so acting, the court stated, in what was probably dicta, that

> [o]f course the Supreme Court and all Courts in a supervisory role are concerned with delay . . . [A]nd we are the first to emphasize that agencies must exert the greatest resourceful, imaginative ingenuity in devising procedures which in a day of ever-expanding dockets will permit the regulatory process to function properly with reasonable dispatch.[181]

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177. 5 U.S.C. § 555(b), 558(c), 706(1) (1976) discussed at note 23 *supra.*

178. 336 F.2d 687 (5th Cir. 1964), *cert. denied* 380 U.S. 908 (1964).

179. In *Weingarten,* the Court of Appeals for the Fifth Circuit reversed the district court's grant of an injunction prohibiting the FTC from remanding a section 5 proceeding against J. Weingarten, Inc. to an FTC hearing examiner because the remand order did not violate the A.P.A. "reasonable dispatch" requirement. 336 F.2d at 690-91. This conclusion was reached, notwithstanding Weingarten's claim that a three and one-half year time period the proceedings had taken constituted unreasonable delay, *because* Weingarten was unable to prove that three and one-half years was an abnormal time period for such a proceeding. *Id.* at 691.

180. *Id.* at 696-97. The court stated specifically that:

> [T]his prohibition on the use of an Examiner *is an unwarranted intrusion into the administrative process by a Judge.* Unlike traditional court proceedings which have a constitutional genesis and function so that judging must ordinarily be done by Judges, not Masters, LaBuy v. Howes Leather Co., 1957, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, Congress recognizes that in administrative adjudication much must be left to hearing officers. Indeed, it is the fact finding function through the inescapable use of hearing officers, their sense of independence, and the review of their findings which has been at the core of the concern for improving the quality of such actions. With the wide range of its statutory responsibilities, the number and complexities of the kind of matters it must handle, *there is simply no basis for the District Judge taking it on himself to tell the Commission how it should husband and deploy its resources and manpower.*

Id. at 696 (emphasis added).

181. *Id.* at 691-92.

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This dicta from *Weingarten* (particularly the second sentence) was quoted frequently by courts to justify refusals to invalidate agency devised procedures whose purpose was to speed agency decisionmaking when such procedures were challenged on other than unreasonable delay grounds. For example, in three ICC cases, *Younger Brothers, Inc.,v. United States,*[182] *Tose, Inc. v. United States,*[183] and *Caroline Freight Carriers Corp. v. United States,*[184] the courts cited that language as part of their rationale for upholding the ICC's use of a

182. 238 F. Supp. 859 (S.D. Texas 1965). In *Younger Brothers, Inc.*, the court specifically stated:

> This leaves only the tag end contention that in its disposition of the case, the Commission failed to comply with the requirement of § 8(b), 5 U.S.C.A. § 1007(b) of the APA, that the order reflect the reasons and basis for the findings and conclusions. If this is a claim that Division 1, otherwise fully satisfied with Examiner's Report, has to go through the laborious process of issuing its own decision-report, it quickly fails. The Commission, as do other adjudicatory tribunals, court or administrative, has the right, if not the duty, to exercise imaginative resourcefulness and judicial inventiveness in developing procedures which enable it to stem the tide of ever increasing backlogs. See FTC v. J. Weingarten, Inc., 5 Cir., 1964 336 F.2d 687 . . . .
>
> The DANDO device is certainly permissible. North American Van Lines, Inc. v. United States, N.D. Ind. (3-Judge), 1963, 217 F.Supp. 827, 842; Deioma Trucking Co. v. United States, N.D. Ohio (3-Judge), 1964, 233 F.Supp. 782, 783. When pursued it means, of course, that the Commission's action stands or falls with the Examiner's Report. From that viewpoint, there is nothing to the criticism leveled here. First, there was no proper exception taken as to the form or adequacy of the findings (as distinguished from the underlying evidence) . . . . Next, the Examiner's Report, exceptionally detailed and revealing, fully met the APA test.

Id. at 861-62 (citations and footnotes omitted).

183. 304 F. Supp. 894, 900 (E.D. Pa. 1969). This court stated:

> The final objection of the appellants is to the Commission's use of the so-called "DANDO" device whereby it adopted the findings and conclusions of the Examiner without hearing and without further findings or conclusions. This device has been affirmed on a number of occasions and we see no objections to its use in the circumstances of this case, especially in view of the careful and thorough decision of the Examiner. Houff Transfer, Inc. v. United States, 291 F. Supp. 831 (W.D. Va. 1968); Younger Brothers, Inc. v. United States, 238 F. Supp. 859 (S.D. Tex. 1965); North American Van Lines, Inc. v. United States, 217 F.Supp. 837 (N.D. Ind. 1963), Deioma Trucking Company v. United States, 233 F.Supp. 782 (N.D. Ohio 1964).

Id. at 900.

184. 307 F. Supp. 723 (W.D.N.C. 1969). The court held that the ICC's use of the DANDO device did not violate A.P.A. procedural requirements. The court stated that:

> It is now settled law that when the Commission finds no material error in the statement of facts and the conclusions thereon of the Joint Board or hearing examiner, it is not required to prepare a detailed report, but may affirm and adopt the report of such board or examiner as its own. This application was filed February 11, 1965, and now after four and one-half years, 15,000 pages of testimony and 700 exhibits, we are asked to send it back for further hearings because the Commission did not prepare its own detailed report.

Id. at 727. The court went on to cite the quote from *Weingarten* discussed in text.

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"Short Form Decisional Process" (called a DANDO device) against challenges that it did not comply with the A.P.A. By not invalidating the DANDO device the court furthered the goal of prompt administrative decisionmaking because the DANDO device allowed the ICC to adopt the written reports or decisions of an agency hearing examiner or board when affirming the lower tribunal's decision. Therefore, the ICC saved the time spent writing its own decisions.[185]

The goal of prompt decisionmaking was well-served in *Nader v. FCC*,[186] notwithstanding the court of appeals' refusal to order a particular structuring of the FCC's caseload.[187] The court was willing to require the agency to submit a schedule for the completion of proceedings that were pending and undecided for ten years.[188] The court

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185. *See* description of DANDO device at notes 182-84 *supra*.

186. 520 F.2d 182 (D.C. Cir. 1975). In *Nader*, A.T.&T. customers obtained judicial review of an FCC decision approving A.T.&T. rate increases. In that proceeding, FCC inaction on two issues was attacked. Those issues related to how Western Electric expenses affected the determination of a fair rate of return for A.T.&T. *Id.* at 196-97. The Western Electric issues were first raised with the FCC in 1965. The *Nader* court questioned whether the FCC would ever resolve the issues and stated that "[w]e are concerned as are the petitioners, with the Commission's failure to conduct these proceedings within a reasonable time." *Id.* at 205. After reviewing the procedural history of the FCC proceedings, the court, quoting from the customers' brief, stated:

> *Nine years should be enough time for any agency to decide almost any issue.* There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all—and the result is a denial of justice.

Id. at 206 (emphasis added).

187. *Id.* at 195-96. The court cited FCC v. Schreiber, 381 U.S. 279 (1965) and FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) as authority for the propriety of delegating to agencies the discretion to develop their own procedural principles. The court of appeals went on to state:

> Similarly, this court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload. Construing a provision of the Federal Aviation Act similar to 4(j), we stated in *City of San Antonio v. CAB*, 126 U.S. App. D.C. 112, 374 F.2d 326 (1967) that:
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> > No principle of administrative law is more firmly established than that of agency control of its own calendar . . . . Consolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts. "Congress plainly intended to leave the Board free to work out application procedures reasonably adapted to fair and orderly administration of its complex responsibilities."
>
> *Id.* at 329 (citations omitted). With these principles in mind, petitioners' contention verges on the frivolous and we accordingly reject it.

520 F.2d at 195-96. The contention which was strongly rejected by the court was that it was an "abuse of discretion" not "to consider Western Electric's rate of return in Phase I of Docket 19129," a caseload structuring claim. *Id.* at 195.

188. *Id.* at 205-07. The remedy ordered was based on A.P.A. § 706(1). The court stated:

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of appeals did not feel precluded by the limited-judicial-review-of-agency-procedures standard from acting affirmatively to control the "time-dimension" for the FCC's disposition of the Western Electric issues. Thus, the court in *Nader* would exert control over the time required by the FCC to complete the Western Electric proceeding, but not over the ordering of the FCC's caseload.[189]

Although *Nader* may not be generally significant because the time period within which the FCC failed to act was egregiously long, the case is at least a barometer indicating the willingness of the Court of Appeals for the District of Columbia Circuit to depart from the limited review standard, in the appropriate circumstances, in order to ensure timely decisionmaking.[190] Although the court of appeals used section 706(1) of the A.P.A. as the basis for imposing judicially supervised scheduling of this FCC proceeding,[191] the court did not explicitly integrate schedule supervision, a procedural intervention, with its rejection of judicial caseload structuring, a similar procedural intervention.

The court's scheduling intervention is to be lauded, but it would be better if the court were to explicitly acknowledge that it was departing from limited procedural review because it had concluded that promptness outweighed the agency procedural discretion rationale. Explicit judicial weighing ought to prevent (1) agency paralysis; (2) sapping of agency intiviative; and (3) rejection of agency procedural expertise when the court decides to review agency procedures (challenged on undue delay grounds) and decides to impose procedural constraints on the agency's decisionmaking process. Doctrinal consistency would be enhanced also if the court of appeals acknowledged that it was applying a different standard of procedural review and if the court in-

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> [W]e will require that within thirty days . . . the Commission submit a schedule for the orderly, expeditious resolution of the AT&T's tariff filings. . . . This schedule shall include the Commission's proposed timetable for disposing of . . . the issues presented herein. After a schedule of proceedings has been approved, the Commission will be expected to adhere to it; . . . the Commission will be required to explain any and all material failures to comply. The [court] . . . will retain jurisdiction solely to ensure compliance.

Id. at 207.

189. The remedy ordered in this case will require very close judicial supervision of day-to-day FCC calendar control over this proceeding. This amount of judicial supervision is unprecedented in light of the very limited judicial review standard of agency procedures previously discussed.

190. The District of Columbia Circuit is a very important court of appeals for federal administrative agency judicial decisions because it has the statutory authority to review a number of regulatory agency decisions. *See, e.g.*, 47 U.S.C. § 402 (1976) as discussed in A. SCHWARTZ, ADMINISTRATIVE LAW at 145 (1976).

191. 520 F.2d at 206.

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tegrated the rationale for this flexible procedural review with the rationale for limited procedural review.[192]

Limited procedural review has also led courts to be unwilling to remedy claims of unreasonably delayed administrative decisionmaking when agency procedures are challenged as the cause of the delay. This unwillingness is illustrated in the FCC cases of *Mesa Microwave, Inc. v. FCC,*[193] *Harvey Radio Laboratories, Inc. v. United States,*[194]

192. Limited procedural review of agency procedures also facilitated prompt decisionmaking in FCC v. WJR, The Goodwill Station, 337 U.S. 265 (1949). In that case, radio station WJR sought to stay FCC consideration of a radio station license application filed by an applicant whose signal would have interfered with WJR's signal. If granted, the stay would have been in effect until FCC "clear channel proceedings" were completed. *Id.* at 269-71. In affirming the court of appeals, which affirmed an FCC order denying the request, the Court cited Pottsville Broadcasting, 309 U.S. 134, and stated: [T]he Commission was under no duty to WJR to *postpone final action* on the Coastal Plains permit until it had disposed of the clear channel proceeding . . . . Furthermore the judicial regulation of an administrative docket sought by WJR" is improper because courts are not allowed to control agency caseload disposition. *Id.* at 272. Limited procedural review also facilitated prompt decisionmaking in: MOOG Industries v. FTC, 355 U.S. 411 (1958) (MOOG Industries' challenge to enforcement of an FTC cease and desist order was rejected by the Supreme Court. The Court upheld enforcement of the order, challenged by MOOG on grounds that the FTC had not entered similar orders against MOOG's competitors, because the FTC has discretion to determine whether it will proceed against one or all of the companies in a particular industry.); Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (Supreme Court rejected a challenge to the FPC's use of the procedural device of setting natural gas rates by region. This procedure allowed the FPC to more efficiently do its job of determining whether the rates proposed were just and reasonable); and American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970) (Supreme Court rejected a challenge to the ICC's failure to follow its own rules or to "relax" those rules because "[t]he Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to *resolve quickly and correctly urgent transportation problems.*" *Id.* at 538 (emphasis added)).

193. 262 F.2d 723, 725 (D.C. Cir. 1958). The court held that a six-month delay by the FCC in which it did nothing to process applications for CATV licenses, while the entire subject of CATV licensing was being looked into, is not such a delay or so improper as to justify the requested writ of mandamus.

194. 289 F.2d 458 (D.C. Cir. 1961). In this case a radio station license applicant challenged a ten year delay by the FCC in processing its application as being violative of the A.P.A. unreasonable delay standards. The delay was a result of three FCC proceedings: (1) "NARBA" (North American Regional Broadcast Agreement), (2) "Daytime Skywave Proceeding," and (3) the "Clear Channel Case." 289 F.2d at 459. The court of appeals rejected the applicant's A.P.A. unreasonable delay claim and affirmed the FCC order denying the applicant's request for action on its license application. In so doing, the court of appeals stated that this delay although "long and unfortunate" may be necessary while the clear channel case is pending because

> [t]he Clear Channel proceedings contemplates the possibility of a fundamental realignment of radio stations on the clear channel frequencies. Accordingly, "piecemeal" consideration of requests for individual locations on these frequencies might well prejudice the ultimate allocation and defeat the purposes of the program. And the effort invested in a determination of individual proposals might

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Kessler v. FCC,[195] and *Buckeye Cablevision, Inc. v. United States,*[196] as well as the EEOC case of *Chromcraft Corp. v. United States Equal Employment Opportunity Comm'n*[197] and the CAB case of *Puget Sound Traffic Association v. CAB.*[198] The courts in these cases are sacrificing timeliness to some other more important policy goal of the particular agency such as uniform consideration, by the FCC,[199] of

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> be rendered futile by a contrary disposition of the rulemaking proceeding—thus producing even more delay.

Id. at 460.

195. 326 F.2d 673 (D.C. Cir. 1963). In this case, an applicant for a radio station license challenged a freeze order of the FCC which precluded FCC consideration of license applications until new rules (then being considered by the FCC) were adopted governing such proceedings. *Id.* at 678-79. Rejecting the applicant's request for a hearing on the application notwithstanding the freeze, the court of appeals noted:

> Although the courts will rarely order the Commission to hold a hearing looking to the possible grant of a particular application, there may be circumstances where the length of delay is so excessive or the reasons for delay so arbitrary that a hearing must be ordered to prevent substantial injustice . . . . In the instant case neither the length of the freeze [the date of the freeze order was May 20, 1962; the court's opinion was dated December 20, 1963] nor the reason for its imposition justify an exception to the general policy that the time of holding of hearings is a matter for the reasonable license of the Commission's discretion.

326 F.2d at 684 n.10.

196. 438 F.2d 948 (6th Cir. 1971). This case is discussed in the text accompanying notes 95-99, *supra*.

197. 465 F.2d 745 (5th Cir. 1972). A notification procedure devised by EEOC which resulted in delayed service of charges on the employer in employment discrimination cases was held not to violate A.P.A. unreasonable delay standards because the procedure was devised to protect charging employees and to conserve scarce EEOC staff and budgetary resources which were seriously overburdened.

198. 536 F.2d 437 (D.C. Cir. 1976). In this case, the court of appeals held that it could not review CAB "orders instituting a separate investigation into airline fare structure" because they were not final orders, but were merely interlocutory orders. *Id.* The court addressed the problems of "common faring" by stating:

> We also recognize the importance of an early decision concerning the continued propriety of common faring. Yet we cannot say that delay of that decision, in order to permit more specific and meaningful inquiry and response, was arbitrary or capricious under the circumstances or that it was not within the limits of the agency's discretion in the management of its responsibility.

Id. at 439.

This was because the CAB was not acting to avoid "meaningful or timely judicial review" and because the common faring question was not specifically considered in the other proceedings. *Id.* at 439.

199. *See also* Committee for Open Media v. FCC, 543 F.2d 861 (D.C. Cir. 1976). In this case, Committee for Open Media challenged the extension of a television station's broadcasting license (under section 307(d) of the Federal Communications Act, 47 U.S.C. § 307(d) (1962)) beyond three years from the date of its renewal application, filed in 1970, without the filing of a new renewal application. In rejecting this challenge because section 307(d) of the Act automatically extends broadcasting licenses until the Commission makes its renewal decision, the Court of Appeals for the District of Columbia Circuit stated that the purpose of the extension provision is "to protect licensees from harm associated with delays in agency action on requests for license renewals." *Id.* at 866-67.

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radio station license applications after various rulemaking proceedings are completed. These cases establish the need for explicit weighing of policy rationales, in order to integrate timeliness with other agency policy goals, and for specific time period standards. The court would then have the benefit of the agency's judgment as to when timeliness should be sacrificed to other policy goals and why in the agency's opinion that sacrifice should be made. Then agency expertise could be utilized, not circumvented, in devising standards for flexible or expanded review by courts of agency procedures and unreasonable delay claims.

D. *Recent Case Developments*

A more hospitable attitude of the Courts toward agency procedures devised statutorily to ensure prompt decisionmaking is illustrated in the Occupational Safety and Health Act of 1970[200] procedures for determining safety violations which were challenged on seventh amendment grounds in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission.*[201] The challenged OSHA procedures provided for prompt adjudication of the fact of a safety violation and for assessment of a civil monetary penalty if an employer's violation was established.[202] Timely determinations were

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200. Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.). For a legislative history of this Act, see H.R. REP. NO. 91-1291, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177-5241.

201. 430 U.S. 442 (1977). The precise issue according to the Court was "whether, consistent with the Seventh Amendment, Congress may create a new cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial." *Id.* at 444.

202. The Court described these procedures as follows:

> Under the Act, inspectors, representing the Secretary of Labor, are authorized to conduct reasonable safety and health inspections. 29 U.S.C. § 657(a). If a violation is discovered, the inspector, on behalf of the Secretary, issues a citation to the employer fixing a reasonable time for its abatement and, in his discretion, proposing a civil penalty. §§ 658, 659. Such proposed penalties may range from nothing for *de minimis* and nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations, §§ 658(a), 659(a), 666(a)-(c) and (j).
>
> If the employer wishes to contest the penalty or the abatement order, he may do so by notifying the Secretary of Labor within 15 days, in which event the abatement order is automatically stayed. §§ 659(a), (b), 666(d). An evidentiary hearing is then held before an administrative law judge of the Occupational Safety and Health Review Commission. The Commission consists of three members, appointed for six-year terms, each of whom is qualified to adjudicate contested citations and assess penalties 'by reason of training, education or experience.' §§ 651(b)(3), 659(c), 661, 666(i). At this hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty; and the judge is empowered to affirm,

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likely under these procedures because they required affirmative action, within a specified number of days, to trigger the next stage of procedure and to stay the action of the agency ordering "abatement" of a safety violation or imposition of a civil penalty.[203]

These procedures were challenged, *inter alia*, on constitutional grounds by two employers who were cited for safety violations under the Act and who were assessed penalties which they contested.[204] The Supreme Court rejected the Seventh Amendment challenge[205] and stated:

> We disagree. At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[206]

In so holding, the court acknowledged the quickness of the OSHA procedures[207] and thereby implicitly validated the objective of prompt

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modify, or vacate any or all of these items, giving due consideration in his penalty assessment to "the size of the business of the employer . . . , the gravity of the violation, the good faith of the employer, and the history of previous violations." § 666(i). The judge's decision becomes the Commission's final and appealable order unless within 30 days a Commissioner directs that it be reviewed by the full Commission. §§ 659(c), 661(i); see 29 CFR §§ 2200.90, 2200.91 (1976).

If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed penalty becomes final unless the employer timely petitions for judicial review in the appropriate court of appeals. 29 U.S.C. § 660(a). The Secretary similarly may seek review of Commission orders, § 660(b), but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." § 660(a). If the employer fails to pay the assessed penalty, the Secretary may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried. § 666(k). Thus, the penalty may be collected without the employer ever being entitled to a jury determination of the facts constituting the violation.

430 U.S. at 445-47.

203. See description of procedures note 202 *supra*.

204. 430 U.S. at 447-49.

205. 430 U.S. at 460-61. The Court's reasoning is contained in 430 U.S. at 450-60.

206. 430 U.S. at 450.

207. The Court stated specifically:

Congress found the common law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common law, and *placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.* The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law.

Id. at 461.

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administrative decisionmaking.[208] The court's implicit validation is premised on acknowledgement that the particular procedures under attack provide a "speedy" determination of safety violation issues by an administrative tribunal. It is also premised on not clogging the federal courts with OSHA litigation which, if a jury trial were required, would seriously slow down the pace of OSHA case dispositions because the federal courts are, as the Court pointed out, already "crowded."[209] Finally, apart from the court clogging problem, a jury of six or twelve persons would probably be an inherently slower means of adjudicating safety violation facts than a trained administrative law judge who would gain expertise by deciding a number of these cases.

A willingness to invalidate agency procedures, notwithstanding the doctrine of limited procedural review,[210] when an agency grossly delays consideration of a litigant's administrative claim is illustrated in *North American Van Lines, Inc. v. United States.*[211] In this case, an interstate common carrier challenged a "flagging" rule devised by the ICC as being violative of the A.P.A. "unreasonable delay" standards[212] because it resulted in the staying of thirty-one applications of this carrier for

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208. The Court noted that: "Congress is not required by the Seventh Amendment to *choke the already crowded federal courts* with new types of litigation nor prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field." *Id.* at 455.

209. *Id.*

210. The difficulties posed for judges reviewing regulatory agency decisions are stated by the Honorable Irving R. Kaufman, United States Court of Appeals for the Second Circuit, in Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening,* 45 N.Y.U.L. REV. 201 (1970) in which he notes:

> At regular intervals during the month, my law clerk brings to chambers the briefs and records of cases I am scheduled to hear at the next sitting of our court. If he is carrying all the briefs under one arm, I can be fairly confident that the docket will consist largely of criminal cases; if both arms are needed, there must be at least one patent case on the docket. But if the briefs, records and appendices are so bulky that he has to haul them in relays, I know that once again the court is called upon to review a decision by an administrative agency. These records, alive with complex economic, accounting, engineering, medical and other scientific or technical issues are the all too tangible basis for a few thoughts I should like to develop on the nature of appellate review of administrative decisions in the United States.
>
> I shall begin—candidly—by divulging a trade secret: appellate judges cannot possibly be as familiar as the administrative agency with the factual controversies or the specialized knowledge involved in many agency decisions. Few appellate judges, for example, are intimately acquainted with the underlying geological and accounting principles upon which the Federal Power Commission relied when it determined, on a record totaling many thousands of pages, the "cost" of producing natural gas in an area constituting a major portion of the southeastern United States.

Id. at 201-02.

211. 412 F. Supp. 782 (N.D. Ind. 1976).

212. 412 F. Supp. at 791.

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"new operating authority" certificates of convenience and necessity[213] between September, 1972 and December, 1975.[214] The result of this rule was that the carrier "received no new operating authority . . . [and] its business has stagnated."[215]

Finding that the "flagging rule" was arbitrary, that it was unlawful because it exceeded statutory authority, and that delays caused by use of the rule were unreasonable, (all violations of the A.P.A.),[216] the court ordered the ICC to decide the improperly stayed applications within sixty days.[217] The court also concluded that the stay orders were imposed without giving the carrier proper notice or an opportunity to be heard on the stays as required by the A.P.A.[218] Finally, the court cited the limited review rule in *FPC v. Transcontinental Gas Pipe Line*[219] and indicated that the ICC's treatment of North American Van Lines constituted the "substantial justification" sufficient to allow a departure from limited procedural review. This was because the court

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213. 412 F. Supp. at 784.

214. 412 F. Supp. at 785-90. The "flagging rule" is described by the court as follows:

> The Interstate Commerce Commission, charged under 49 U.S.C. §§ 306-07 with the duty of issuing certificates of convenience and necessity to carriers of goods in interstate commerce, employs a 'flagging' or deferral rule in considering applications for new operating authority submitted by established carriers. Under this practice, when an applicant's fitness has been placed in issue in any formal proceeding or inquiry being conducted by the ICC, final determination and disposition of *any* application for new authority submitted by that carrier is thereafter automatically stayed until the investigation or inquiry is resolved or terminated.

Id. at 784.

215. 412 F. Supp. at 807.

216. 412 F. Supp: at 799. The court stated specifically:

> We conclude that the ICC's statutory duty under the Interstate Commerce Act to determine a carrier's fitness in an application proceeding may not be fulfilled by the expedient of promulgating an informal rule automatically withholding a fitness determination whenever an investigation involving the carrier is filed by the ICC's Bureau of Enforcement. We conclude that such a rule is arbitrary within the meaning of [the A.P.A.] 5 U.S.C. § 706(2)(A), that it is in excess of statutory authority under 49 U.S.C. § 307 within the meaning of 5 U.S.C. § 706(2)(c), that it therefore is unlawful within the meaning of 5 U.S.C. § 706(1). The delay attendant upon application of the rule is not reasonable, within the meaning of 5 U.S.C. § 558(c) and 5 U.S.C. § 706(1).

Id.

217. 412 F. Supp. at 808.

218. 412 F. Supp. at 802-06. The court concluded on this issue that

> [t]he notice requirements of 5 U.S.C. § 554(b), and the hearing provisions of 5 U.S.C. § 554(c) are controlling. In *no* case has NAVL ever been afforded the rights provided in those sections. Accordingly, we find that every stay order has been entered "without observance of procedure required by law," 5 U.S.C. § 706(2)(d) and is therefore unlawful within the meaning of that section.

Id. at 806.

219. 423 U.S. 326 (1976).

felt the ICC was acting in bad faith and because, factually, *Transcontinental* was distinguishable since no new evidence was required of the ICC by the court in *North American.*[220]

The "flagging rule" invalidation case may portend a more activist judicial role in invalidating agency procedures that cause delay. In fact, however, the case can be reconciled with the limited procedural review rule either (1) because factually the delay was egregious and the agency was acting in bad faith or (2) because legally the "flagging rule" failed to meet the procedural minimums required by the A.P.A. The first rationale gives specific meaning to "substantial justification" as used in *Transcontinental* and the second rationale is a clearly established doctrine.[221]

Thus limited, procedural review is still a viable doctrine absent unusual circumstances such as bad faith or a failure by the agency to satisfy the A.P.A. procedural requirements.[222] An important lesson to

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220. 412 F. Supp. at 807. The court specifically stated that:

> NAVL's right to a determination of its earlier applications and to a hearing on the propriety of a stay as to the later applications will be illusory unless the relief granted is likely to actually "*compel* agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Ordinarily, "in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry . . . ," *FPC v. Transcontinental Gas Pipe Line*, 423 U.S. 326, 333, 96 S. Ct. 579, 583, 46 L.Ed.2d 533, 540 (1976). We are faced here, however, with purposive delays by the ICC, strongly suggesting bad faith, intentionally cutting off plaintiff's business, constituting a course of unlawful conduct extending back more than three years. If ever there were a case demonstrating "substantial justification," this is it. But furthermore, our order as to the ICC stays entered prior to March 5, 1975, expressly precludes the ICC from seeking new evidence. Instead, in each application proceeding there is a completed record with which the ICC is well acquainted, requiring now only a final determination to grant or deny the new authority.

Id. at 807-08.

221. See discussion of *Vermont Yankee* in text accompanying notes 145-50 *supra.*

222. One of the most famous cases articulating the doctrine is SEC v. Chenery Corp., 332 U.S. 194 (1947) (SEC has discretion to use rulemaking or adjudication to develop its policies and the court will not require the SEC to use one or the other process). *See* Davis, ADMINISTRATIVE LAW TEXT (3d ed. 1972) § 17.08. State courts have also recognized the doctrine of agency discretion to devise its own procedures to carry out its substantive mandate. *See* California Ass'n of Nursing Homes v. Williams, 4 Cal. App. 3d 800, 813, 84 Cal. Rptr. 590 (1970), cited and discussed in California Optometric Ass'n v. Lachner, 60 Cal. App. 3d 500, 510, 131 Cal. Rptr. 744, 751 (1976). *See also* Brennan v. Occupational Safety and Health Review Comm'n, 492 F.2d 1027 (2d Cir. 1974) (reversal by O.S.H.R.C. of the administrative law judge's decision to reopen a hearing constituted abuse of discretion); Ass'n of Mass. Consumers, Inc. v. SEC, 516 F.2d 711 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976) (agency's refusal to consolidate two proceedings, which consolidation would have unnecessarily delayed the completion of those proceedings, is within the agency's discre-

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be learned from analyzing this doctrine, as it affects claims of unreasonable administrative delay caused by agency procedural choices, is that controlling delayed administrative decisionmaking requires legislative cooperation and the development of procedural innovations designed to enhance prompt decisionmaking.

IV. Procedural Reform Proposals

A. *Introduction*

Proposals to reform administrative procedures for the express purpose of enhancing prompt administrative decisionmaking have been articulated in Congressional studies and scholarly literature. Some of these proposals will be examined. In addition, ideas utilized to ensure prompt decisionmaking and solve analogous delay problems in criminal litigation, civil litigation, and the administration of justice generally, will be examined to determine if, by analogy and cross-fertilization, these ideas can be imported into the administrative decisionmaking arena for possible use to control delay.

B. *Congressional Reform Proposals*

The Senate Committee on Governmental Affairs, in a major study on federal regulatory agencies, devoted one volume to the subject of delay in the regulatory process.[223] The report made eleven "principal recommendations" of procedural reforms to improve the promptness of administrative decisionmaking.[224] These eleven proposals are: (1) use informal rulemaking more frequently;[225] (2) speed up decisions in such cases as "rate regulations" and "technical decisions," through substitution by A.P.A. amendment of a "modified procedure" for "formal adjudicatory procedures;"[226] (3) amend the A.P.A. to allow

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tion); Municipal Electric Utility Ass'n v. Federal Power Comm'n, 485 F.2d 967 (D.C. Cir. 1973) (policy allowing premature filing of application for rate increases is a permissible "flexible housekeeping measure").

223. Ribicoff Report, Vol. Four, *supra* note 2.

224. *Id.* at XIII-XV. The report made a total of thirty-three proposals for procedural reform summarized at XVII-XXII.

225. The precise first recommendation is that "[a]gencies should be authorized and encouraged by statute to make greater use of informal rulemaking procedures." *Id.* at XIII. *See also id.* at 37-38.

226. The second recommendation is:

> Because formal adjudicatory procedures are not well-suited to certain kinds of cases now handled by such procedures, and unnecessarily delay these cases, the Administrative Procedure Act (APA) should be amended to provide for a modified procedure to govern those cases. Specifically, the modified procedure should be made applicable to cases involving market entry and exit, rate regulation, approval of financial transactions, and technical decisions.
>
> The modified process should provide for:

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restriction of oral proceedings in adjudicatory hearings;[227] (4) strengthen the penalties available to ensure compliance by parties with agency information requests;[228] (5) devise procedures that speed up the agency

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(a) A legislative-type hearing in which oral statements are permitted but in which there would be no cross-examination;
(b) An adjudicative hearing following the legislative hearing, in which cross-examination would be permitted only when necessary to resolve particular factual issues which are essential to the outcome of the proceeding;
(c) An impartial officer or panel to shepherd the case through the modified process, unless agency members decide to handle the case themselves;
(d) Separation of functions between the presiding officer and the rate or enforcement bureau; and
(e) Discovery controlled by the presiding officer for information which is essential to the agency's determination.

Id. at XIII. *See also id.* at 38-53.

227. The precise third recommendation is:

Congress should amend the APA to clarify the power of an agency in any adjudication to restrict or eliminate oral testimony and oral (and written) cross-examination, unless they are shown to be essential to resolve specific issues on which the case may turn. Agency rules should provide that only written evidence will be accepted, unless oral testimony or cross-examination is essential.

Id. at XIII. *See also id.* at 55-65, 73-76. To further enhance prompt adjudicatory decision-making, the report recommends the following:

4. Oral direct-examination and cross-examination should ordinarily be allowed only when the perceptions, memory, or honesty of the witness is at issue. Except in circumstances such as these, agencies should not be obligated to provide parties with the opportunity to develop the facts through formal oral trials. But an agency should, in its discretion, provide for an oral trial when it believes this will expedite the proceeding.

5. Agencies should develop procedures for routine cases under which written evidence is received and organized by agency staff and is submitted directly to the agency members, an employee board, an ALJ, or other appropriate decision-maker. This approach should be used when the personal management of an ALJ is not needed. In kinds of cases where an applicant knows beforehand what must be proved to win the case, the entire evidentiary case should have to be filed with the application.

6. (a) Without limiting the flexibility that discovery rules provide to the ALJ, agencies should by rule explicitly direct ALJs to use a firmer hand in guiding the course of adjudicatory proceedings.

(b) The rules should provide that virtually all testimony and other evidence be submitted, at least initially, in writing, but the judge should have the power to grant exceptions from this requirement.

(c) The ALJ should be required to establish deadlines for the parties to supply information needed by other parties, to submit direct, followed by rebuttal testimony, and to prepare written answers to any necessary interrogatories.

8. Agency rules should provide that only written evidence will be accepted, unless oral testimony or cross-examination is essential. On his own initiative, the ALJ should narrow the issues and evidence to what is truly necessary.

Id. at XVII-XVIII. *See also id.* at 55-65, 73-78.

228. The specific recommendation is:

Because of difficulties in securing timely compliance with requests for necessary information, Congress should enact legislation—

(a) authorizing agencies to seek monetary penalties against parties who fail to provide information that is properly sought by the agency,

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review process;[229] (6) alter the process of recruiting Administrative Law Judges (ALJ) to get the best people available;[230] (7) amend the A.P.A. to require agency development of deadlines for the completion of decisionmaking processes;[231] (8) enhance the quality of "agency leadership

(b) clarifying the authority of agencies to make adverse inferences and strike defenses and motions relating to information a party has improperly failed to provide to the agency, and

(c) authorizing the Federal Trade Commission, on an experimental basis, to apply civil contempt penalties to parties who fail to provide information that is properly sought by the Commission. The Administrative Conference of the U.S. should study the use of this direct agency contempt authority and report on how it is used and on its usefulness in reducing delay.

Id. at XIII-XIV. *See also id.* at 67-72.

229. The recommendation is:

To reduce delay in agency review of Administrative Law Judge (ALJ) decisions, Congress should enact legislation allowing each agency to provide that decisions or categories of decisions become final unless reviewed by the agency in its discretion. Each agency should be allowed to establish appellate boards and assign to them some or all of the agency's responsibilities for reviewing initial decisions.

Id. at XIV. *See also id.* at 83-84, 91-92. Further specific recommendations of the report on "agency review" are:

10. In deciding whether review of any issue is justified, the agency or board should apply the following criteria:

(a) A determination in an initial decision may appropriately be reviewed if it appears not to be supported by substantial evidence or if the decision raises a novel and important issue of law or policy.

(b) Before accepting an application for review of an appellate board decision, the agency should make a preliminary finding that clear errors of fact or unresolved legal or policy issues of the utmost importance are presented.

No statement of reasons should be required for declining review, and neither a decision to grant nor a decision to decline review should be deemed prejudicial error.

11. Oversight committees of Congress should inquire periodically into the agencies' success at limited review.

Id. at XVIII-XIX. *See also id.* at 83-84, 91-92.

230. The precise recommendation is that "[t]he ALJ selection process should be fundamentally revamped, with greater weight assigned to the views of an independent panel of distinguished government and non-government lawyers so that only the best-qualified candidates are assigned the sensitive role of ALJ." *Id.* at XIV.

Other recommendations on the subject of ALJ's are:

17. In the ALJ selection process (a) the "rule of three" should be abolished, allowing the agency to select any candidate on the register, (b) veterans' preference should be abolished, and (c) selective certification should be abolished, contingent on the first two reforms. In addition, the role of the Civil Service Commission point scores in determining the position of ALJ's on the register should be eliminated or severely restricted. Instead, much more weight should be assigned to the views of an independent panel of distinguished Government and non-Government lawyers.

18. Chief ALJs should take more responsibility for reviewing the work of their ALJs for both quality and productivity.

Id. at XIX. *See also id.* at 105-08, 110-12.

231. The specific recommendation is:

The Administrative Procedure Act should be amended to require agencies to establish deadlines, whenever possible, for general classes of proceedings, and for

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and management;"[232] (9) require agencies to develop "generic stan-

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the various stages of proceedings within each class. Where it is not appropriate to establish deadlines for general classes of proceedings and where the agency justifies that exception the APA should require that deadlines be set for particular matters at the commencement of consideration.

Id. at XIV. The report further states some thoughtful, management oriented, recommendations for not only articulating deadlines but also for ensuring that deadlines that are set are in fact met by the particular agency. These recommendations are:

22. With the assistance of management specialists, the chairman or administrator should develop systematic means of scheduling agency projects, monitoring compliance with the schedules, and intervening in agency operations when delay occurs.

23. The Administrative Procedure Act should be amended to require agencies to establish deadlines whenever possible, for general classes of proceedings and for the various stages of proceedings within each class. Where it is not appropriate to establish deadlines for general classes of proceedings, and where the agency justifies that exception, the APA should require that deadlines be set for particular matters at the commencement of consideration. Failure to meet deadlines established by the agencies should be considered by courts in determining whether a proceeding has been unreasonably delayed under section 10 of the APA.

24. Agency management specialists should tabulate periodic reports, showing whether deadlines are being met and comparing performance among regional offices or other administrative units. Where work follows a complicated bureaucratic path and the contributions of various bureaus must be centrally coordinated, or where the work is so urgent that top management must be notified of any delays, the agency should have a system to keep track of where in the agency each proceeding or other major work item is, and when each stage of processing should be completed.

25. Agency management should become involved whenever a delay problem is identified, and the more egregious problems should receive attention from the highest management levels.

26. Agencies should systematically collect data on the time and staff resources consumed in accomplishing various regulatory tasks, and should use such data to make deadlines more realistic, to plan assignments of work and resources that achieve the greatest results in areas of the greatest urgency, and to identify problems and evaluate solutions throughout the agency's rules of practice.

27. Each agency should publicly announce its schedules for completing the various stages of proceedings. When delays result, the agency should provide participants with a revised schedule. The agency should immediately explain any failures to meet its deadlines in significant proceedings, and should periodically report on its overall performance in meeting deadlines.

28. An appropriate committee of the House and Senate should oversee management efforts comprehensively, including the setting and meeting of deadlines, at Federal regulatory agencies. Each agency should be required to submit periodically to Congress a report describing deadlines imposed on agency proceedings, the agency's degree of success in adhering to the deadlines, and the reasons for any delays.

29. The Administrative Conference should have the permanent tasks of insuring that statistics are generated by the various agencies, and that the statistics are brought together and comprehensively explored. The information compiled should include the deadlines established for proceedings, the rates of success at meeting these deadlines, and the reasons for failures to meet them.

Id. at XX-XXI. *See also id.* at 133-50.

232. This recommendation is:

(a) Commission chairmen should take an active personal interest in managing

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dards" and to state their "goals and priorities;"[233] (10) establish a

the agency. Each commission should have a strong executive director responsible for directing and supervising day-to-day staff activities.

(b) The chairman or administrator should develop systematic means of scheduling agency projects, monitoring compliance with the schedules, and intervening in agency operations when delays occur.

Id. at XIV. The report recommends several leadership enhancement proposals to make prompt decisionmaking a reality. These are:

12. The President should nominate and the Senate should confirm only individuals with the breadth of vision, intellect, and energy to manage the programs of a large governmental organization. Regulators with a narrowly legalistic view of their role as agency members should not be appointed.

13. Only those with demonstrated administrative ability should be selected as chairmen or administrators of regulatory agencies.

14. To enhance the skills brought by agency members to their jobs, the Administrative Conference should pursue its plans to sponsor a series of seminars for agency heads and senior staff to cover such areas as planning of priorities and budgets, and managing regulatory programs. It should also provide commission members a forum for discussing problems in decisionmaking and leadership by a collegial body.

15. Supervisors and managers should refrain from immersing themselves excessively in the details of day-to-day operations, so that they can promptly review staff work and can otherwise devote their energies to supervision and management.

16. Agencies should weed out superfluous layers of authority and review. The Civil Service Commission and Congress should explore ways of establishing a more flexible grade and pay structure to eliminate some of the pressure currently felt by practicing professionals to seek supervisory and managerial positions . . . regardless of their lack of interest or ability in these areas. . . .

19. In order to provide the optimum balance between collegiality and maximum efficiency for multimember commissions, such commissions should consist of 3 or 5 members.

20. Each commission chairman should take an active personal interest in managing the agency. But he should exercise his administrative powers in accordance with the policies of the entire commission, and should actively consult with his colleagues on all major matters. Commission members should depend on the chairman to translate their decisions and concerns into actual administration and direction of staff operations.

21. Each commission should have a strong executive director responsible for directing and supervising day-to-day staff activities. The executive director should have sufficient authority over bureau directors that his insistence on high-quality work produced on schedule is not disregarded.

Id. at XIX-XX. *See also id.* at 97-104, 114-26.

233. This recommendation is:

Agencies should develop explicit statements of goals and priorities for standards development, enforcement efforts, and other agency activities to aid efficient application of staff and other resources and prompt attainment of agency goals. Agencies should also develop clear generic standards, ordinarily by rulemaking, to speed the resolution of individual cases.

Id. at XIV. *See also id.* at 153-56, 157-62. Agencies should be given explicit power to prioritize cases. This recommendation is:

31. Except in areas where agency action is essential to protect petitioners' rights, agencies should screen public petitions, along with internally generated proposals, in accordance with explicit priority criteria. Congress should amend

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separate agency planning unit;[234] and (11) strengthen legislative oversight of agency "goals and priorities."[235]

Adoption of these proposals, and utilization of them by regulatory agencies, should enhance prompt administrative decisionmaking so long as the goal of timely decisionmaking is preserved and integrated with the adoption and implementation of these currently advocated goals: (1) expanding public access to and public participation in agency decisionmaking and (2) ensuring agency accountability to Congress and the public.[236] These proposals should be considered for adoption by non-regulatory federal agencies, such as the Social Security Ad-

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> statutes, where necessary, to clarify the power of agencies to screen such petitions in accordance with explicitly stated priority criteria. Agencies should adopt these criteria after public notice and comment.

Id. at XXI. *See also id.* at 156-57.

234. The specific recommendation here is "[s]ince lack of planning contributes much to agency delay, each agency should have an advisory planning unit situated outside the operational divisions of the agency with responsibility for collecting the information and performing the analysis required for informed policymaking." *Id.* at XV. This recommendation is elaborated upon as follows:

> Each agency should have an advisory planning staff responsible for collecting the information and performing the analysis required for informed policymaking. The principal planning unit should be independent of the operational divisions of the agency and should report directly to the agency members. Operational divisions should also have people with planning responsibilities to assist directors in planning policies and operations in their areas of responsibility.

Id. at XXI. *See also id.* at 162-65.

235. The precise recommendation here is that "[e]ach agency should be required to submit periodically to its congressional oversight committees a list of agency goals and priorities, so that Congress may review and approve such plans." *Id.* at XV. Other specific recommendations on this subject include:

> 33. Congress and its oversight committees should clarify agencies' legislative mandates and insure that they make economic, technological, and social sense. Each agency should be required to submit periodically to its congressional oversight committees a list of agency goals and priorities for the next few years, setting out items such as these:
>
> (a) Areas where generic standards can be developed or where clarification is needed.
>
> (b) Areas where substantive regulation should be developed and imposed, where enforcement efforts must be pursued, and where other action is needed.
>
> (c) Specific objectives for agency action in each of these areas, and projected dates for their accomplishment, along with proposed resource allocations for these areas, sufficient to accomplish each objective by the specified date.
>
> (d) Discussion of the criteria by which these areas were selected and these objectives and dates were specified.
>
> Each agency should, in addition, report routinely on areas where it needs more precise legislative guidance, or where its legislative mandate should be fundamentally changed. Congressional oversight committees should evaluate the reports and discuss them with agency officials at public hearings.

Id. at XXI-XXII. *See also id.* at 166-69.

236. *See* Vol. 3, *Public Participation in Regulatory Agency Proceedings* (July 1977), RIBICOFF REPORT, *supra* note 2.

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ministration,[237] and by state administrative agencies, whether regulatory or non-regulatory.[238]

The goal of enhancing prompt decisionmaking through procedural reforms is institutionalized in federal statutes establishing the Administrative Conference of the United States,[239] providing for executive reorganization,[240] and mandating agency operational review.[241]

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237. The Social Security Administration's delayed decisionmaking problems are well documented in White v. Mathews, 559 F.2d 852, 859 (2d Cir. 1977). Some of the proposals would have to be adapted to the individual agencies' primary goals and purposes.

238. State public utility commissions, for example, perform rate setting functions analogous to the Federal Power Commission. These state rate setting proceedings often involve voluminous records, complicated issues, and long hearings. The "modified procedure" proposal should be considered by such commissions to enhance prompt decisionmaking in those cases. See note 226 *supra*.

239. 5 U.S.C. §§ 571-76 (1976). Section 571 of the statute states the purpose of the conference. It reads:

> It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out *expeditiously* in the public interest.

5 U.S.C. § 571 (1976) (emphasis added).

Section 572(3) defines "administrative procedure." It reads:

> (3) "*administrative procedure*" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, *the speed of agency action*, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

5 U.S.C. § 572(3) (1976) (emphasis added).

The conference has authority to:

> (1) [S]tudy the efficiency, adequacy of the administrative procedure used by administrative agencies in carrying out administrative programs and make recommendations . . . therewith. . . . (2) [A]rrange for interchange among administrative agencies of information potentially useful in improving administrative procedure. . . .(3) [C]ollect information and statistics from administrative agencies and publish . . . reports . . . for evaluating and improving administrative procedure.

5 U.S.C. § 574(1)-(3) (1976).

240. 5 U.S.C. §§ 901-13 (1976). The President is allowed to reorganize executive branch agencies through executive orders subject to congressional review. *See* 5 U.S.C. §§ 908-13 (1976). The purposes of the executive reorganization statutes are to allow the President through executive branch reorganization to:

> (1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;
> (2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;

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The A.P.A. also provides flexibility which can enhance timely decisionmaking.[242] Many of the scholars' ideas for procedural reform are channeled through the Administrative Conference.[243]

C. *Scholars' Reform Proposals*

Scholars in law reviews and other periodicals, such as the A.B.A.'s Administrative Law Review, have articulated ideas for procedural reforms. Some of these proposals date back to the early 1960's which indicates that administrative delay is not a new problem.[244] Scholars in

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(4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
(6) to eliminate overlapping and duplication of effort.

5 U.S.C. § 901 (1976). Thus, through reorganization of agencies, a procedural reform on a grand scale, the President can ensure "expeditious" or prompt administrative decisionmaking. Section 901 was amended in 1971 to require: "(c) The President shall from time to time examine the organization of all agencies and shall determine what changes in such organization are necessary to carry out any policy set forth in subsection (a) of this section." 5 U.S.C. § 901 (1976).

241. 5 U.S.C. § 305 (1976). This section requires "executive agencies" to "review systematically the operations of its activities, functions, or organization units, on a continuing basis." 5 U.S.C. § 305(b) (1976). The statute states that the purposes of the review include: "(1) determining the degree of efficiency and economy in the operation of the agency's activities, functions, or organization units; (2) identifying the units that are outstanding in those respects; and (3) identifying the employees whose personal efforts have caused their units to be outstanding in efficiency and economy of operations." 5 U.S.C. § 305(c) (1976). The Office of Management and Budget is now responsible for ensuring that the agency's review is done periodically. Reorg. Plan No. 2 of 1970, 35 Fed. Reg. 7959 (1970), *reprinted in* 5 U.S.C. app. at 824 (1976) *and in* 84 Stat. 2085 (1970).

242. 5 U.S.C. § 556(d) (1976) governing hearings states in relevant part: "[A]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or *unduly repetitious evidence.*" (Emphasis added). One of the results of this allowance is better case control by making the parties present evidence only as to relevant legal issues. By excluding evidence in the above categories, the fact finding body has less of a record to sift through and is theoretically able to save time in its deliberations on the case. Similarly, 5 U.S.C. § 556(b) (1976) is flexible as to who can preside at hearings including, "(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more hearing examiners appointed under section 3105 of this title." *Id.* § 556(b) (1976). The A.P.A. also is *flexible* in allowing the following: (1) "an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." *Id.* § 556(d) (1976). The Act also provides for omission of the recommended decision procedure when "the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires." *Id.* § 557(b)(2) (1976).

243. *See* Fuchs, *The Administrative Conference of the United States*, 15 AD. L. REV. 6, 6-7, 23-43 (1963).

244. *See, e.g.*, Munn, *The Lesson of the Independent Gas Producer Regulatory Experiment*, 14 AD. L. REV. 40, 52-53 (1961) (discussing the use of the "omnibus hear-

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the last eight to ten years have advocated the use of such approaches as agency review boards,[245] summary judgment,[246] minimizing adjudication time through development of regulatory standards,[247] manage-

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ing" as a device for the consolidation of rate hearings, "for the introduction of evidence common to all," and to avoid having to hear similar evidence sixteen different times); Landis, *Perspectives on the Administrative Process*, 14 AD. L. REV. 66, 70-71 (1961). Dean Landis notes that:

> If we turn our attention to the procedural phase of the administrative process, the prime difficulty that attaches to it is the factor of delay. It is, of course, an old and common saying that justice delayed is justice denied, but the fact that such a saying is shopworn does not detract from its essential truth. Delay is thus equally an element of the lack of due process as those procedures which the Administrative Procedure Act and the proposed Code of Administrative Procedure have sought to correct. Indeed, I think this lack of expedition is far more serious than defects that occur in the administrative handling of controversies.

Id. at 70. McCulloch, *The NLRB and Techniques for Expediting the Administrative Process*, 14 AD. L. REV. 97, 98-103 (1961) (discussing techniques such as delegating decisionmaking to trial examiners with limited review by the board, lessening the number of adjudicated cases through settlement and tougher penalties for unfair labor practices, and using "prehearing procedures to narrow the issues" to speed up the NLRB decisionmaking processes); Elman, *The FTC and Procedural Reform*, 14 AD. L. REV. 105 (1961) (discussing devices such as holding hearings in one place, using issue narrowing prehearing procedures and discovery to speed up FTC decisionmaking); Schultz, *Progress and Problems in Agency Adjudication*, 14 AD. L. REV. 239 (1962) (discussing the use of "employee boards" in agency adjudication and the benefits and drawbacks of that device); Baum, *Reorganization Delay, and the Federal Trade Commission*, 15 AD. L. REV. 92 (1963) (arguing that the major cause of FTC delay, which was serious at that time, is the Commission's "prime emphasis on an unselective case approach in fulfilling its statutory goals.") *Id.* at 92; and Minow, *Suggestions for Improvement of the Administrative Process*, 15 AD. L. REV. 146 (1963) (comments by the "New Frontier" chair of the Federal Communications Commission on using, *inter alia*, an "administrative court" to improve administrative procedures at the FCC).

245. Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969) (discussing, *inter alia*, regulatory agency use of "intermediate appellate review boards" as a procedural device to reduce delay at those agencies). See articles discussing the concept therein. *Id.* at 549 n.19.

246. Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971) (discussing use of summary judgment as a device to reduce delay in administrative adjudication). The suggestion originally came from Professor Davis who suggested: "Some agencies might well take a leaf from the federal rules of civil procedure and permit summary judgment without evidence when no issue of fact is presented." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.13, at 578 (1958).

247. Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA As a Case Study*, 64 CAL. L. REV. 14 (1976) (discussing the FDA's use of summary judgment and of "quasi formal" or "hybrid" rulemaking to set regulatory standards as devices for minimizing long drawn out adjudicative and enforcement hearings and thereby reducing regulatory delay at the FDA). See also a discussion of summary action, *i.e.*, when the harmful consequences of delaying action until an adjudicatory hearing is held are unacceptable, *e.g.*, spoiled food, agencies can act summarily because they need to act promptly. Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

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ment standards,[248] broad interpretation of regulatory statutes[249] coupled with integration of procedure with policy so that procedure serves policy,[250] improving rulemaking processes,[251] and amending the A.P.A.[252] The Administrative Conference of the United States remains a fruitful source for such proposals.[253] Determining their effectiveness, particularly the effectiveness of management-type proposals, is greatly enhanced by the ability to measure the length of time administrative decisionmaking processes take.[254]

D. *Other Sources*

A systematic examination and evaluation of the procedural reform proposals and approaches that have been adopted and utilized to cope with similar delayed decisionmaking problems in criminal litigation, civil litigation, and the administration of justice generally, would be useful for those seeking to solve the problems of delayed administrative decisionmaking. The experience gained utilizing such proposals could be tapped and the ideas adapted to the administrative setting. For example, the Speedy Trial Act contains a number of escape clauses from the specific deadlines that it uses to enforce prompt processing of criminal cases.[255] An empirical evaluation of how effective

248. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974) (discussing use of management concepts, a "quality assurance system" in social welfare administration).

249. Blumrosen, *Toward Effective Administration of New Regulatory Statutes* (pt. 1), 29 AD. L. REV. 87 (1977). See discussion at note 105 *supra*.

250. Blumrosen, *Toward Effective Administration of New Regulatory Statutes* (pt. 2), 29 AD. L. REV. 209 (1977). See discussion at note 105 *supra*.

251. *See, e.g.*, Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276 (1972); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

252. Ross, *ABA Legislative Proposals to Improve Administrative Procedures in Federal Departments and Agencies*, 27 AD. L. REV. 395 (1975) (discussing, *inter alia*, amendments to the APA that would expand the use of ALJs to hear cases initially and to make final decisions, and would permit "internal appeal boards" to finally determine simple cases leaving the more important cases to be decided by agency leadership).

253. *See Symposium: The Administrative Conference of the United States*, 26 AD. L. REV. 259 (1974); Miller, *A Continuing Forum for the Reform of the Administrative Process*, 27 AD. L. REV. 205 (1975).

254. *See* Clark & Merryman, *Measuring the Duration of Judicial and Administrative Proceedings*, 75 MICH. L. REV. 89 (1976) (see particularly the mathematical formula devised by those authors at 93-95). Doane, *Measuring the Duration of Judicial and Administrative Proceedings: A Comment*, 75 MICH. L. REV. 100 (1976).

255. 18 U.S.C. §§ 3161-3174 (1976). *See* text accompanying notes 32-36 *supra* for specific examples of these escape clauses. *See also, Speedy Trial: A Constitutional Right in Search of Definition*, 61 GEO. L.J. 657 (1973); Strunk, *Denial of the Right to a Speedy Trial: Strict Remedy for an Uncertain Doctrine*, 1 JUST. SYS. J. 73 (1974).

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the deadlines are in ensuring prompt criminal adjudication, in light of the escape clauses, would be extremely valuable to an administrative agency that is considering whether or not to adopt specific time period deadlines for the completion of its proceedings, whether or not to utilize escape clauses, and, if so, what kind of escape clauses to adopt.[256]

Delayed decisionmaking problems in civil litigation, particularly in the federal system, are acute enough to have led, in part, to a national conference in 1976[257] to determine what could be done about the tremendous expansion in the number of court cases filed.[258] This expansion slowed the litigation process[259] and has caused concern that

256. *See* text accompanying notes 32-36 & 47-75 *supra*. An examination of the legislative history of the Speedy Trial Act would also be useful since the principal issues and principal objections to imposition of binding deadlines that are presented there are applicable by analogy to administrative decisionmaking. *See* [1974] U.S. CODE CONG. & AD. NEWS 7401-60. One example is the discussion of an alternate way to ensure speedy trials through amendment of Rule 50(b), Federal Rules of Criminal Procedure, which plan included deadlines but insufficient sanction for violating the deadlines. *Id.* at 7405-06. In discussing sanctions, the House Committee on the Judiciary raised the issue of whether the sanction for not meeting the deadlines should be dismissal with prejudice of the charges against a defendant whose trial is delayed beyond the deadline. *Id.* at 7404. Such discussion of issues, countervailing considerations, and sanctions can be applied by analogy to administrative delay.

257. This conference was entitled THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, adopting the title used by Roscoe Pound in his 1906 speech to the American Bar Association. *See* THE POUND CONFERENCE, 70 F.R.D. 79 (1976). Rifkind, *Are We Asking Too Much Of Our Courts?*, 70 F.R.D. 96 (1976). See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

258. Federal court cases filed increased from 89,112 in 1960, to 112,606 in 1969, and to 143,284 in 1974. Lieberman, *Will Courts Meet the Challenge of Technology?*, 60 JUD. 84, 86-87 (1976).

259. United States Supreme Court Chief Justice Burger acknowledged that civil litigation delay was a serious current problem when he stated:

> Other conditions that caused dissatisfaction in 1906 are still with us. Jurors, witnesses and litigants continue to have their time squandered. They are often shuffled about courthouses in confusion caused by poor management within the courts. The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by fees and expenses. Inordinate delay in criminal trials and our propensity for multiple trials and appeals shock lawyers, judges and social scientists of other countries.
>
> There is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited—to use the words of Moorfield Story, a former president of the American Bar Association—by the litigant "with the longest purse." Every person in this conference knows how the "long purse" has been used to produce long delays and a depreciated settlement. Efficiency—like the trial itself—is not an end in itself. It has as its objective the very purpose of the whole system—*to do justice*. Inefficiency drains the value of even a just result either by delay or excessive cost, or both.

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the quality of judges' work may be lessened because of inordinate demands on their time.[260] Some of the suggested causes of delay, such as the use of trial juries,[261] do not apply to administrative agencies, but other suggested causes, such as the increased quantity[262] and complexity[263] of cases, can also be considered causes of administrative delay.[264]

Examination of the solutions to civil litigation delays could be a very useful source of ideas to control delays in administrative decisionmaking. Some of the civil litigation solutions require transfer of decisionmaking authority from courts to administrative bodies.[265] These

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Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 92 (1976) (footnote omitted) (Keynote Address at THE POUND CONFERENCE, note 257 *supra*).

260. The relationship between increased volume of cases and the quality of judicial decisionmaking which results from the pressure to decide ever greater numbers of cases and which increased volume causes delays in case decisions is discussed in Cramton, *Federal Appellate Justice in 1973*, 59 CORNELL L. REV. 571-73 (1974); Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232-35 (1976); Rifkind, *Are We Asking Too Much Of Our Courts?*, 70 F.R.D. 96, 97-100 (1976); and Levi, *The Business of Courts: A Summary and a Sense of Pespective*, 70 F.R.D. 212-13 (1976). *See also* England and McMahon, *Quality Discounts in Appellate Justice*, 60 JUD. 442 (1977), for an analysis of the significant difference between the hours necessary to complete all of the tasks of a Florida Supreme Court Justice in one year and the hours available to complete those tasks in one year. The number of hours required was 3,321 and the number of hours available was 1,920. *Id.* at 445-50. (Based on a "five-day, forty-hour work week covering a forty-eight-week work year." *Id.* at 445).

261. Schaeffer, *Is the Adversary System Working in Optimal Fashion*, 70 F.R.D. 159 (1976). Justice Schaeffer (of the Illinois Supreme Court) is critical of the use of juries in civil trials and states "[o]ne of these major defects is the extent to which trial by jury delays the disposition of cases. The careful study of Professors Kalven and Zeisel shows that on the average it takes 40 percent longer to try a case to a jury than to a judge." *Id.* at 161 (footnotes omitted).

262. *See* Lieberman, *supra* note 258, at 86-87.

263. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 200-05 (1976) (Kirkham focuses on antitrust cases and cautions that "the Big Case literally threatens to engulf us." *Id.* at 211). *See also* Rifkind, *supra* note 257, at 108.

264. On increased volume and delay, see the discussion of *White v. Mathews* in the text accompanying notes 63-72; on complexity, see the comments of Judge Kaufman on the size and complexity of administrative agency records, *supra* note 210; *See also* Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432 (1976). Although these articles discuss the difficulties of judicial review of administrative agency decisions with complex issues and large records, those difficulties at least suggest that the agencies involved may also have difficulty coping with the large records in making the decisions that these judges review.

265. Rifkind, *supra* note 257, at 106, suggests that two groups of workers, seamen and railroad employees, could have their work injury claims determined by workers' compensation administrative agencies, taking another group of cases from the overburdened courts. This change, however, would add additional workload to whatever administrative agency was designated to decide these cases. Bork, *supra* note 260, at 237-39, advocates creation of an appellate administrative court for these cases that generate a large amount of paper, and that involve "repetitious factual issues" under

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ideas may lead to more administrative agencies or to increased caseloads and delays in existing administrative agencies.[266] Other ideas, such as "impact statements," which derive from environmental regulation[267] and which have been advocated to relieve court congestion,[268] are also applicable to administrative agency caseload planning and management.

"Administrative impact statements" could be required from Congress and state legislatures when they debate or pass new legislation which: 1) changes the existing law administered by an agency in a manner that affects its ability to process its caseload promptly; 2) adds additional agency responsibilities (such as the transfer of aged, disabled and blind welfare entitlement determinations to the Social Security Administration in the "S.S.I." amendments to the Social Security Act);[269] or 3) significantly increases or decreases the budget of an agency. Similarly, the impact on administrative agencies of judicial decisions should be watched by some organization, such as the Administrative Conference of the United States, to determine if a court decision will

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such statutes as the Truth-in-Lending Act, or the Social Security Act. These courts, staffed by administrative law judges, would take those cases from the federal district courts and would lighten the district court burden by, in his estimate, 20,000 cases a year. Mr. Chief Justice Burger, in his keynote address, *supra* note 259, at 94-95, advocates changes in the ways that medical malpractice, negligence (personal injury), family law, probate, and land title cases are handled. He suggests the worker's compensation model as a starting point for personal injury (negligence) cases. If personal injury cases were shifted to a worker's-compensation-type agency, an existing agency could be swamped by the number of new cases added to its workload, and a new agency would have to devise procedures to insure that it handled its caseload promptly *and* had *adequate resources* to do so.

The provision of adequate public resources for that job can not be so lightly taken for granted in the wake of the overwhelming success in California of the Jarvis-Gann Tax initiative (Proposition 13) in the June, 1978 primary election.

266. This is not a desirable development from the perspective of this article. Increased caseload was a significant factor in the clogging of the Social Security Administration. *See* White v. Mathews, 559 F.2d 852 (2d Cir. 1977). Much of the clogging was caused by the addition of "Black Lung," cases (Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901-960 (1969)) and "S.S.I. cases" (Title XVI, Supplemental Security Income for the Aged, Blind, and Disabled, 42 U.S.C. §§ 1381-1383(c) (1973)); 559 F.2d at 859. Thus, any alleviation of judicial workload may be at the expense of the administrative agency that has to absorb the increased caseload. In the "S.S.I. cases," the transfer was made from state administrative agencies to a federal administrative agency.

267. *See* the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4367 (1969) which requires environmental impact statements.

268. Mr. Chief Justice Burger has advocated congressional preparation of a "judicial impact statement" when it is deliberating on new legislation. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1050 (1972); Rifkind, *supra* note 259, at 109-10, suggests extending the judicial impact statement requirement to court decisions when they decide cases that create new or expanded causes of action.

269. Title XVI, Supplemental Security Income for the Aged, Blind, and Disabled, 42 U.S.C. §§ 1381-1383(c) (1973).

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significantly burden the agency. *Goldberg v. Kelley*[270] may have had such an impact on state welfare agencies if only because the pretermination notice and opportunity to be heard requirement it imposed on those agencies forced them to allocate more resources to termination hearings and, presumably, fewer resources to applications for benefits.

The development of judicial administration as a specialty[271] is an idea worth exploring. Specialists could be trained to manage and administer agencies, as court administrators have been trained to administer courts, without diluting or infringing on the substantive decisionmaking authority of agency leaders or administrative law judges.[273]

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270. 397 U.S. 254 (1970).

271. Burger in his keynote address, *supra* note 259, at 87, mentions three organizations actively involved in the developing field of judicial administration: the Judicial Conference of the United States, The National Center for State Courts, and the Institute for Court Management. A national leader in training new judges and in preparing bench manuals is California's Center for Judicial Education and Research, located in Berkeley, California. The American Bar Association Commission on Standards of Judicial Administration has drafted standards relating to trial courts, court organization, and appellate courts. Burke, *The New Standards of Judicial Administration: Time Now for Implementation*, 62 A.B.A.J. 1172 (1976).

Court unification is another aspect of organizational reform precipitated by the development of judicial administration in: 1) Alabama: *see* Mitchell, *The Judicial Article Implementation Act—An Overview*, 38 ALA. L. REV. 31 (1977); Martin, *Alabama's Courts—Six Years of Change*, 38 ALA. L. REV. 8 (1977); Heflin, *The Judicial Article Implementation Act*, 28 ALA. L. REV. 215 (1977); Shores, *The Alabama Experience Over the Past Five Years*, 49 N.Y. St. B.J. 98 (1977); 2) Wisconsin (proposed): *see* Beilfuss, *The State of the Judiciary*, Feb. 1977 WIS. B. BULL. 36 (1977); and 3) California: Kleps, *Crisis Planning for Court Reorganization*, 60 JUD. 268 (1977). On the subject of court unification, *see also* Berkson, *The Emerging Ideal of Court Unification*, 60 JUD. 372 (1977); on court reform, *see* Boyle, *Making a Big Court Better*, 60 JUD. 233 (1976); Schulert and Hoelzel, *Court Reform, The Unheralded Winner of the 1976 Elections*, 60 JUD. 281 (1977); Katalinas, *Cleveland Municipal Court's Administrative Concepts*, 48 CLEV. B.J. 130 (1977); and *State Court Progress at a Glance*, 56 JUD. 427 (1973).

The subject of judicial administration is well enough established to be included in first year law school casebooks on civil procedure. *See* M. ROSENBERG, J. WEINSTEIN, H. SMIT, H. KORN, ELEMENTS OF CIVIL PROCEDURE, (Foundation Press, 3d ed. 1976) 878-916. The subject has also attracted the attention of scholars in other fields such as organizational theory. *See* Mohr, *Organizations, Decisions, and Courts*, 10 L. & SOCY. REV. 620 (1976). On judicial administration, *see generally* Friesen, *Judicial Administration Lessons from England*, 71 F.R.D. 469 (1977), and P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL (West Pub. Co., 1976), reviewed by Christian, Book Review, 60 JUD. 403 (1977).

272. On court administrators, see Footlick, *How Will the Courts be Managed?*, 60 JUD. 78 (1976).

273. The following are indicative of similar although possibly embryonic developments in administrative agencies: 1) M. Ruhlen, *Manual for Administrative Law Judges*, (issued by Admin. Conf. of U.S.), reviewed by Ross, Book Review, 27 AD. L. REV. 107 (1975). Ross indicates that manuals "for state and local administrative proceedings" are almost nonexistent. *Id.* at 107, n.1. 2) Pfeiffer, *Hearing Cases*

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Other ideas worth examining and adapting to the administrative setting include: using the benefits of technology such as computers and videotape,[274] simplifying the subtantive rules of law,[275] requiring a "probable merit" hearing prior to a civil trial or discovery,[276] case screening and "summary disposition of cases,"[277] court reorganization,[278] use of a science court,[279] special procedures for complicated federal appellate court cases,[280] and procedures used in criminal ad-

Before Several Agencies—Odyssey of an Administrative Law Judge, 27 AD. L. REV. 217 (1975), in which the author, a federal administrative law judge, advocates "the ultimate adoption of a concept of a unified independent corps of administrative law judges." *Id.*

274. *See, e.g.*, Lieberman, *Will Courts Meet the Challenge of Technology?*, 60 JUD. 84 (1976) (discussing the possible application of videotape and computer technology to the courts), and J. REED, THE APPLICATION OF OPERATIONS RESEARCH TO COURT DELAY (1973), reviewed by Bellas, Book Review, 1 J. SYS. J. 89 (1974).

275. Rifkind, *supra* note 257, at 109-10. This is particularly useful for complicated cases.

276. *Id.* at 107.

277. Cramton, *Federal Appellate Justice in 1973*, 59 CORNELL L. REV. 571, 572 (1974); *See also* Betten, *Institutional Reform in the Federal Courts*, 52 IND. L.J. 63, 64-65 (1976) (discussing administrative and institutional techniques to help federal appellate courts control caseload and enhance the quality of judicial decisions). On "screening devices" to channel cases out of a court system, *see also* Levi, *supra* note 260, at 218-19 (such as "probable merit" hearings, and independent mediation panels); Sander, *The Multi-Door Courthouse, Settling Disputes in the Year 2000*, No. 3 BARRISTER 18 (1976) (such as, mediation, malpractice screening, arbitration); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). Here the author discusses the above techniques plus use of ombudsmen, and negotiation. He also develops "criteria" for determining which "dispute resolution mechanism" is best suited to a particular problem. *See generally* Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1977) (discussing, *inter alia*, proposals to eliminate cases, such as Jones Act cases (seaman) or Federal Employer Liability Act (railroad employee) cases, from being brought in federal courts so as to ease the caseload burden on federal courts); Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797 (1971) (discussing, *inter alia*, the relationship between "good procedure," judicial administration, and the "quality of justice"); Schwarz, *Non-Judicial Remedies for Administrative Abuse: The Mexican Experience*, 29 AD. L. REV. 115 (1977); and Rubin, *Views from the Lower Court*, 23 U.C.L.A. L. REV. 448 (1976).

278. Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 591-95 (1974) (discussing, *inter alia*, federal appellate court reorganization).

279. The purpose of a "science court" is to aid in decisionmaking by public bodies composed of non-experts when complicated scientific issues are part of the issues faced in a particular decision. Markey, *A Forum for Technocracy? A Report on the Science Court Proposal*, 60 JUD. 365 (1977).

280. Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 444-45 (1976); *see also* Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976); Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals*, 23 U.C.L.A. L. REV. 480 (1976); and Lay, *Reconciling Tradition With Reality: The Expedited Appeal*, 23 U.C.L.A. L. REV. 419 (1976).

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judication such as the "omnibus hearing."[281] Although some of these ideas may be unadaptable to administrative settings, they are at least worthy of examination to see if analogous problems lend themselves to analogous solutions.

In conclusion, there are a variety of solutions used in criminal litigation, civil litigation, and judicial administration to cope with mounting problems of delayed decisionmaking.[282] Our hope is that some of these ideas can be adapted to the equally pressing problem of delayed administrative decisionmaking. There are also the reform proposals of Congress and the scholarly literature. However, reducing administrative delay requires an examination of the role of the legislature.

V. THE LEGISLATURE: OVERSIGHT, GENERIC STANDARDS, AND DELAY

Legislatures are responsible for the creation of administrative agencies[283] and have continuous "oversight" responsibilities over those

281. Clark, *The Omnibus Hearing in State & Federal Courts*, 59 CORNELL L. REV. 761 (1974).

282. In the RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 180, Mr. Max D. Paglin, consultant to the Administrative Conference of the United States, advocates use of "management techniques" and "pre-hearing techniques" to control agency delay. See the transcript of remarks of experts at the *Symposium on Undue Delay in Regulatory Agencies* (held before the Senate Committee on Government Operations in Washington, D.C. on November 17, 1976). *Id.* at 176-219. Other experts in the symposium advocated the use of procedures similar to those used in federal courts to speed up case disposition such as: 1) "[S]ummary judgment," suggested by Mr. William F. Pederson, Jr., Staff Counsel of the Committee on Government Operations. *Id.* at 190; 2) "written presentations" and limitations of oral trial-type hearings, suggested by Mr. Max D. Paglin. *Id.* at 190-91; 3) use of discovery, such as written interrogatories, as a substitute for "wasteful cross-examination," suggested by Mr. Seymour Wenner, consultant to regulatory commissions on administrative procedure. *Id.* at 192; 4) "preproposal availability of staff drafts" in rulemaking, proposed by Mr. Richard B. Herzog, Assistant Director for National Advertising, Bureau of Consumer Protection, Federal Trade Commission. *Id.* at 194; 5) use of discovery penalties to force parties to admit facts not in dispute and to reinforce prompt decisionmaking as an expectation of the agency and people before it, suggested by Mr. Herzog. *Id.* at 196-97; 6) use of management and planning principles, for example, prioritization of tasks, with an office to inform the agency when it is engaging in "priority tradeoffs," suggested by Mr. Edward Heiden, Director, Office of Strategic Planning, Consumer Product Safety Commission. *Id.* at 217-18. *See generally id.* at 198-219.

283. For example, the Consumer Product Safety Commission was established by congressional enactment. Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (codified at 15 U.S.C. §§ 2051-2081 (1976). The history of the Consumer Product Safety Commission and an evaluation of its effectiveness are contained in STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG. 2D SESS., FEDERAL REGULATION AND REGULATORY REFORM (Comm. Print 1976) at 195-242 [hereinafter cited as MOSS REPORT].

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agencies based on the statutes defining agency responsibilities.[284] Furthermore, legislatures have continuous "oversight" because they are responsible for agency budgets.[285] Legislatures therefore have the key role to play in resolving problems of delayed administrative decision-making. This section will discuss legislative efforts to control administrative delay through oversight and the imposition of agency developed generic standards. The primary emphasis will be on congressional oversight of federal agencies. However, this section's conclusions are equally applicable to state legislative bodies.

Two recent major congressional studies[286] on federal regulatory agencies have examined Congress' responsibility for oversight to ensure that agencies are performing the tasks statutorily required of them by Congress. Legislative oversight can be defined to include 1) "study, review and investigation . . . ," 2) "congressional efforts to review and control policy implementation by the regulatory agencies;" and 3) "an active concern with the administration of policy during implementation."[287] Oversight, or "legislative review," has been "statutorily authorized" by Congress since 1946.[288] Congressional oversight of

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284. *See, e.g.,* congressional action adding determination of "Black Lung" claims to the responsibilities of the Social Security Administration in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901-960 (1976).

285. Congressional responsibility for funding agencies allows Congress to review the agency's performance as it evaluates agency budget requests. See discussion of "appropriate oversight" in STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOLUME TWO, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. DOC. NO. 26, 95th Cong., 1st Sess. 18-43 (1977) [hereinafter cited as the OVERSIGHT STUDY].

286. The MOSS REPORT, *supra* note 283, and the OVERSIGHT STUDY, *supra* note 285.

287. The OVERSIGHT STUDY, *supra* note 285, at 4. For the third definition of oversight the Study cites Aberbach, The Development of Oversight in the United States Congress: Concepts and Analysis (October, 1976) (discussion paper prepared for the Commission on the Operation of the Senate, University of Michigan Institute of Public Policy Studies).

288. Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 417-18 nn. 9-10 (1976) [hereinafter cited as Ribicoff]. Senator Ribicoff states:

> Congress' oversight function was first statutorily authorized by the Legislative Reorganization Act of 1946 in which each standing committee of Congress was mandated to exercise continuous watchfulness of the execution by the administrative agencies concerned, of any laws on the subject matter of which was within the jurisdiction of such committee. Legislative Reorganization Act of 1946, 753, tit. I., § 136, 60 Stat. 832.

Id. at 417-18 n.9. On the subject of oversight, *see generally* Williams, *Securing Fairness and Regulatiry in Administrative Proceedings,* 29 AD. L. REV. 1, 26-32 (1977); Krasnow and Shooshan, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission,* 10 HARV. J. LEGIS. 297 (1973); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277 (1975); Cutler and Johnson, *Regulation and the Political Process,* 84 YALE L. J. 1395 (1975); Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines*

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regulatory agencies has been criticized for being inadequate and reforms have been suggested.[289] The purposes and structure of oversight as well as proposals for reform, will be related to the problem of administrative delay.[290]

Oversight and regulatory reform in general have been precipitated by dissatisfaction with the federal regulatory agencies.[291] One of the problems stimulating reforms is administrative delay by regulatory agencies. The Ribicoff Report suggests, for the legislative role, that "(t)he principal reform effort, for reducing delay as well as other regulatory ills, must be for Congress to clarify and simplify the regulatory mandates and make sure that they make economic, scientific, and social sense."[292] This report advocates both "[r]egular periodic review of agencies' programs and resources by both legislative and appropriations committees . . ."[293] and the "[e]ncouraging [of] agency planning . . . [by] aggressive congressional oversight."[294] Final-

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from the Founding Fathers, 28 AD. L. REV. 429 (1976) (discussing legislative veto proposals and the separation of powers doctrine); and *Proceedings of the Administrative Law Section's 1976 Bicentennial Institute-Oversight and Review of Agency Decisionmaking*, 28 AD. L. REV. 569 (1976).

289. Ribicoff, *supra* note 288, at 419-21. See authorities cited and oversight reform proposals discussed therein at 421-27.

290. Ribicoff states:

> The goals of oversight, or legislative review, are straightforward. The primary purpose of oversight is to insure that agencies administer the laws enacted by Congress in accordance with congressional intent. Oversight also serves to promote a constant interchange with the regulatory agencies to see that the general concerns of the public are brought to the attention of the agencies and reflected in their policies. Oversight serves, too, to prevent dishonesty, waste, and abuse of the administrative process. Finally and importantly, effective congressional oversight should prevent the agencies from making decisions that properly are left to the political process. In sum, legislative oversight of the regulatory agencies should insure the accountability of non-elected administrastors to the elected representatives of the public.

Id. at 418 (footnotes omitted).

291. The OVERSIGHT STUDY, *supra* note 285, was a reaction and response to dissatisfaction with oversight. The MOSS REPORT, *supra* note 283, focused extensively on the reform of nine federal regulatory agencies. In its introduction, it ranked the agencies it has studied into three groups, based on effectiveness as measured by the report. These rankings are: 1) "The Top" group, consisting of the SEC, FTC, and the EPA; 2) "The Middle" group, consisting of the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, the FCC, and the FDA; and 3) "The Bottom" group consisting of the ICC and the FPC. MOSS REPORT, *supra* note 283, at 11-13. The introductory ranking is followed by chapters on each of the agencies studied and by chapters discussing the study's major recommendations for reforming federal regulatory agencies.

292. The RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 166; *see also id.* at 166-68, 170-71.

293. *Id.* at 169.

294. *Id.* at 168.

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ly, the report calls for agency development of "clear generic standards, ordinarily by rulemaking, to speed the resolution of individual cases."[295] The Ribicoff Report and its recommendations are an example of the positive effects of congressional review of regulatory agency problems which encourage further congressional oversight of regulatory agencies and thereby further reduction of administrative delay.[296]

One useful legislative oversight tool for reducing administrative delay is the "proposed requirement for an agency 'compliance report' to be incorporated into each agency's annual report" to its oversight committee.[297] Such compliance reports could include 1) valuable caseload data, 2) reports on "bottlenecks" in a particular agency's caseload, 3) an agency's performance with regard to its timeliness standards, 4) agency resource and case priorities and how those priorities relate to an agency's performance of those timeliness goals, and 5) an agency's need for additional fiscal and staff resources to meet its standards and priorities.[298] Extensive data on these subjects could lead to measurements of the impact of particular procedural reforms, of generic standards, and of new legislation on an agency's ability to handle its caseload priorities.[299] Congress could use its own agencies (such

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295. *Id.* at 170. On generic standards, *see also id.* at 157-62, 183-84.

296. Similarly, the MOSS REPORT, *supra* note 283, at 554, recommends greater use of informal rulemaking (notice and comment rulemaking) as a substitute for formal rulemaking to speed up agency deliberations.

297. The MOSS REPORT, *supra* note 283,at 596-97, recommends reforming compliance reports so that caseload data is reported, and compliance with, *inter alia,* statutory deadlines by the reporting agency.

298. *Id.* Much of the information sought here could be obtained through periodic questionaires sent to agencies. *See id.* at 608-26 (appendix F. listing questionaires sent by the subcommittee to the agencies studied). Estimating the resources necessary to complete a case is an idea now used at the FTC. *Id.* at 79. On bottlenecks, *see* RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 180. For discussion of timeliness standards, *see* text accompanying notes 24-36 *supra. See also* discussion of agency planning and Congress' appropriation role in the RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 168-70. Congress has the responsibility for appropriating sufficient funds so that an agency can hire adequate staff and can run its operation expeditiously.

299. The OVERSIGHT STUDY, *supra* note 285, at VII & VIII, in its oversight improvement recommendations, advocates an increase in the amount of information transmitted from agencies to Congress. The type of information discussed in the text accompanying notes 298-99, *supra,* could also be more easily gathered and used if such recommendations were implemented. These recommendations include: 1) Congress should mandate by statute joint agency transmittal of its budget requests and legislative agenda to Congress and the Office of Management and Budget. *Id.* at VII; *see also* Ribicoff, *supra* note 288, at 422-23; 2) congressionally required deadlines for agency data transmittal with biennial congressional review of agency compliance with information collection and reporting requirements. *Id.* at VII; 3) oversight committee coordination between Houses of Congress, between legislative and appropriations committees, and among standing committees through greater use of reports. *Id.* at

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as the Office of Technology Assessment; the General Accounting Office, particularly the Office of Program Review and Evaluation; the Congressional Research Service; and the Congressional Budget Office) to collect, evaluate and report their findings regarding, for example, the impact of a particular generic standard on the speed of enforcement-case disposition by the Federal Trade Commission.[300] A separate oversight office should be administratively contained within GAO or CRS to coordinate oversight, specifically to "analyze the impact of proposed and promulgated agency regulations and to make recommendations based on its analysis."[301]

Two other related oversight recommendations that would be useful for controlling administrative delay are widespread agency development of "generic standards"[302] and "recodification" of agency laws.[303] Procedural recodification similar to the OSHA procedures,

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VII-VIII; and 4) congressionally mandated agency program evaluation with agency reports on goal development, goal performance assessment, the impact of agency rules, and regulatory principles used by the agency with an emphasis on agency self-evaluation. *Id.* at VIII. *See also id.* at 58, discussing recommendations that agency reports should include data on delay in regulatory activities and should state efforts to lessen paperwork.

300. The OVERSIGHT STUDY, *supra* note 285, at VIII-IX, recommends more frequent utilization of congressional offices such as the Office of Technology Assessment (OTA), the General Accounting Office (GAO), Congressional Research Service (CRS), and the Comptroller General (CG) for oversight work. For example, the OVERSIGHT STUDY specifically recommends the use of GAO to aid in stating "goals and objectives in new legislation, so that evaluation of agency activity might be improved." *Id.* at IX. The OVERSIGHT STUDY goes on to discuss in depth the oversight role of GAO, and details the oversight powers granted GAO by recent legislation. *Id.* at 71-76. The Study also looks at 1) the role of CRS as the "research and reference" arm of Congress. *Id.* at 68-69; 2) OTA as the source of "technical expertise" for Congress. *Id.* at 69-70; and 3) CBO as the "financial data or fiscal forecast" source for Congress. *Id.* at 70-71. These offices could provide the kind of data evaluation mentioned in the text with each office contributing its own brand of expertise. Congress would then have independent information for agency evaluation.

On the FTC example, *see* RIBICOFF REPORT, VOL. FOUR, *supra* at 183 (Mr. Herzog's statement).

301. OVERSIGHT STUDY, *supra* note 285, at 136. *See* discussion of oversight offices in Ribicoff, *supra* note 288, at 424-25 (particularly the proposals for a "special office for regulatory agency oversight" and for "special subcommittees dealing only with oversight." *Id.* at 424).

302. The RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 157-62, advocates agency use of "generic standards" on a much greater scale than is currently the case. The report uses the term "generic standards" to mean agency policymaking through articulation of regulatory standards in rulemaking and when feasible in adjudicative hearings. *Id.* at 157-58. The report concludes that "[a] second aspect of policymaking that is weak at many regulatory agencies, and one that is particularly important to support efforts in streamlining individual proceedings, is establishing broadly applicable generic standards to guide decisionmaking in individual cases." *Id.* at 157.

303. The OVERSIGHT STUDY, *supra* note 285, at IX, recommends mandatory "recodification", by combined effort of Congress and each agency, of relevant

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that survived constitutional attack in the *Atlas Roofing* case,[304] would enhance prompt decisionmaking. The OSHA model is suggested as an example. Both "substantive recodification" and "generic standards" would speed up agency decisionmaking. "Substantive recodification" would be helpful if there were simplification and clarification of the statutory standards agencies are required to implement.[305] Generic standards have the potential of speeding up agency decisionmaking. These standards 1) provide policy guidelines for deciding individual cases, 2) clarify and limit the number of contested issues at agency hearings because definitive policy answers are provided for some issues, and 3) allow greater decisionmaking by ALJ's without the necessity of having agency members review each of those decisions to ensure agency policy is consistently followed.[306] Clear, simple standards also enhance predictability which can speed up decisionmaking because the agency, the ALJ's, and the litigants have definite answers to resolve some of the issues in administrative litigation.[307] It may also prevent some litigation if counsel can point to clear standards when advising a client that compliance is the preferred option, where there is no doubt that the standard applies to the client or to the client's product.[308]

The overall purposes of congressional oversight are consistent with the reduction of delayed administrative decisionmaking. Two of those purposes are directly congruent with delay reduction. These purposes are 1) "determining the effectiveness of regulatory policies" promulgated by Congress, the impact of those policies and the implementation of those policies by the agenices;[309] and 2) monitoring the efficiency and integrity of agency operations because "inefficient management of an agency can do serious damage to regulatory

statutes, cases, and administrative rulings utilizing law revision counsel from both houses of Congress. It also advocates better drafting of legislation to narrow the regulatory mandate of an agency so that congressional oversight will be enhanced. *Id.* The study stresses the value of its recommendation by indicating that recodification should result in more specific regulatory standards. In this manner agency performance can be measured more easily, so that agencies can better understand congressional intent, regulated industries can better comprehend the laws governing their conduct, and Congress can more easily understand how the agencies are applying their mandated standards. *Id.* at 137-39.

304. *See* discussion in text accompanying notes 200-09 *supra*.

305. The RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 158-60, and particularly at 158 n.21.

306. *Id.* at 157-62.

307. *Id.* at 158-63.

308. *Id.* at 158.

309. The OVERSIGHT STUDY, *supra* note 285, at 4; *see also* RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 168-69, on congressional oversight and agency planning.

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policy."[310] However, the time and resources demanded of agencies in gathering information, writing reports and testifying at congressional hearings, as part of legislative oversight, can contribute to delays at those agencies because staff and fiscal resources are devoted to oversight and not to the other business of the agency.[311] Thus Congress must be sensitive to the time consumed by agencies on oversight matters. Congress must also be very efficient in organizing and conducting oversight by using Joint House and Senate Oversight Committees, yearly oversight plans, and coordination of oversight to prevent "duplication of effort and unnecessary burdens on the agencies."[312] Congress must be willing to push agencies to plan and set priorities but must not dictate the details of agency procedure, or disturb agency planning by imposing new substantive standards with procedural requirements that cause serious delay problems for the agencies asked to administer those standards.[313]

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310. OVERSIGHT STUDY, *supra* note 285, at 5. Other objectives of Congressional oversight listed by the study include: 1) prevention of arbitrary decisions ad abuse of power by agencies; and 2) monitoring agency adherence to congressional intent in the administration of laws passed by Congress. *Id.* at 4. The overall purpose of congressional oversight is to ensure agency accountability. *Id.* at 5-7.

311. In the RIBICOFF REPORT, VOL. FOUR, *supra* note 2, at 182, Mr. Peter L. Strauss, General Counsel of the Nuclear Regulatory Commission, and Columbia University Law School professor, notes that

> oversight by Congress, by the judiciary, by anyone, tends uniquely to consume the time of the people at the top of the agency. So one of the prices that one pays for an oversight system is that you divert the attention of commissioners from doing the other things which they might be doing—for example, from deciding some complex questions which are before them, and which ought to be given their full attention.

The OVERSIGHT STUDY, *supra* note 285, at 96, provides additional support for this conclusion. It states:

> Presenting testimony at hearing requires a large commitment of time by the agency personnel involved. An agency such as EPA, which presented testimony in hundreds of hearings over the past few years, spends a great deal of its resources in responding to requests by several different committees for testimony. The impact on the agencies of the fragmented committee structure might be softened somewhat if there were coordination between committees. Instead, the lack of coordination between committees often adds to the strain on an agency's limited resources.

Id.

312. The MOSS REPORT, *supra* note 283, at 545. *See* the OVERSIGHT STUDY, *supra* note 285, at 91-96, 106-11, for similar discussion on oversight problems and the need for efficiency and cooperation in oversight. *See also id.* at 51-55, for a discussion of the role of congressional hearings, both oversight and legislative, in agency oversight. For discussion of related oversight topics, *see id.* at 62-64, discussing agency program evaluation; at 64-67, informal oversight and casework; at 18-43, appropriations committees and oversight; and at 15-17, types of oversight committees.

313. This conclusion is supported by comments of various participants in a "Symposium on Undue Delay in Regulatory Agencies" sponsored by the Senate Committee on Government Operations and reported in the RIBICOFF REPORT, VOL. FOUR, *supra*

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In conclusion, legislative oversight and the imposition of generic standards have important potential for reducing administrative delay. Compliance reports, recodification, and the development of policy standards are suggested as possible means to achieve that end.

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note 2, at 175-219. Mr. Ben C. Fisher, a private lawyer, suggests that Congress should engage in a cost/benefit analysis so that the procedures chosen to implement a substantive standard do not end up costing more, in terms of delay, than the benefit rendered by the substantive standard. *Id.* at 187-88; *see* comments of Mr. Max D. Paglin, and Mr. Reuben B. Robertson on Congress, through oversight, pressuring agencies who have bottlenecks in the "intermediate review" or the agency-review-of-ALJ-decisions stage because the agencies do not follow their own guidelines for "discretionary review" and end up having many more cases to review than they should. *Id.* at 197-98. *See also,* comments of Mr. Richard Lichtwardt, Executive Director, Federal Communications Commission advocating that Congress, in its oversight role, be "results-oriented" but not dictate specific procedures to agencies. *Id.* at 173, 203-04; his comments advocating resource prioritization by agencies or by Congress at appropriations time, *id.* at 217; and the comments of Mr. Edward Heiden, Director, Office of Strategic Planning, Consumer Product Safety Commission, commenting on his agency, *id.* at 173. He stated: "[O]ur Commission has gone on record and published in the Federal Register for comment a proposed set of priorities and standards for project selection." *Id.* at 217. He goes on to advocate integration of prioritizing and planning at the policymaking level so that the aency can explicitly see the "priority trade-offs" that happen with its decisionmaking. *Id.* at 217-18.

314. Proposed solutions to the delay problem should take into account two important trends in the development of administrative law. The first of these trends is expanding public participation in agency decisionmaking. It is also expanding public access to agencies. For a discussion of this trend *see* Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process,* 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Leighton, *The Consumer Advocacy Agency Proposal . . . Again,* 27 AD. L. REV. 149 (1975); Lenny, *The Case for Funding Citizen Participation in the Administrative Process*, 28 AD. L. REV. 483 (1976); Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391 (1976); Williams, *Public Participation in Locating Facilities Dedicated to Public Use*, PUB. UTIL. FORT. Sept. 16, 1971 at 101; Comment, *Public Participation in Federal Adminstrative Proceedings*, 120 U. PA. L. REV. 702 (1972); and Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 HARV. L. REV. 1815 (1975). *See* the MOSS REPORT, *supra* note 283, at 469-72; STAFF OF SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOLUME THREE, PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. RES. 71, 95th Cong., 1st Sess. (1977) at VII-XIV. Trister, *Legislative Proposals to Improve Access to Federal Courts and Administrative Agencies,* 10 CLEARINGHOUSE REV. 1023, 1036-40 (1977); Houseman, *Recent Developments on Legislative Proposals to Improve Access to Federal Courts and Administrative Agencies,* 11 CLEARINGHOUSE REV. 25 (1977).

The second important trend which should be taken into account when developing solutions to the delay problem is the trend toward ensuring greater agency accountability to both the public and the legislature. *See, e.g.,* Government in the Sunshine Act, 5 U.S.C. § 552b (1976). For a discussion of the Act, *see* Note, *The Government in the Sunshine Act—An Overview*, 1977 DUKE L.J. 565 (1977).

Although these two trends may be significant in the development of solutions for delay, it is beyond the scope of this article to assess the impact of these trends upon the already serious problems of administrative delay. *See* text accompanying notes 37-46 *supra*.

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VI. Conclusion

The problem of administrative delay is complex and does not lend itself to simplistic solutions. Proposed solutions have to be flexible enough to accommodate developing trends in administrative law and policy.[314] However, potential shifts in future administrative goals do not abrogate the need for present action.

Effective time constraints for agency action must be adopted. Before a benchmark is selected, the various timeliness standards must be analyzed and evaluated. Standards for judicial review of agency procedures have to be taken into account. Furthermore, the legislature should pursue the proposals for reducing delay through oversight and through development of generic timeliness standards. However, it will take an integrated effort of the agencies, the courts, and the legislatures to ensure that administrative agencies complete their decisionmaking processes in a prompt and efficient manner.

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