

INFORMAL ACTION—ADJUDICATION—RULE MAKING: SOME RECENT DEVELOPMENTS IN FEDERAL ADMINISTRATIVE LAW†

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All administrative decision-making involving the formulation of policy is divided into three parts: informal action, rule making, and formal adjudication. This is an oversimplification, but a useful one. Implementation of policy, while intimately involved with—and sometimes physically and chronologically inseparable from—its formulation, is nonetheless an analytically distinct operation. The distinction is clearest in the case of rule making, which normally consists of the formulation of a policy (rule) in a fashion procedurally separate from any implementation or application of that policy to particular cases.¹ An adjudication² may involve merely the application to a particular case of a policy previously formulated by some other means, but it more frequently involves a choice between various policies and the simultaneous application of the chosen policy to the facts of the particular case; nonetheless the two processes are analytically distinguishable. Informal actions are similar in this

† This article grows out of the work of the Rulemaking Committee of the Administrative Conference of the United States in 1969-70; the writer served as ad hoc secretary to the committee during that period. The insights of its chairman, Mr. Howard C. Westwood, and of the other members of the committee have been crucial in the development of the views presented herein. However, those views are those of the author and have not been considered or approved by the Administrative Conference or, except to the extent specifically indicated herein, by the Rulemaking Committee.

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1. Exceptions exist because section 2 of the Administrative Procedure Act [APA] defines "rule" as "an agency statement of general or particular applicability and future effect . . ." 5 U.S.C. § 551(4) (Supp. V, 1970) (emphasis added). For the meaning of this cryptic language, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958) [hereinafter cited as DAVIS—TREATISE]. "Rule making" is defined as "agency process for formulating, amending, or repealing a rule . . ." 5 U.S.C. § 551(5) (Supp. V, 1970).

2. Throughout this article the term "adjudication" will be used to refer only to formal adjudication—that is, adjudication "required by statute to be determined on the record after opportunity for an agency hearing . . ." 5 U.S.C. § 554(a) (Supp. V, 1970). Where the term "formal adjudication" is used, the word "formal" is added merely for emphasis. The APA defines "adjudication" much more broadly, as "agency process for the formulation of an order." *Id.* § 551(7). "Order" is in turn defined as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing . . ." *Id.* § 551(6). The great bulk of "adjudications" in this broad sense are informal actions as that term is used herein. See note 3 *infra*.

respect to adjudication; but when an agency acts informally, the fact that policy is being formulated may be obscured by failure to articulate the policy or by articulation only in a fashion not available to the public.

The above discussion is not intended as a purportedly self-contained generalization that would ignore the many subtleties of the processes in question, the differences within each of the three categories, or the fact that elements of two or all three may be involved in a particular case. It is intended merely to suggest, as a framework for discussion, that policy making by administrative officers can roughly and generally be classified, according to the procedure followed, in one of these three categories. The distinction between rule making and adjudication is, of course, at least verbally formalized and enshrined in the provisions of the Administrative Procedure Act [APA]. Informal actions³ are, almost by definition, those formulations of policy which, for one reason or another, fall outside the supposed rigors of the APA as it now stands.⁴ Informal action may also be involved, in substance, when an agency decides formal proceedings without articulating in a meaningful way the policies which lie behind its decision.

3. Generally, the term "informal action" is used herein to mean those formulations of agency policy which are subject neither to the notice and public-participation requirements of sections 553(b) and (c), 5 U.S.C. § 553(b)-(c) (Supp. V, 1970), nor to the requirements of a formal adjudication. Of course the very nature of policy formulation excludes those agency acts which are merely ministerial or are otherwise so plainly dictated by statute that no choice among competing possible policies is involved.

4. The Act is riddled with exceptions, some of which may merit reconsideration. Section 4, *id.* § 553(a)(1), exempts from all procedural requirements in the Act any rule making involving "a military or foreign affairs function of the United States." Similarly exempted are matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." *Id.* § 553(a)(2). Recommendation No. 16 of the Administrative Conference advocated repeal of the section 553(a)(2) exemption for matters involving public property, loans, grants, benefits, or contracts. 1969 ANNUAL REPORT, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 45-46 (1970); see Bonfield, *Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 554 (1970). Except for the right of interested persons to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. § 553(e) (Supp. V, 1970), the rule-making procedural requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(b)(A). An agency can similarly avoid conducting a rule-making proceeding if it "finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B). As to adjudications, the statute contains procedural requirements only for formal adjudications, see note 2 *supra*, and imposes no requirements on the host of agency actions which are technically adjudications but fall outside the definition of a formal adjudication. Even within the class of formal adjudications, sections 554(a)(1)-(6) carve out a number of exceptions. *Id.* § 554(a)(1)-(6).

Much of the literature on administrative law and procedure is devoted to attempts to formulate ideal boundaries between these three procedural notions and to define the specific procedural devices and opportunities most appropriate to each of them.

The present article has two basic theses. First, there is general and sound agreement, at least among those outside Government and also by many inside it, that the realm of informal action should be considerably restricted, to the profit of its two rivals, from the area which it presently occupies; and informal action itself—in the area which it continues to occupy—should often be accompanied by a greater degree of articulation of standards and of reasons for decisions. Second, the contest between rule making and adjudication is largely an unprofitable one and, in at least many instances where the choice between them is debatable, the course of greatest wisdom is to employ elements of both in fashioning a procedure most appropriate to the particular issues and circumstances of each case or class of cases. As will be suggested, both of these propositions are greatly illuminated and strengthened by judicial decisions, publications, and other events of the last two years.

1.

The salient characteristic of informal action is that it involves formulation of policy which has an impact on the citizenry, or portions of it, although the formulation may be hidden from the public view. Even the very existence of a policy is often invisible because the act of formulation is never acknowledged, and the act of implementation may be carried out, intentionally or otherwise, in a manner which disguises the fact that a policy is being applied, let alone what that policy is. Articulation of the policy may exist in a departmental or agency file, or it may exist only in the minds of the officials implementing it. Even worse, there may be no policy at all in situations where good and fair administration requires that there be one.

One may hasten to admit that formulation of policy by informal means is, for one reason or another, unavoidable and even desirable in some areas. Sensitive questions of foreign and defense policy are perhaps the most obvious examples. It is undisputed, however, that informal action is not a desirable means for the formulation of policy in many other areas. Informal action involves policy decisions without any prior notice to—let alone participation by—the general

public or those members thereof who will be affected by the policy. It may involve no judicial review, except to the extent that a court may be persuaded to declare that under the circumstances a wholly different procedure was required by law.⁵ Perhaps most important of all, if the policy in question has never been articulated or at least never publicly announced, the public cannot know the nature of the policy, its intended scope and limitations, or the reasons for it. The public can therefore judge neither whether the policy is sound nor, if it is sound, whether it is being applied fairly and consistently to those cases which by its own definition fall within it. Nor can a member of the public assess whether the policy has an impact on him or, if it does, the nature and scope of that impact. Informal action presents, in short, substantial dangers of arbitrariness, inconsistency, unfairness, and possible corruption.

Once one concedes that informal action is necessary in some areas despite these potentialities for abuse, the question becomes whether it is being employed, at the expense of more appropriate procedures, in areas where it is *not* necessary. Today there is a consensus among those best qualified to form a meaningful opinion that this question must be answered in the affirmative. Professor Kenneth Culp Davis' brilliant book on this subject⁶ seems to the present writer to demonstrate conclusively that many agencies are not resorting as fully as would be both possible and desirable to the use of available procedures. Instead, these agencies to a large degree are still acting on the basis of policies and standards that have either never been articulated or, if articulated within the agency, have never been subjected to the salutary crucible of procedures involving some degree of public knowledge and participation. Clearly, the vast bulk of administrative policy decisions are in fact made by informal action,

5. *But see pp. 57-59 infra.* The District of Columbia Circuit has recently held that an agency interpretative rule — even an “informal” rule stated in a letter in response to an inquiry — while not requiring a rule-making proceeding, is judicially reviewable so long as the subject matter of the rule is actual rather than hypothetical and so long as the ruling is final within the agency. *National Automatic Laundry & Cleaning Council v. Schultz*, ____ F.2d ____ (D.C. Cir. 1971).

6. K. DAVIS, *DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY* (1969) [hereinafter cited as *DAVIS—INQUIRY*]. *See also* DAVIS—*TREATISE* §§ 1.04-8, 1.04-13, 4.13-22 (1970 Supp.); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969). Closely related points were made with equal cogency and a wealth of detail in Judge Friendly's Holmes Lectures, although Friendly addressed himself primarily to the inadequacy of articulated standards in the disposition of formal proceedings, not to what goes on when there are no formal proceedings at all. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 1055, 1263 (1962).

with the more formal procedures occupying only a small part of the whole. Until recently attention may have focused unduly on refinements of the formal procedures *where they are already and admittedly applicable*, with relatively little attention given to the much broader problem of how to bring some degree of procedural regularity and articulation to bear on the areas commonly assumed to be outside the area of formal administrative procedure altogether.

Professor Davis raises the problem in some areas that have rarely been regarded as even potential candidates for formal procedure, such as the unfettered discretion generally possessed and exercised by prosecutors in deciding which apparent crimes to prosecute and which to drop.⁷ But he also discusses many areas which could and should be subjected to formal procedures with little or no alteration in conventional assumptions and habits of thought, including many areas where the failure of administrators to avail themselves of such procedures is quite inexcusable.

Many reasons, not all of them sinister, explain why administrators will probably always draw the line between informal action and more formal methods of policy-making in a manner considerably more generous to the former than most non-administrators would regard as

7. DAVIS—INQUIRY 162-214. This fascinating area unfortunately cannot be treated in any detail here. One horrible example not mentioned by Davis was brought to light in Seagle, *The Twilight of the Mann Act*, 55 A.B.A.J. 641 (1969), although the author of that article apparently did not regard it as such. The Mann Act, 18 U.S.C. § 2421 (1964), makes it a felony to transport a woman across state lines for any "immoral purpose"—the sort of vague statutory language which inevitably leads to administrative arbitrariness unless clarified and made more specific by implementing regulations—a procedure not generally available, or at least not thought to be available, in the application of criminal statutes. Seeming to suggest that there is no urgent need to repeal the Mann Act in spite of its alarming verbal breadth, Mr. Seagle observed that prosecuting attorneys generally enforce the Act only in what they regard as "aggravated" situations. One example given of an "aggravated" type of situation is a case where the woman was "chaste" before beginning her interstate odyssey! Seagle, *supra*, at 643. There seems little doubt that, even with respect to less ambiguous statutes, prosecutorial discretion is so broad and powerful as to present substantial danger of abuse. But the prescription is less apparent than the diagnosis, although Davis makes some provocative suggestions. The current revitalization, as regards criminal statutes, of the "void for vagueness" doctrine may provide a partial solution. See, e.g., *Ricks v. United States*, 414 F.2d 1111 (D.C. Cir. 1968); *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968); *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *prob. juris. noted*, 397 U.S. 1061 (1970); *Broughton v. Brewer*, 298 F. Supp. 260 (D. Ala. 1969); *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969).

For better or worse, however, it is too late to contend seriously that the "void for vagueness" doctrine has any significant promise in inhibiting virtually unlimited grants of discretion to agencies in non-criminal matters. If "unfair methods of competition" is not too vague for a

desirable or fair. Articulation of policy is difficult and burdensome, particularly the formulation of standards which give the public some reasonable guidance as to the limits of the policy by suggesting rules for deciding, or at least identifying, the hard cases; the "I know it when I see it" approach is much easier. Administrators may have a perfectly genuine fear of formulating abstract standards which, as particular cases arise, may be found not altogether satisfactory, particularly if the administrators are going to be placed under some degree of restraint in changing those standards. Moreover, formal procedures take time and money, both of which are often in short supply.

As opposed to those considerations which commend more formal procedures, all of the above factors in support of informal action are likely to loom larger in the minds of administrators than in the minds of others, including judges, lawyers in private practice, and writers of law review articles. There is a need, therefore—and there seems every reason to believe it will be a continuing need—for means by which the administrators may be persuaded and, if unpersuaded, compelled to restrict unfettered discretion by use of more formal procedures in certain areas and instances where they would not do so if left wholly to their own devices. Professor Davis and others have, in this writer's judgment, demonstrated that the presently available means for accomplishing this persuasion or compulsion are inadequate. What additional means are needed?

A few courts have begun to fashion a legal doctrine which, if it flourishes and is applied wherever it seems clearly applicable, should go far toward improving the situation. Two leading cases are *Hornsby*

statute prohibiting conduct, even with only civil sanctions, it is hard to think of any language that could be. See 15 U.S.C. § 45 (1964), *constitutionality upheld*, *Sears Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919).

A closely related problem, probably more prevalent in local than in federal law, is the practice of adopting statutes or regulations which "overshoot" by making almost everyone a lawbreaker, see DAVIS—INQUIRY 165, and then vesting in prosecutors or, as a practical matter, in individual policemen virtually unlimited discretion to punish such conduct as they deem offensive. A classic though perhaps petty example is the common practice of promulgating absurdly low speed limits. The effective speed limit is then set by tacit consent between police and drivers. This may not be altogether inequitable as a general matter, but woe to the driver who either is ignorant of the "real" speed limit or who becomes the object of police interest for other reasons. Disorderly conduct and vagrancy statutes have comparable results and are intolerably vague to boot. The situation often created—the power of the police and government lawyers to arrest and prosecute almost anyone for something or other if they want to—is characteristic neither of a free society nor of one governed by law.

*v. Allen*⁸ and *Holmes v. New York City Housing Authority*.⁹ In *Hornsby*, the court held that a state agency acted without constitutional due process when it denied an application for a liquor-store license without articulating, in rules and regulations, any standards to govern action on such applications and without giving any explanation of the basis for denial of the particular application in question. In *Holmes*, the court reached a similar result in reviewing the denial of the plaintiff's application for admission to a low-rent public housing project by an agency which allegedly¹⁰ had adopted no standards for choosing among applicants and had given those found ineligible no reasons for its decisions. Both *Hornsby* and *Holmes* pointed out in strong terms the necessity for articulated standards and reasons for decision in order to avoid or minimize such abuses as arbitrariness, favoritism, and corruption. If administrative practices like those condemned in *Hornsby* and *Holmes* rise to fourteenth amendment due process significance, it must be wholly clear that at least equal requirements are imposed on federal agencies by the fifth amendment¹¹ if not by the APA. This suggests the intriguing conclusion that administrative action, even in the many areas expressly exempted from the rule-making requirements of the APA, is nevertheless subject on constitutional grounds to some minimum requirement of articulation and non-arbitrariness where it affects private rights or interests. And it is well known that traditional "standing" limitations and other doctrines restricting the types of rights and interests which may be judicially cognizable in relation to agency action are very rapidly being eroded in favor of wider governmental accountability to those affected by governmental policy.¹²

Two holdings of the highest importance in this developing requirement of articulation of policy were made in *Environmental*

8. 326 F.2d 605 (5th Cir. 1964).

9. 398 F.2d 262 (2d Cir. 1968). See also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Smith v. Lander*, 288 F. Supp. 66 (S.D. Miss. 1968); *Davis, A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 730 (1969).

10. The decision was on a motion to dismiss. 398 F.2d at 264.

11. In *Thorpe v. Housing Authority*, 386 U.S. 670 (1967), the Supreme Court granted certiorari to consider (as it subsequently explained, *Thorpe v. Housing Authority*, 393 U.S. 268, 272 (1969)) whether a tenant in a federally assisted housing project "was denied due process by the [local] Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons." However, the case was decided on other grounds.

12. See DAVIS—TREATISE ch. 22 (1970 Supp.).

Defense Fund, Inc. v. Ruckelshaus.¹³ First, the court construed the provisions of the Federal Insecticide, Fungicide and Rodenticide Act¹⁴ as requiring, in effect, that the Secretary of Agriculture institute formal proceedings in a situation where he proposed to give the matter informal consideration for some time before deciding whether to act formally. The statute provides that when a registered pesticide fails to conform to certain standards, the

registration is subject to cancellation in accordance with procedures prescribed by statute. In the ordinary case, the administrative process begins when the Secretary issues a notice of cancellation to the registrant. The matter may then be referred, at the request of the registrant, to a scientific advisory committee, and to a public hearing, before the Secretary issues the order that effectively cancels or continues the registration.¹⁵

Environmental protection groups petitioned the Secretary requesting him to issue a notice of cancellation with respect to DDT. While issuing such notices with respect to certain uses of DDT, the Secretary proposed to conduct informal investigations with respect to other uses before deciding whether to issue notices against those uses. Subsequently the Secretary, though making a number of findings regarding the harmfulness of DDT, took the position that issuance of the requested notices of cancellation should continue to be deferred on the ground that investigations were still being conducted and that final decisions had not been made concerning the uses for which cancellation notices had not been issued.¹⁶ The court held that the issuance of notices of cancellation was meant to be the beginning, not the end, of the administrative process and that once there was "a substantial question" concerning the safety of a registered pesticide, the Secretary was *required* to issue a cancellation notice and thus to trigger the formal administrative process.¹⁷ The Court declared that

[t]he Secretary may, of course, conduct a reasonable preliminary investigation before taking action under the statute. . . . But when, as in this case, he reaches the conclusion that there is a substantial question about the safety of a registered item, he is obliged to initiate the statutory procedure that results in . . . a public hearing. We recognize, of course, that one important function of that procedure is to afford the registrant an opportunity to challenge the initial decision of the Secretary. But the hearing, in particular, serves other functions

13. 27 AD. L.2D 1054 (D.C. Cir. 1971) (Bazelon, C.J.).

14. 7 U.S.C. §§ 135-135k (1964).

15. 27 AD. L.2D at 1056.

16. *Id.* at 1055.

17. *Id.* at 1067.

as well. Public hearings bring the public into the decision-making process, and create a record that facilitates judicial review. If hearings are held only after the Secretary is convinced beyond a doubt that cancellation is necessary, then they will be held too seldom and too late in the process to serve either of those functions effectively.¹⁸

The court therefore remanded the case to the Secretary "with instructions to issue notices with respect to the remaining uses of DDT, and thereby commence the administrative process."¹⁹ While the court rested its decision on the statutory scheme in question and on its legislative history, it found little in those authorities more specific than the principle that "when Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not lightly be sidestepped by administrators."²⁰ Thus there is excellent reason to regard the precedent set by the court as having a potentially broad application beyond the area directly involved. For example, the rule-making provisions of the APA are themselves a congressionally created "procedure that gives the public a role in deciding important questions of public policy." The *Ruckelshaus* rationale suggests a means by which courts might well, in appropriate cases, require agencies to make policy by rule making rather than by less formal means. When the *Ruckelshaus* rationale is combined with the constitutional considerations underlying *Hornsby* and *Holmes*, a powerful weapon against acts of unfettered discretion seems in the process of being forged.

The other relevant branch of the court's opinion is even more striking in its language, though perhaps not in its result. The complaint also challenged the Secretary's failure to exercise his statutory discretion summarily to suspend registration of a pesticide pending further administrative proceedings. Finding that the Secretary had neither given "an adequate explanation for his decision to deny interim relief in this case" nor issued general regulations or otherwise articulated the criteria to be applied to individual cases, the court remanded to the Secretary for "a fresh determination" on the issue of interim suspension.²¹ The court recognized that such "criteria" might be developed either by "regulations of general applicability" or by successive ad hoc decisions, but insisted that criteria and articulated criteria there must be. In view of its holding

18. *Id.* at 1065.

19. *Id.* at 1066.

20. *Id.* at 1064.

21. *Id.* at 1067.

that an order denying suspension was subject to judicial review,²² the court's remand for failure to articulate reasons could perhaps be regarded as merely another in the long line of decisions requiring agencies which issue reviewable orders to give sufficient explanation to make such review feasible.²³ But the court's language indicated that it took a considerably broader view of the implications of its holding. In the concluding section of its opinion the court announced a "new era" in administrative law:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.

Strict adherence to that requirement is especially important now that the character of administrative litigation is changing. As a result of expanding doctrines of standing and reviewability, and new statutory causes of action, courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.

To protect these interests from administrative arbitrariness, it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action. For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.²⁴

22. *Id.* at 1061.

23. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *American Broadcasting Co. v. FCC*, 179 F.2d 437 (D.C. Cir. 1949); *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554 (D.C. Cir. 1938).

24. 27 AD. L.2D at 1070.

Another recent landmark decision from the District of Columbia Circuit is *United States v. Bryant*,²⁵ in which narcotics investigators had made, but failed to preserve, a tape of a conversation which the Government sought to relate to a particular narcotics transaction in subsequent criminal prosecutions. Holding that the tape was clearly discoverable and that the duty to disclose on discovery implies a duty to preserve, the court went on to hold that the sanctions for nondisclosure—dismissal of the indictment or a new trial—“will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation.”²⁶ The court made it clear that it expected “rules, systematically applied and systematically enforced”²⁷ from each investigative agency.²⁸ And, as in *Ruckelshaus*, the court indicated it was well aware of the broader implications of its holding:

These cases point up an anomaly of our criminal process: controlled by rules of law protecting adversary rights and procedures at some stages, the process at other stages is thoroughly unstructured. Beside the carefully safeguarded fairness of the courtroom is a dark no-man’s-land of unreviewed bureaucratic and discretionary decision making. Too often, what the process purports to secure in its formal stages can be subverted or diluted in its more informal stages.²⁹

A somewhat different, but also highly significant, approach was taken by the Supreme Court in the recent landmark case of *Citizens To Preserve Overton Park, Inc. v. Volpe*.³⁰ Citizens groups challenged a determination by the Secretary of Transportation approving construction of a highway through a public park. Plaintiffs invoked statutory provisions forbidding the Secretary to authorize the use of federal funds to finance construction of highways through public

25. No. 23,957 (D.C. Cir. Jan. 29, 1971).

26. *Id.* at 19.

27. *Id.* at 2.

28. Citing *Ruckelshaus and DAVIS—INQUIRY*, the court declared that “our approach is in keeping with an incipient but powerful trend in the law—a new refusal to rely blindly upon the unstructured exercise of official discretion and a new judicial willingness to require promulgation of and obedience to rules by administrative agencies.” No. 23,957 (D.C. Cir. Jan. 29, 1971) at 19. Also cited, as finding “a constitutional basis for the requirement of rule making by the police,” was Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 814 (1970).

29. No. 23,957 (D.C. Cir. Jan. 29, 1971) at 2.

30. 39 U.S.L.W. 4287 (U.S. Mar. 2, 1971).

parks if a "feasible and prudent" alternative route is available. If no such route is available, the Secretary may approve construction only if there has been "all possible planning to minimize harm to such park."³¹ The Secretary had held no hearing and made no findings. The Court held that the Secretary's action was neither an adjudication nor a rule making—that is, that it was an informal action as the term is used herein. However, the Court held that the Secretary's action was judicially reviewable as to three issues: whether the Secretary acted within the scope of his authority; whether the determination was arbitrary, capricious, or an abuse of discretion; and whether applicable procedural requirements were observed. The Court declined to hold, as petitioners requested, that formal findings and a statement of reasons were procedurally necessary, but remanded to the district court "for plenary review of the Secretary's decision," "based on the full administrative record that was before the Secretary at the time he made his decision."³² While the Secretary had introduced affidavits prepared for the litigation, attempting to support the Secretary's decision, the Court held that "these affidavits were merely *post hoc* rationalizations" and "clearly do not constitute the 'whole record' compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act."³³ Recognizing that "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence," the Court observed that "it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard."³⁴ If such additional explanation should prove to be necessary and the Secretary still declined to prepare formal findings, then "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves."³⁵

The Supreme Court did not, as did the District of Columbia Circuit in *Ruckelshaus* and *Bryant*, urge the agency in question to formulate standards, by rule or otherwise, for the exercise of its discretion. That difference in approach may be explained by the fact

31. Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 1653(f) (Supp. V, 1970); Federal Aid to Highway Act of 1968, § 138, 23 U.S.C. § 138 (Supp. V, 1970).

32. 39 U.S.L.W. at 4293.

33. *Id.* at 4292.

34. *Id.* at 4293.

35. *Id.*

that the statutes in question themselves provided fully explicit standards. And, while the Court held that formal findings or a statement of reasons were not required, it came close to requiring the agency, in effect, either to make such findings or to be prepared to testify in court as to its reasons. It seems reasonable to expect that agencies confronted with these alternatives should and will tend towards a wider use of formal findings, or at least statements of reasons, even where those are not statutorily required.

Thus recent decisions indicate that the courts have a promising role to play in narrowing the areas in which unfettered administrative discretion operates.³⁶ The Committee on Informal Action of the Administrative Conference of the United States, under the chairmanship of Warner W. Gardner, is approaching the same problem on two fronts. First, the Committee is developing guidelines designed to assist agencies in determining when a greater degree of articulation of standards of policies may be needed and in selecting the most appropriate means to that end.³⁷ The Committee has declared that "there is a growing body of scholarly opinion that an outstanding failure of the contemporary administrative process is the failure of the typical agency sufficiently to use the rule-making process or to clarify the standards which govern its decisions."³⁸ The Committee's preliminary draft of guidelines takes the form of 33 penetrating questions³⁹ which each agency might ask itself, together with a list of factors which the agency might take into account in

36. As this article goes to press the United States Court of Appeals for the District of Columbia has suggested that there may be informal actions which "as a matter of elementary fairness" an agency may not take without providing "reasonable opportunity . . . for submission of views by those materially affected . . ." *Independent Broker-Dealers' Trade Ass'n v. SEC*, ___ F.2d ___ (D.C. Cir. 1971).

37. A tentative draft of *Guidelines for the Study of Informal Action in Federal Agencies* was approved by the Committee on April 10, 1970, and was transmitted to both the governmental and the public members of the Conference for comments.

38. *Guidelines*, *supra* note 37, at 2.

39. *E.g.*, "1. To what extent is it feasible for the principles which govern the agency function to be reduced to generalized rules and regulations?" *Id.* at 2. "3. To what extent is it feasible, when generalized rules are impracticable, to disclose the agency law and policy by published statements (a) clarifying or making more specific the statutory or agency standards, (b) describing agency policy, or (c) listing the factors which would enter into discretionary agency action?" *Id.* at 4. "4. To what extent is it feasible, when no more comprehensive rule-making is practicable, to issue particular rules in the form of advisory interpretations, examples and hypotheticals?" *Id.* at 5. "15. To what extent should the agency advise the public as to the legality or enforcement consequences of proposed actions by declaratory orders, advisory opinions or informal advice?" *Id.* at 11.

arriving at its answers.⁴⁰ This Socratic approach is most stimulating and effective. Only a rare agency could seriously go through the process of self-examination laid out in these guidelines without becoming aware of a host of ways in which its procedures could be improved.

Second, the Committee on Informal Action has addressed itself to specific areas in which it finds that informal action should give way to more formal procedures or should be accompanied by a greater degree of articulation. So far the Committee has concluded that articulation of standards would be desirable concerning specified functions of two agencies; one agency promptly agreed, and the other has made partial implementation with the Committee's remaining recommendations under study.⁴¹

On March 13, 1970, another committee of the Administrative Conference, the Rulemaking Committee, adopted a resolution⁴² which recommended enactment of an amendment to the APA

to the effect that every agency which issues orders affecting substantial interests of private persons, whether after hearing or through informal action without

40. For example, under Question 1 reported in note 39 *supra*, the Committee lists the following factors as among those relevant to the desirability of an expanded use of generalized rules: "(a) The degree to which the governing statute is precise or vague. (b) The degree to which the affected public is ignorant or knowledgeable of the principles which in fact govern agency action. (c) The degree of practical need by the public for a defined and organized statement of the rules which control the agency function. (d) The degree of stability or of change in the development of the agency function; the inquiry is whether rule making can proceed in relative confidence that new applications and new insights will not in the immediate future make the rule obsolete. (e) Whether there is a comprehensive body of precedents—in published opinions, filed letters, internal memoranda or the files and recollections of individual attorneys or officials—sufficient to support generalization into a rule. (f) Whether as a matter of drafting a generalized rule could be expressed with reasonable clarity, or whether the governing principles are so various that a generalized rule would be so complex or so vague as to have little utility. (g) Whether there is need for speedy publication, so that the procedures suggested under Questions 2, 3, or 4 would be preferable. (h) Whether there is a statutory direction or authority to promulgate rules and regulations." *Id.* at 2-4.

41. The Committee's first study dealt with remission and mitigation of forfeitures by the Criminal Division of the Justice Department. The Committee found that, while the procedures were generally fair, the Department "had no published regulations regarding the procedural and substantive aspects of this category of cases," did not make decisions used as precedents available to the public, and did not uniformly notify unsuccessful applicants of the reasons for denial. 1969 ANNUAL REPORT, *supra* note 4, at 18. The Department agreed to change its procedures in all these respects.

The Committee's second study, which also found the procedures inadequate, involved "no action" letters of the Securities and Exchange Commission. Studies of additional procedures, including those of the Immigration and Naturalization Service, are in progress. *Id.*

42. Because of reservations on the part of the Council of the Conference, the resolution was not presented to the June 1970 session of the Conference and has since undergone revision in the Committee.

hearing, should, as far as is feasible in the circumstances, state through formal decisions or general rules, or if that is impractical through policy statements other than rules, the standards that guide its discretionary determination in each type of agency action, and from time to time review its rules and policy statements so that they will reflect the agency's developing experience and understanding.⁴³

This recommended statutory language goes no farther than to state, as a legal rule of general applicability, the doctrine already suggested in the *Holmes*, *Hornsby*, *Ruckelshaus*, and *Bryant* cases. If such statutory language were adopted, agencies would for the first time be under a degree of general statutory obligation to articulate their standards and policies rather than formulating those standards and policies *in camera* and implementing them as a matter of unfettered discretion.⁴⁴ The proposed statutory language is calculated to allow all reasonable scope for the exercise of agency discretion, the key language being "as far as is feasible in the circumstances."⁴⁵ Other escape hatches—for example, "if that is impractical"—are equally apparent. The significant thing is that an agency's decision concerning the feasibility and practicality of more formal procedures in the particular circumstances would be judicially reviewable. The enactment of such language as that quoted above could have a most

43. This text was based on language suggested to the Committee by Professor Davis. In his treatise, Professor Davis proposes for consideration a statutory provision which includes virtually identical language as well as an explicit provision for judicial review. See DAVIS—TREATISE § 6.13 (1970 Supp.).

44. Such an obligation might have been held to arise from the present language of the APA: Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

. . . .
(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure . . . ;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency

5 U.S.C. §§ 552(a)(1)(B)-(D) (Supp. V, 1970). However, apparently the only court to deal with the question held that this section imposes no requirement that regulations be issued but only that any regulations issued be published. See *Gras v. Beechie*, 221 F. Supp. 422 (S.D. Tex. 1963).

45. The Committee did not recommend that the new subsection contain any exceptions, even for such areas as military or foreign affairs functions. Courts construing such a subsection would undoubtedly take into account, in assessing an agency's claim that promulgation of rules or articulation of standards is not "feasible in the circumstances," the fact that certain areas, including military and foreign affairs functions, are traditionally exempt from procedural requirements. However, no categorical, blanket exception seems necessary or desirable.

constructive impact in accelerating the development of the law in this area, would cure a significant defect in the APA, and would go far toward providing an effective, yet balanced and reasonable, safeguard against the inappropriate or arbitrary exercise of unfettered administrative discretion.

In the absence of statutory change, courts nevertheless have adequate sources of power to compel agencies, where appropriate, to use more formal procedures and to move toward greater articulation of standards. As *Hornsby* and *Holmes* show, the Constitution is the ultimate source of that power and is sufficient by itself in aggravated cases. But a federal court reviewing federal administrative action will invariably have sources of power short of the Constitution on which to rely. The statute conferring the administrative power in question will almost certainly contain a provision which can and should be read as commanding that the agency act reasonably and in the public interest, not only in its substantive determinations but also in affording such structured procedures, articulation of standards, and public participation as are appropriate in the circumstances to enable it to make its substantive decisions rationally and fairly.⁴⁶ The court in *Ruckelshaus* readily found such a mandate in the governing statute. *United States v. Bryant* found it in the federal criminal rules regarding discovery. As has been suggested,⁴⁷ the APA itself can be read as embodying a congressional mandate that agencies act by rule making where it is feasible. In the case of the vast body of agency actions which are technically informal adjudications, once a court has found that an action is judicially reviewable at all, it is a short step to a holding that the basis for agency decision must be sufficiently articulated to make review feasible. In short, courts are far from

46. The host of modern statutes providing that an administrator shall "take into account" this or that before doing something cry out for procedural safeguards, or at least articulation of grounds for decision, if they are not to become dead letters. For example 16 U.S.C. § 470f (Supp. V, 1970), provides that "the head of any Federal agency . . . shall, prior to the approval of the expenditure of any Federal funds . . . take into account the effect of the undertaking on any district, site, building structure, or object that is included in the National Register[of historic places]." The agency head is directed to afford the Advisory Council on Historic Preservation "a reasonable opportunity to comment," but no other procedural requirements are stated. Obviously, the policy implemented in this section will remain nothing but a pious hope unless, at the least, the courts require agencies to explain their decisions and to show how they have taken the congressional directive into account. *Cf. Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

47. See notes 13-24 *supra* and accompanying text.

powerless in this area, and their power is one we may expect to see exercised more frequently than in the past.

II.

The statutory language suggested above, when speaking of the procedures to be followed whenever feasible and not impractical, expresses no preference between "formal decisions"—that is, adjudications on a record—and "general rules" which emerge from rule-making proceedings. Many of those who have urged the wider use of more formal procedures in lieu of unfettered agency discretion have concluded that rule making should be the procedural norm, used wherever feasible for the formulation of general policies.⁴⁸ There is something to be said for this approach, or at least for the more qualified proposition that rule making should be expanded somewhat at the expense of adjudication. However, for what appears to be a complex amalgam of reasons, by no means all of them invalid,⁴⁹ a number of agencies have developed a strong preference for adjudication and have rarely used rule-making procedures. In some areas and circumstances agencies can probably proceed most effectively by developing the law, as courts do, through successive formal adjudications. Almost any formal adjudication, moreover,

48. E.g., Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROB. 659 (1957). The NLRB, in particular, has been sharply criticized for its failure to use rule-making procedures. See *Operating Eng'rs Local 49 v. NLRB*, 353 F.2d 852, 856 (D.C. Cir. 1965), and authorities there cited; Peck, *The Atrophied Rule-Making Power of the National Labor Relations Board*, 70 YALE L.J. 729 (1961). For comprehensive reviews of the literature and some shrewd suggestions, see Robinson, *The Making of Administrative Policy: Another Look at Rule-Making and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970) [hereinafter cited as Robinson]; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

The so-called "Ash Council" Report assails agencies for excessive case-by-case adjudication and recommends a wider use, as a basis for policy formulation, of "less formal procedures such as exchanges of written or oral information, informal regulatory guidance, or rule making." THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 5 (1971). See also *id.* at 21, 49. The exhortation to greater use of rule making is hardly surprising, but the recommendation that "informal procedures" be more widely used, *id.* at 21, might appear on its face to be in conflict with the view expressed herein that less rather than more informal action is needed. The report does not discuss in any detail the types of informal procedures which are contemplated.

49. See Robinson 488 n.15; Shapiro, *supra* note 48, at 926-29, 942-58. See also *In re* Petitions filed by Best, CCC, and others for Rule Making to clarify standards in all comparative broadcast proceedings, Memorandum Opinion and Order, 18 P & F RADIO REG. 2D 1523 (1970).

involves the declaration of principles that will be applicable to persons and cases other than those directly involved, and the cases holding that, in general, an agency is entitled to choose which method it wishes to employ⁵⁰ appear to be sound. While various attempts have been made to draw general or abstract lines separating areas especially appropriate for formal adjudication from those more appropriate for rule making, none of these attempts has won general acceptance and the exercise seems somewhat unprofitable. The present writer would certainly not match his "litmus paper" against Judge Friendly's in this area, and the jurist has said that his is inadequate.⁵¹ Rather than focusing on drawing such a line, it seems wiser to move toward a flexibility that would make available in each proceeding, no matter how labeled, those procedural opportunities and devices most appropriate for the resolution of the particular issues involved.

A considerable difference in outlook on this point may arise between the academic approach, in which the formulation of general rules in rule-making proceedings with broad public participation may seem particularly inviting, and that of the practicing lawyer. The latter tends to be convinced that in determining factual disputes "the truth is most likely to be refined and discovered in the crucible of an evidentiary hearing."⁵² He is likely to be deeply suspicious of any movement toward the greater use of a procedure which would deprive him of safeguards and opportunities which he by experience considers critically effective in protecting his client's interest: evidentiary hearings with the right of cross-examination; findings of fact and conclusions of law, with the agency at least ostensibly limited in the grounds for its decision to matter appearing of record; and judicial

50. *E.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. A.P.W. Prods. Co.*, 316 F.2d 899, 905 (2d Cir. 1963).

51. Friendly, *supra* note 6, at 869. "The line between these two functions is not always a clear one and in fact the two functions merge at many points." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 770 (1969) (Black, J., concurring). *See also* *Regular Common Carrier Conf. v. United States*, 307 F. Supp. 941 (D.D.C. 1969); 1 DAVIS—TREATISE § 5.01, at 285; Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 331-33 (1961); Friendly, *supra* note 6, at 869-70. One aspect of this question was at the heart of *Wyman-Gordon*, *supra*, where the Court (6-3 on this issue) held that a rule adopted in an adjudicatory proceeding for prospective application only was invalid as a rule. However, a plurality of the court held the agency free to apply the legal principle embodied in the rule in successive adjudications. For a thorough and constructive discussion of this perplexing case and its implications, see Bernstein, *The NLRB's Adjudication—Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

52. *The Citizens Comm. v. FCC*, 436 F.2d 263 (D.C. Cir. 1970); *see Reflections on the Conduct of an Administrative Hearing*, 20 AD. L. REV. 101, 105-06 (1967).

review of the evidence within the limitations of the "substantial evidence" test. To the practicing lawyer, alleged administrative expertise—generally a more weighty factor in rule making than in adjudication—seems significant largely as a rationale by which the agency can escape having its decision tested on review, with some degree of rigor, against a record which the lawyer can play some part in making.⁵³ While it is true that review of an agency rule can be sought on the ground that it is arbitrary, capricious, or an abuse of discretion,⁵⁴ the experience of most practicing lawyers is undoubtedly that the characteristics of an adjudicatory proceeding generally mean that the weaknesses of a decision in such a proceeding can be attacked far more effectively on review than can perhaps equally significant weaknesses in a decision promulgating a rule.⁵⁵ To a considerable extent, then, with limited exceptions both agencies and the lawyers practicing before them, though largely for different reasons, would oppose any drastic curtailment of adjudication in favor of the more theoretically tidy and logical rule-making device.

The debate, while largely inconclusive, is by no means academic since much can turn on the procedural opportunities that are available. Under the scheme of the APA, the principle advantages of rule making are prior public notice of the terms or substance of the proposed rule, or at least of the subject matter and issues involved in the proceeding,⁵⁶ and an opportunity for all interested persons to participate. The principal advantages of a formal adjudication are the

53. See Robinson 519-20. As is perhaps obvious, this assessment of rule making is addressed to rule makings subject only to the provisions of 5 U.S.C. § 553 (Supp. V, 1970), not to proceedings which—though technically rule makings—are "required by statute to be made on the record after opportunity for an agency hearing," *id.* § 553(c), and thus share many of the procedural characteristics of adjudications. See Robinson 486 n.5. *But see* note 63 *infra*.

54. 5 U.S.C. § 706(2)(A) (Supp. V, 1970).

55. See DAVIS—TREATISE §30.10 (1970 Supp.); Robinson 488 n.15, 527-28. *Contra*, Shapiro, *supra* note 48, at 941, 944-47.

56. 5 U.S.C. § 553(b)(3) (Supp. V, 1970). Of course an agency may modify a proposed rule in the course of the proceeding, *e.g.*, *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967), and may to some degree alter or expand the subject matter and issues involved. But unless the notice provision of section 553 is a nullity, an agency must at some point provide a new notice before making changes in the course of the proceeding that substantially alter the impact on interested parties. *Cf.* *Chicago, B. & Q.R.R. v. United States*, 242 F. Supp. 414 (N.D. Ill. 1965). In the *California Citizens Band* case, *supra*, the court went to considerable lengths to show that the charges were indeed fairly trivial and of no real significance. While the present writer knows of no decided case in which a notice has been held statutorily insufficient in light of the rule finally adopted, he has experienced cases in which, in his opinion, that issue should have been raised and should have been determined adversely to the agency.

right to an evidentiary hearing with the right both to present evidence and to cross-examine, the requirement of an agency decision founded on the record, and judicial review of the evidence. In each case these are only minimal requirements; there is no statutory reason why an agency, even in a proceeding labeled "rule making," may not incorporate some or all of the procedures characteristic to an adjudication and vice versa.⁵⁷ The principal thesis of the remainder of this article is that in at least a significant number of instances agencies should thus exercise their discretion to fashion hybrid or conglomerate procedural devices which would utilize those characteristics of both adjudication and rule making that are most appropriate in light of the circumstances and issues of the particular case. It is submitted, further, that, like any other exercise of agency discretion, an agency's decision whether to employ procedural devices not uniformly required by statute is subject to judicial review for abuse of discretion and should be set aside when such abuse is found.

One area in which such procedural inventiveness may be not only desirable but obligatory is suggested by the line of cases holding that, even where a right to formal adjudication is expressly created by statute, an agency may have the power effectively to foreclose that apparent right by deciding, in a rule-making proceeding of general applicability, some or even all of the issues which would determine the result of the statutorily required adjudication. The courts have consistently held that where an entire class of persons similarly situated is involved, particularly if the class is a large one, an agency may proceed by rule making rather than by repeated adjudications involving similar or identical issues.⁵⁸ The landmark cases hold that the statutory requirement of a "hearing" is satisfied if the agency

57. The opportunity to participate in rule making given to interested persons by 5 U.S.C. § 553(c) (Supp. V, 1970) involves participation "through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* It can hardly be doubted that the "with or without" language invokes agency discretion, not acts of pure grace.

58. See *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Pacific & Southern Co. v. FCC*, 405 F.2d 1371 (D.C. Cir. 1968); *WBEN, Inc. v. United States*, 396 F.2d 601, 617-18 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968); *Conley Electronics Corp. v. FCC*, 394 F.2d 620 (10th Cir. 1968); *Pacific Coast European Conf. v. FMC*, 376 F.2d 785 (D.C. Cir. 1967); *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir. 1967); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966) (the "Blocked Space" case); *Capitol Airways v. CAB*, 292 F.2d 755 (D.C. Cir. 1961); *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960); *Regular Common Carrier Conf. v. United States*, 307 F. Supp. 941 (D.D.C. 1969); *Borden Co. v. Freeman*, 256 F. Supp. 592 (D.N.J.), *aff'd*, 369 F.2d 404 (2d Cir. 1966), *cert. denied*, 386 U.S. 992 (1967). See also

formulates a general rule in a proceeding conforming to the rule-making provisions of the APA and makes available a meaningful procedure by which an applicant may obtain a "full hearing" upon setting forth "reasons, sufficient if true, to justify a change or waiver of" the general rule.⁵⁹ In general, while the results reached by the courts seem defensible, the substitution of a rule making for an adjudication may impose upon the agency an obligation to supplement the minimum rule-making procedure required by statute through the use of procedural devices adequate for the resolution of the issues presented.

A classic example is *Air Line Pilots Association v. Quesada*,⁶⁰ where a statute provided that no certified pilot could be deprived of his certificate without an adjudication and an evidentiary hearing. However, the court upheld the Federal Aviation Administrator's promulgation, by rule-making procedure and without an evidentiary hearing, of a regulation that all pilots would lose their certificates upon reaching the age of 60. Reasoning that it would be impractical to hold individual hearings to determine if each of the thousands of airline pilots was still physically fit at 60, the reviewing court approved the Administrator's action on the ground that the statutory right to an adjudication had no application to the formulation of a general rule. The petitioners had taken an "all or nothing" approach on review, insisting that no individual certificate could be modified without an individual adjudication,⁶¹ and the court's rejection of this argument has considerable appeal even in the face of the apparent statutory requirement.

One may suppose that if the petitioners had been both more modest and more specific in their demands, they might have had a

Note, *The Use of Agency Rulemaking To Deny Adjudications Apparently Required by Statute*, 54 IOWA L. REV. 1086 (1969). Virtually the only case that has gone the other way is *Philadelphia Co. v. SEC*, 175 F.2d 808 (D.C. Cir. 1958), *vacated as moot*, 337 U.S. 901 (1959), in which what purported to be a general rule was held a disguised penalty against individuals. See *Robinson supra* note 48, at 501-02. The FTC's assertion of authority to promulgate "trade regulation rules" which would be conclusive in subsequent adjudications presents special problems, including the use of "official notice," which are outside the scope of this article though intimately related to the questions here discussed. See *id.* at 490-96.

59. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); see *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964).

60. 276 F.2d 892 (2d Cir. 1960).

61. Dissenting in the "Blocked Space" case, Judge (now Chief Justice) Burger argued with considerable force that the holding in *Air Line Pilots* was unnecessary since the pilots' certificates contained an express condition subjecting their terms to subsequently adopted FAA regulations. 359 F.2d at 636.

greater chance of success. Suppose that, without challenging across the board the agency's decision to proceed by rule making, or as an alternative to such a challenge, they had sought an evidentiary hearing on such issues as the age at which a majority of pilots are no longer physically fit to retain their certificates or the feasibility of handling the problem on an individual basis by requiring periodic physical examinations or by some similar means. These may or may not be "legislative facts," in Professor Davis' sense,⁶² but they seem perfectly well adapted to constructive development through an evidentiary hearing. If the agency had agreed to hold hearings limited to such issues and had then set the "retirement" age at a point manifestly not justified by the evidence or had imposed a blanket retirement age without allowing for exceptions and without considering feasible alternatives even though the evidence had shown that they were available, the reviewing court might well have been persuaded, whether under the "arbitrary and capricious" test or under some other formula, to set the rule aside. And the court would likely have been somewhat more willing to do this because of the statutory requirement of an evidentiary hearing in individual cases, even though the court took the view that this requirement did not directly apply because of the general nature of the rule in question.

In the class of cases under discussion, the opinions are not devoid of hints that a petitioner would be wise, rather than demanding a full statutory adjudication as a matter of right,⁶³ to specify what procedures, not normally required in a rule-making proceeding, he considers appropriate in the particular circumstances of the case.⁶⁴

62. See note 81 *infra* and accompanying text.

63. Even in certain proceedings—rule makings-on-a-record and adjudications involving "claims for money or benefits or applications for initial licenses"—conducted pursuant to 5 U.S.C. §§ 556-57 (Supp. V, 1970), an agency may escape an evidentiary hearing by invoking section 556(d), which provides that in these classes of cases "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). Rejecting the plaintiff's claim of prejudice, the court in *Long Island R.R. v. United States*, 318 F. Supp. 490 (E.D.N.Y. 1970), allowed the agency to escape by this route, largely on the ground that plaintiff had not adequately "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony." *Id.* at 499. This holding underlines the importance of a timely and specific offer of proof if an oral hearing is to be sought successfully.

64. A passage in the *Blocked Space* opinion has become famous in this respect:

We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kinds of facts they proposed to adduce, and by what witnesses, etc. Nor

Under the exhaustion rule, the plaintiff would of course first have to direct his request to the agency. If a party contends and demonstrates that the rule making necessarily involves a decision of matters of disputed fact, requests an evidentiary hearing, and makes an offer of proof of his version of the facts, it is submitted that a reviewing court could and should require the agency either to grant the requested hearing or to give, in its decision, a reasoned explanation for a denial. Various reasons might support such a denial; the most obvious would be a soundly based agency explanation that, even if the facts which the party offered to prove were correct, its rule would still be warranted for reasons which it states.⁶⁵ The point is that an agency decision to reject such an offer of proof in a rule-making proceeding in which an evidentiary hearing could be ordered by the agency, but is not uniformly required by statute, is just as much an exercise of agency discretion as is adoption of substantive rules and is judicially reviewable under the "arbitrary, capricious, or abuse of discretion" test. While I know of no decided case—with one very recent exception—in which an agency denial of such an offer of proof in a rule-making proceeding has been reversed as an abuse of discretion,⁶⁶

was there any specific proffer as to particular lines of cross-examination which required exploration at an oral hearing. 359 F.2d at 632-33.

Unfortunately, the court largely vitiated this pragmatic approach by a retreat into the "legislative fact" mystique, thereby becoming at least as "conceptual" as petitioners. See notes 81-83 *infra* and accompanying text.

65. *Cf. Siegel v. AEC*, 400 F.2d 778, 782, 784-85 (D.C. Cir. 1968).

66. In *National Air Carrier Ass'n v. CAB*, 436 F.2d 185 (D.C. Cir. 1970), plaintiff contended that CAB approval of an airline agreement under section 412 of the Federal Aviation Act, 49 U.S.C. § 1384 (1964), which contains no hearing requirement, nevertheless was invalid without an evidentiary hearing on the facts of the case because of the serious factual issues involved. While the court rejected the contention, it did so only after a fairly detailed analysis of the issues and after a bow to

principles gleaned from a number of recent administrative law decisions, principles which can be summarized in the statement that the need for an evidentiary hearing is particularly acute when the issue presented is one which possesses a great substantive importance, or one which is unusually complex or difficult to resolve on the basis of pleadings and argument. *Id.* at 191 (citing the *Marine Space Enclosures* and *Allegan County* cases cited in notes 77-78 *infra*).

In *Upjohn Co. v. Finch*, 422 F.2d 944, 955 (6th Cir. 1970), the court held that, regardless of whether a challenged order by the Commissioner of Food and Drugs removing certain drugs from the market constituted adjudication or rule making, the test of whether an evidentiary hearing was required was whether "a genuine and substantial issue of fact" had been raised by means of an offer of proof. The court held that the required showing had not been made, although ample opportunity had been afforded. In *American Home Prods. Corp. v. Finch*, 303 F. Supp. 448 (D. Del. 1969), a preliminary injunction was granted against similar action by the Commissioner of Food and Drugs. Without discussing the rule making-adjudication question,

such decisions will be made in the future if counsel are imaginative in anticipating the specific procedures they need to present their case and in demonstrating to the agency—and, when necessary, to a reviewing court—why such procedures are appropriate in the circumstances.

The exception mentioned above is *Walter Holm & Co. v. Hardin*⁶⁷ in which the court granted declaratory relief to parties challenging regulations of the Department of Agriculture respecting the size of imported tomatoes. The regulations were issued pursuant to an earlier “marketing order” which in turn was issued pursuant to section 8c of the Agriculture Marketing Agreement Act of 1937.⁶⁸ The statutory requirement of notice and hearing prior to the issuance of marketing orders had been complied with. The marketing order itself, however, did not require notice and hearing prior to the issuance of regulations. The Department, regarding the regulations as rules, had issued a notice of proposed rule making and invited and accepted written presentations, but had not provided an oral hearing. The court did not

the court held on the basis of the particular statutory scheme involved that a right to an evidentiary hearing was established by the presentation of “meritorious, non-frivolous objections, which could most appropriately be resolved finally after a full hearing.” *Id.* at 454.

In *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139 (1st Cir. 1966), *cert. denied*, 398 U.S. 905 (1967), the court rejected a contention that a hearing had been wrongfully denied on finding that the administrative proceeding in question was a rule making, not an adjudication. The court seemed to take the view that its conclusion followed automatically unless a *constitutional* right to a hearing could be established. The court’s analysis is faulty in not considering whether denial of a hearing was an abuse of discretion. The court, however, went on to apply the “substantial evidence” test and in *that* connection observed that “we suspect that further accumulation of data would not have greatly assisted the Board,” 364 F.2d at 145, and that petitioner had had an opportunity “to submit relevant facts” in writing and had not done so. *Id.*

In *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), the court upheld a “ruling,” promulgated without even an ordinary rule-making proceeding although with an opportunity for *ex post facto* “petitions for review.” Requiring the broadcast of anti-smoking messages by stations carrying cigarette advertising, the ruling was premised on agency declarations to the effect

- (1) that cigarette advertising inherently promotes cigarette smoking as a desirable habit,
- (2) that very substantial medical and scientific authority regards this habit as highly dangerous to health and therefore undesirable, and (3) that in view of the volume of cigarette advertising, existing sources were inadequate to inform the public of the nature and extent of the danger. *Id.* at 1104.

These are factual matters, certainly, and at least some of them are not altogether self-evident. While agreeing that “as a general rule . . . more careful procedures are required to support innovation by an administrative agency,” *id.* at 1104, the court held that the Commission’s premises were “supported by the record.” *Id.* The “record” was, in fact, virtually nonexistent. The court was correct, however, in pointing out that the parties requesting an evidentiary hearing had made no detailed and specific offer of proof.

67. No. ____ (D.C. Cir. March 19, 1971).

68. 7 U.S.C. § 608c (1964).

challenge the Department's classification of the proceeding as a rule making and expressly declined to hold that every regulation pursuant to a marketing order required the same notice and hearing necessary for a marketing order itself. However, observing that "it is not the case that all administrative actions legitimately denominated regulations are ipso facto freed from any need for oral hearings,"⁶⁹ the court held that in view of the issues involved in the proceeding, including claims that the regulation discriminated against importers and that its adoption had been unduly influenced by domestic producers, the importers had a right to oral hearing since their claim that an effective showing required oral presentation to Department officials, including cross-examination if that proved to be necessary for fairness, was not insubstantial.

The court was undoubtedly somewhat influenced by the facts that notice and hearing were required for marketing orders, and that if the Department could unrestrictedly adopt regulations without a hearing, the congressional purpose could be circumvented by the issuance of marketing orders in the most general terms, with the real policy decisions being "taken by 'regulation' providing opportunity only for written comments."⁷⁰ However, the decision does plainly stand for the landmark proposition that there are circumstances in which courts may and will require the holding of evidentiary hearings in rule-making proceedings, and it holds that the record before the court showed the existence of such circumstances.

The inquiry here suggested is not unlike that involved under the provision of the Federal Communications Act which ordains that a hearing need be held on a license application only if "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding" that the public interest would be served by granting the application.⁷¹ In that context, the courts have held that

as a general matter, the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They

69. No. —, at 12. For this proposition the court cited the *Blocked Space* case, cited in note 58 *supra*, and *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908). The holding in the latter case was that a state denied fourteenth amendment due process by finally fixing tax assessments (which were not judicially reviewable) without affording the taxpayer an opportunity to be heard orally, with "the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Id.* at 386.

70. No. —, at 12.

71. 47 U.S.C. § 309(e) (1964).

"should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent."⁷²

In these cases, as in others, agency action has been reversed for failure either to hold an evidentiary hearing or to give an adequate or sustainable explanation of why none was necessary.⁷³ In a different, but again analogous, statutory context, the United States Court of Appeals for the Second Circuit has observed:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.⁷⁴

These authorities suggest that, in the rule-making area also, an agency fails to perform its duty if it construes an offer of proof narrowly or requires an unduly burdensome showing when an evidentiary hearing is sought.

The point is not limited to an evidentiary hearing, though that is the most conspicuous procedure which is not required in all rule makings, but which may be called for in particular cases. Oral argument is not as a general matter required in rule-making proceedings either, but it is possible to imagine cases in which its denial might be an abuse of discretion.⁷⁵ Addressed to some or all

72. *Retail Store Employees Union, Local 880 v. FCC*, 436 F.2d 248, 254 (D.C. Cir. 1970) (quoting *Midwestern Gas Transmission Co. v. FPC*, 258 F.2d 660, 668 (D.C. Cir. 1958)).

73. See *The Citizens Comm. v. FCC*, 436 F.2d 263 (D.C. Cir. 1970); *Joseph v. FCC*, 404 F.2d 207 (D.C. Cir. 1968); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); cf. *L. B. Wilson, Inc. v. FCC*, 397 F.2d 717 (D.C. Cir. 1968).

74. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965).

75. *American Export & Isbrandtsen Lines v. FMC*, 334 F.2d 185 (9th Cir. 1964), held that oral argument satisfies a statutory requirement of a "full hearing" when no genuine and material issue of disputed fact is present. *Accord*, *Los Angeles v. FMC*, 388 F.2d 582 (D.C. Cir. 1967); *NLRB v. Bata Shoe Co.*, 377 F.2d 821 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967); *Persian Gulf Outward Freight Conf. v. FMC*, 375 F.2d 335 (D.C. Cir. 1967); *Producers Livestock Marketing Ass'n v. United States*, 241 F.2d 192 (10th Cir. 1957), *aff'd sub nom.*, *Denver Union Stockyard Co. v. Producers Livestock Mkt'g Ass'n*, 356 U.S. 282 (1958). This entirely reasonable rule is, of course, simply the administrative procedure equivalent of summary judgment in the courts. One way of determining whether such summary judgment disposition is appropriate is through use of a show-cause procedure in which the agency presents the parties with tentative findings and conclusions and the opportunity to file objections, supported with detailed materials, designating the findings objected to and showing what evidence they would produce at a hearing. 20 AD. L. REV., *supra* note 52, at 123-24, 139. This or some other type of "tentative statement of agency or staff views," Friendly, *supra* note 6, at 1296, could usefully sharpen the issues and present the question whether an evidentiary hearing is needed in a highly specific context. The FCC has recently proposed new procedures for summary

issues, either oral argument, an evidentiary hearing, or both may be highly appropriate in various rule-making proceedings. On some issues an investigatory type of hearing—that is, one without the right or cross-examination—might be most appropriate. Conceivably, in some cases discovery proceedings may be enough;⁷⁶ an on-the-record conference procedure is another possibility.⁷⁷

A most suggestive discussion of the types of flexible procedural devices that may be available is contained in Judge Leventhal's opinion in *Marine Space Enclosures, Inc. v. Federal Maritime Commission*.⁷⁸ The court remanded for failure to hold a statutorily required hearing, placing "[t]he burden . . . not on the person who wants an unusual hearing (as in the case of rule making, or waiver) but on the agency desiring the unusual dispensation from hearing."⁷⁹ However, the court's discussion of possible procedural devices, focusing on the particular circumstances and issues in the case, is highly suggestive of how a request for a hearing in a rule-making proceeding should also be approached.

The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama. In some cases briefs and oral argument may suffice for disposition.

Whether brief and oral argument are sufficient depends on the nature of the issues. There is more need for an evidentiary hearing when there are underlying questions of fact. The kind of procedure that is appropriate may turn on whether the issue is one that involves a technical judgment . . . and the importance of the underlying substantive issue.

Even though there may be no disputed "adjudicatory" facts, the application of the law to the underlying facts involves the kind of judgment that benefits from ventilation at a formal hearing. In some cases, however, the public hearing may usefully approach the legislative rather than the adjudicatory model.

decision in adjudicatory hearing cases when there is "no genuine issue as to any material fact." FCC News, Report No. 4180, Feb. 4, 1971. See generally E. Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

76. Cf. *Retail Store Employees Union, Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

77. See *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969); 20 AD. L. REV., *supra* note 52, at 103-04.

78. 420 F.2d 577, 589 (D.C. Cir. 1969). See also *First Nat'l Bank v. Saxon*, 352 F.2d 267, 273 (4th Cir. 1965) (Sobeloff, J., dissenting); *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568 (Ct. Cl. 1969); DAVIS—TREATISE §§ 7.01, 7.16, 7.20 (1970 Supp.); Westwood, *Administrative Proceedings: Technique of Presiding*, 50 A.B.A.J. 659 (1964); Ross, *The Big Administrative Proceeding: A Response to Mr. Westwood*, 51 A.B.A.J. 239 (1965).

79. 420 F.2d at 587 n.26.

. . . .
Even in the most formal proceedings a capable hearing officer can evolve techniques that both expedite the proceeding and illuminate the issues.

. . . .
It may be that the issues can be adequately developed for Commission determination through receipt of documents and sworn statements, and hearing oral argument. Any evidentiary hearing may be limited to certain specific issues.⁸⁰

While the need for such supplementary procedures may be particularly conspicuous where the subject of the rule impinges to a greater or lesser extent in an area where a statutory right to an adjudication is involved, the need is not limited to such cases. In *any* case where a rule-making proceeding involves a contested issue of fact which has a vital bearing on the reasonableness of the rule and which is readily susceptible to the taking of evidence, an agency may well abuse its discretion if it fails to conduct an evidentiary hearing even in an area where no statutory right to an adjudication is involved.

In one significant respect, it seems to this writer that some courts are moving backwards, rather than forwards, toward an abstract conceptualism and away from the pragmatic approach here recommended. At this point I must, not without temerity, take issue with Professor Davis, for what I have in mind is some of the consequences of his famous distinction between "adjudicative" and "legislative" facts. "Adjudicative facts are facts about the parties and their activities, businesses and properties Legislative facts do not usually concern the immediate parties but are generally facts which help the tribunal decide questions of law and policy and discretion."⁸¹ In general, Davis' view is that adjudicative facts are suitable for resolution in a full evidentiary hearing with cross-examination, while legislative facts do not require such a hearing. Many courts have adopted the theory and, on occasion, have justified denial of an evidentiary hearing merely by classifying factual issues as "legislative" without any further analysis.⁸² Even aside from the

80. *Id.* at 589-90 & n.36. The court suggested in *Marine Space Enclosures* and held in *City of Portland v. FMC*, 433 F.2d 502 (D.C. Cir. 1970), that where the agency pleads urgency the proper solution is an expedited hearing. The length and confusion of a hearing may often be very substantially ameliorated by pre-hearing procedures, as the Administrative Conference has recommended. See 20 AD. L. REV., *supra* note 52, at 102-04, 140-41.

81. 1 DAVIS—TREATISE § 7.02, at 413. The theory was first stated in Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942). See also Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A.J. 243 (1962).

82. For a thoroughgoing review of these cases, see DAVIS—TREATISE §§ 7.01-.04, 7.06, 15.00-.14 (1970 Supp.).

frequent difficulty of classification, which Davis acknowledges,⁸³ the present writer is wholly unconvinced that a "legislative" fact is necessarily unsuitable for ventilation at an evidentiary hearing.

Among the types of facts which have been called "legislative" are those involving "the general characteristics of an industry"⁸⁴ and questions regarding the probable impact of proposed regulation.⁸⁵ Doubtless such issues may involve imponderables; yet it seems clear that evidentiary presentation, including cross-examination, may often be of great value. An "expert" making "estimates" or "forecasts" necessarily makes certain assumptions, relies on certain data, and engages in certain intellectual processes which he regards as rational. Why is it *necessarily* not useful to require him to testify about these matters, subject to cross-examination, rather than allowing him to hide behind the anonymous expertise of an agency opinion writer? Robinson makes a telling point when he observes that

a judgment on policy or "legislative fact" invariably involves an admixture of particular facts, opinions, and biases, some of which may and some of which may not be appropriate for exploration by testimony and cross-examination. To say categorically that general policy questions or "legislative facts" cannot fruitfully be explored by testimonial procedures and cross-examination is to generalize to an extent which can only obscure analysis.⁸⁶

At one point in his most recent discussion, Davis concedes that "full trial" which is "normally required for disputed and critical adjudicative facts" is also "often desirable, though not required, for disputed and critical legislative facts."⁸⁷ If "full trial" is "desirable," and if an agency has discretion to conduct such a trial, as agencies generally do, then why is such a trial not "required" in the sense that failure of the agency to afford it is an abuse of discretion for which its decision may be reversed by a reviewing court? And even if in the circumstances a full evidentiary hearing should not be required, administrative fiat couched in terms of unfathomable expertise is not the only alternative: still remaining is the whole panoply of intermediate procedural devices which have already been mentioned.⁸⁸

83. *Id.* § 15.03, at 528.

84. *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968).

85. *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966). "It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings." *Id.* at 633. This conclusion is, in the writer's judgment, effectively criticized by Robinson. See Robinson, *supra* note 48, at 503-06.

86. Robinson, *supra* note 48, at 521.

87. DAVIS—TREATISE § 15.00, at 509 (1970 Supp.).

88. See notes 76-80 *supra* and accompanying text.

Davis makes a constructive suggestion in his reformulation of the proposed rule on judicial notice of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. While the rule by its terms applies only to adjudications by courts, Davis recognizes that, if adopted, it is likely soon to be applied to agencies as well.⁸⁹ The rule, as reformulated by Davis, expressly applies to legislative as well as adjudicative facts and provides that "adjudicative facts which are not critical to the controversy and facts which are legislative or not clearly adjudicative may be noticed if the court believes them, whether or not they are subject to reasonable dispute."⁹⁰ The rule goes on to provide that

upon notification that facts are about to be or have been noticed, any party adversely affected shall have opportunity to show that the facts are not properly noticed or that alternative facts should be noticed. The court in its discretion shall determine whether written presentations suffice, or whether oral argument, oral evidence, or cross-examination is appropriate in the circumstances.⁹¹

This formula would be eminently appropriate for rule-making proceedings as well as for adjudications. This is a far cry from a simplistic view that once a fact has been classified as "legislative" an agency has *carte blanche* to resolve it any way it wishes, at least in a rule-making proceeding. This cannot be what Davis means; yet it is what a number of courts seem to have taken him to mean, and it is puzzling that he has not criticized them for the oversimplification.⁹² I submit that the distinction between legislative and adjudicative facts may have done more harm than good and that even if a fact can clearly be classified as one or the other, that classification alone sheds very little—if any—light on what procedures are most appropriate for resolving the issue.

89. DAVIS—TREATISE § 15.00, at 507 (1970 Supp.).

90. *Id.* at 526. "Adjudicative facts that are critical to the controversy shall be noticed only if they are generally known within the territorial jurisdiction of the court or not subject to reasonable dispute."

91. *Id.* at 526-27. See also *id.* § 15.09.

92. Davis' approach to judicial notice seems difficult to reconcile with his criticism of *ABC Air Freight Co. v. CAB*, 391 F.2d 295 (2d Cir. 1968). In that case the agency did hold an evidentiary hearing, and its decision was reversed as not supported by substantial evidence. Davis attacks the decision on the ground that, since the proceeding was a rule making and the facts in question were legislative, "findings supported by evidence are not required." DAVIS—TREATISE § 7.01, at 319 (1970 Supp.). Perhaps the court should have couched its holding in terms of arbitrariness or abuse of discretion, but its general approach seems an excellent example of the sort of critical judicial review that is essential if agencies are to be held to meaningful standards of rationality in exercising their discretionary powers.

III.

The discussion in the previous section contended that one means by which individual rights and interests can be better safeguarded in the rule-making context is through agency utilization, in the rule-making proceeding itself, of procedural devices not uniformly required by statute. But one more factor must be considered: the courts have recognized that the very legitimacy of the use of rule making to formulate general policy which affects individual rights rests largely on the availability of a reasonable and effective opportunity for requesting an exception to—or waiver of—a rule already in effect.⁹³ While the need for a meaningful waiver procedure is particularly acute in the case of rules whose effect may limit or impinge upon an otherwise existing statutory right to an adjudication,⁹⁴ the need is not limited; any agency having a duty to serve the public interest “must be ready to waive . . . general requirements where the public interest would require such a waiver.”⁹⁵

Of course a waiver, or even a hearing on a waiver application, cannot be granted upon a mere request. The applicant must show colorable grounds for his request, and if he demands a hearing he must offer with particularity to show pertinent facts which, if proved, would justify the waiver.⁹⁶ On the other hand, an agency must consider the merits of a waiver application and, if it rejects the application, must give a meaningful statement of its reasons.⁹⁷ Thus a

93. See *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

94. See 351 U.S. 192 (1956); *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968).

95. *560 Broadcast Corp. v. FCC*, 418 F.2d 1166, 1167 (D.C. Cir. 1969).

96. See *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968); see also 418 F.2d at 1167.

97. Obviously the mere observation that the application is not in accordance with the rule from which a waiver is sought is not sufficient. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Community Serv., Inc. v. United States*, 418 F.2d 709 (6th Cir. 1969). However, reviewing courts are naturally hesitant to require an agency to carry out extensive waiver proceedings once it has carefully promulgated a general rule. Thus, a heavy burden has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those which have been carefully considered at the rulemaking proceeding.

Industrial Broadcasting Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970).

In *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671 (D.C. Cir. 1969), the court, in holding an offer of proof insufficient to require a hearing on a waiver application, set the standards for such an offer so high as to make their satisfaction almost impossible. Chief Judge Bazelon seemed on sounder ground when, dissenting in part, he argued that the offer of proof was adequate to

non-frivolous request for a waiver, like a request that the agency employ procedures beyond those uniformly required by statute during the rule-making proceeding itself, is addressed to agency discretion. Either refusal to grant the request for waiver or refusal to grant a hearing on the request is subject to judicial review and may be reversed if shown to be arbitrary, capricious, or an abuse of discretion.

What allegations, when supported by an offer of proof by the party seeking a waiver, should obligate an agency to hold an evidentiary hearing or to explain why such a hearing is unnecessary? Allegations that application of the rule would not be in the public interest because of the special facts of the case should have this result. What about an allegation, coupled with an offer of proof, that the rule is unsound because its adoption was based on an erroneous belief as to material facts? While this has theoretical appeal, the practical consequences of requiring an agency to hold hearings on repeated challenges to the factual conclusions underlying a rule would probably be crippling and pointless. But if the offer of proof specifically alleges that material facts on which the rule was based have *changed* since adoption of the rule, a hearing probably should be required unless the agency can reasonably find that the alleged change would make no difference. Such hearings could have the additional advantage of requiring agencies to take a new look at their rules from time to time when an interested person makes a colorable showing that this is needed.

One commentator has convincingly suggested that courts have generally been too reluctant to reverse agencies for perfunctory denials of waiver requests⁹⁸ and that this judicial attitude would require substantial reform for waiver availability even to approach the role which the Court envisioned for it in *Storer*:⁹⁹ an opportunity for a substitute "full hearing" which effectively reconciles a right to hearing with agency authority to proceed by general rules. However, it seems clear that even if the scope of review were thus expanded, waiver availability could never solve the problem altogether since, at least in

require an evidentiary hearing, criticized the majority as making no distinction between the merits and the right to a hearing, and suggested that the Commission has an obligation to announce specific standards for the showing which must be made by the party seeking waiver. *Id.* at 684. See also *Community Serv., Inc. v. United States*, *supra*.

98. See 54 IOWA L. REV., *supra* note 58, at 1103-04.

99. 351 U.S. 192, 202 (1956).

the absence of changed circumstances, impeachment of the wisdom of the rule in a waiver proceeding will generally not, and probably should not, be permitted. The heart of the solution is to require effective procedures, up to and including a full-fledged evidentiary hearing where appropriate, at the rule-making stage itself.

IV.

Section II of this discussion examined how, in appropriate cases, rule making can and should be made more like adjudication. The converse problem also exists: sometimes adjudication should be made more like rule making. While an agency may well be justified in preferring to formulate its policies on a case-by-case basis rather than by rule making, safeguards may be necessary to ensure that non-parties to the adjudication who may be significantly affected by the new policy receive notice and have an opportunity to be heard.¹⁰⁰ Such safeguards are desirable not only to protect individual rights but also to give the agency the benefit of pertinent facts, arguments, and considerations which might not be before it but which interested persons could contribute. Nothing in the APA would prevent an agency engaged in a formal adjudication from giving public notice that the adjudication may result in the adoption of a new or significantly altered principle or policy which would have application beyond the parties to the proceeding. Neither would the Act prohibit an agency from making available an appropriate means for interested persons to participate. The notice should be given at that point in the proceeding when it first becomes clear that the adoption of such a new or significantly altered principle or policy becomes an issue or is proposed by the agency as a basis for its decision.

The choice of a means for participation by interested persons would be within the agency's sound discretion and would likely vary considerably depending upon, among other circumstances, the stage of the adjudication at which adoption of the new or significantly altered principle first becomes a serious issue. If the issue emerges at the pleadings stage or otherwise prior to the hearing, the hearing examiner could give the public notice and allow other interested persons to participate, either as parties for that limited purpose or on an *amicus* basis, in the hearing itself.¹⁰¹ If the adoption of the new or

100. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). See also note 51 *supra*.

101. The CAB's Rule 14(b), 14 C.F.R. § 302.14(b) (1970), while not directed specifically to the situation here in question, provides a type of limited participation that might be a useful

altered principle first emerges as a serious issue at the initial decision stage, either the examiner or the agency could give the notice and provide an appropriate means for participation. And if the issue first emerges as the agency itself was considering its decision, it could comply with the recommendation either by giving a notice of a proposed or tentative decision or by issuing its final decision with an adequate provision for filing of petitions for rehearing. In either case the agency should provide that persons not theretofore parties to the proceeding, on demonstrating that they would be affected by the new principle, could participate as *amicus* or on some other limited, appropriate basis. If such persons, in addition to presenting arguments, made an offer of proof of material facts, the hearing in some circumstances might have to be reopened—or the particular adjudication might be allowed to proceed to a conclusion, if there were urgent reasons therefor, and the evidence offered by the third parties would be considered in a further adjudication or rule-making proceeding.

The agency should of course balance the reasons favoring such a procedure against any danger that the adjudication might be unduly complicated or delayed. But the result of its balancing would be a discretionary act which a reviewing court should scrutinize for arbitrariness or abuse. If an agency does conclude an adjudication by announcing a new principle of broad application without employing any of the procedures suggested, the proper method for a surprised and injured person to test the reasonableness of the agency's procedure would be first to seek whatever reconsideration the agency's rules permit and, that failing, to seek judicial review as "a person suffering legal wrong because of agency action."¹⁰²

*NLRB v. A.P.W. Products Co.*¹⁰³ suggests that what is here proposed may be existing law. In that case the respondent contended that a party to an adjudication was entitled to a warning that the

model here. Both the NLRB and the FPC have invited or accepted comments from non-parties on changes of principle contemplated in pending adjudications. See Shapiro, *supra* note 48, at 931 (NLRB). In *City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968), the court held that the FPC was "free" to declare "a general principle in the context of an individual proceeding, but with leave to the industry to participate *amicus curiae*." *Id.* at 643. The court indicated sympathy with "uneasiness [on the part of "courts and commentators"] lest an excessively individuated approach may be a seed bed that is too favorable to the rank weed of discrimination." *Id.* at 644.

102. 5 U.S.C. § 702 (Supp. V, 1970).

103. 316 F.2d 899 (2d Cir. 1963).

Board was contemplating a change in its long-standing policy that a back-pay obligation would be tolled for periods when intermediate decisions favorable to the party were in effect. The court, relying in part on the "spirit" of the predecessor of section 554(b)(3),¹⁰⁴ declared:

It is not apparent why, in the ten months that the Examiner's report was before it, the Board could not have found means to inform the parties—and *other interested persons*—that overruling of its tolling rule was being considered and to give them some opportunity to express their views. Although even the highest tribunal has been known to overrule its own precedents, on matters of some moment, though the issue had not been argued before it, *we might well remand* to permit A.P.W. an opportunity to argue this issue to the Board if any purpose would be served thereby. But it is manifest that this would be an exercise in futility—the arguments A.P.W. would make on remand have already been made by the dissenting members and rejected by the majority. *Although we thus do not altogether approve the procedure here, we nevertheless grant enforcement.*¹⁰⁵

V.

The most constructive way to eliminate many of the inequities and inadequacies which appear from time to time in administrative proceedings is to pay less attention to theoretical, conceptual, and largely artificial lines between adjudication and rule making, and to devote more attention to the task of fashioning, out of the available arsenal of procedural techniques, hybrid modes of procedure most appropriate to the issues and circumstances of particular cases or classes of cases. In general, when an agency decision must or should turn on disputed issues of fact susceptible to the receipt of evidence, those issues should be resolved in an evidentiary hearing even though the proceeding is labeled a rule making and the facts are allegedly "legislative." Conversely, when an agency is considering adoption of a policy which could have a significant impact on unrepresented parties, means should be found to give notice and invite participation by non-parties even though the proceeding is labeled an adjudication.¹⁰⁶

104. 5 U.S.C. § 554(b)(3) (Supp. V, 1970). The earlier provision stated that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted."

105. 316 F.2d at 906 (emphasis added—footnotes omitted). *See also* City of Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967).

106. Robinson reaches similar if not identical conclusions. *See* Robinson, *supra* note 48 at 536.

While the drafting and organization of the APA may encourage reliance upon the conceptual or "labeling" approach by agencies, parties and their counsel, commentators, and courts, it may not be generally recognized quite how flexible the Act is in permitting parties to request, and agencies to grant, exactly what has been suggested here. There is, moreover, no statutory or doctrinal barrier to prevent reviewing courts from requiring agencies, as a matter of sound discretion, to grant requests for optional procedures when such requests are properly supported and timely made.

Of the questions discussed, the courts have been explicit in recognizing, at least theoretically, the right to a meaningful waiver procedure.¹⁰⁷ Several opinions suggest that a reviewing court would be receptive, in a proper case, to an argument that an agency abused its discretion in a rule-making proceeding by, for example, refusing to order an evidentiary hearing even though it were demonstrated that a disputed issue of fact must be a crucial factor in its decision.¹⁰⁸ There are also judicial hints that an agency could, where appropriate, be required to import devices normally associated with rule making—public notice and an opportunity for interested persons to be heard—into a formal adjudication.¹⁰⁹ Such a practice might go far toward solving the dilemma which so confusingly divided the Supreme Court in the *Wyman-Gordon* case.¹¹⁰

Ideally, the law should be clarified by incorporating all the suggestions here made in statutory amendments. While to some extent the subject matter involves imponderables, it is not a matter of any great difficulty to draft statutory provisions which take proper account of these imponderables while furnishing opportunities for private parties, guidelines for agencies, and standards for reviewing courts. The following suggested new subsections of section 555 are based on, but go beyond, the work of the Rulemaking Committee of the Administrative Conference in 1969-70.¹¹¹ They are set forth as

107. See notes 93-97 *supra* and accompanying text.

108. See section II *supra*. However, the tendency of some courts to hold that so-called "legislative" facts are ipso facto unsuitable for evidentiary hearing is a retrograde trend. See notes 81-92 *supra* and accompanying text.

109. See section IV *supra*.

110. See note 51 *supra*.

111. As stated at note 42 *supra*, the resolution adopted by the Committee in March, 1970, was not presented to the Conference and has undergone revision in the Committee. The revised resolution was submitted to the Council of the Conference by the Committee on March 31, 1971.

examples of ways in which the Act might be constructively amended to accomplish these objectives. They are not, however, set forth with any great optimism, given the "seeming legislative paralysis"¹¹² of Congress in the administrative law area.

(f) Each agency shall provide, in proceedings to which Section 553 of this title applies,¹¹³ such procedures beyond those required by that section, including oral argument or the taking of evidence or both on some or all issues, as may be appropriate in the circumstances and would serve the ends of justice. When, in any such agency proceeding, an interested person makes an offer of proof in writing of facts which have a direct and substantial bearing on the issues involved in the proceeding, the agency shall as part of its rule making hold a hearing in accordance with Sections 556 and 557 of this title on such issue or issues and shall permit oral argument thereon, unless it for good cause finds (and incorporates in its decision the finding and a brief statement of reasons therefor) that hearing or argument or both are impracticable, unnecessary or contrary to the public interest.¹¹⁴

(g) When in any agency proceeding a party seeks relief,¹¹⁵ the agency shall, before denying such relief on the ground that an existing rule so requires, provide to such party an opportunity to show that application of the rule would not be in the public interest. Such opportunity shall include provision for written presentation and also, where appropriate, for oral argument or for a hearing in accordance with Sections 556 and 557 of this title or both, depending on the circumstances.¹¹⁶

112. Friendly, *supra* note 6, at 1310.

113. That is, rule-making proceedings.

114. The first sentence of the text reproduces, almost verbatim, part of a recommendation by the Committee which was not framed as a statutory amendment. The second sentence contains the substance of a Committee recommendation for statutory amendment, except that as proposed by the Committee the amendment was limited to cases in which the "interested person makes a timely showing that the rule proposed in a notice of proposed rule making may determine an issue or issues which might if the rule were not adopted subsequently arise in an adjudication to which Section 556 applies." This language was designed to limit the recommendation for statutory change to the class of cases discussed at notes 58-66 *supra*—those in which a rule making may impair or preclude a statutory right to an adjudication. As suggested, however, at notes 67-80 *supra* and accompanying text, the principle in question appears to have legitimate application beyond that class of cases. The Committee's 1971 resolution eliminates the proposal for statutory amendment but recommends that in rule-making proceedings agencies "should give consideration to whether oral argument or evidentiary hearings or both would contribute to effective and fair resolution of the issues" and observes that "circumstances warranting evidentiary hearings may exist, for example, where a timely showing that the proposed rule would predetermine significant issues of fact in subsequent formal adjudications is made and accompanied by a substantial offer of proof of facts material to such issues."

115. "Relief" is defined in 5 U.S.C. § 551(11) (Supp. V, 1970). Since this subsection would apply only when a party is seeking relief, not when he is resisting the imposition of a sanction, defined in *id.* § 551(10), it would not permit a person to ignore a rule until enforcement is sought and then to claim a right to show that the rule should not be applied to him.

116. The Committee's recommendation for statutory amendment in the waiver area was limited to formal adjudications and did not contain the second sentence of the above text, the

(h) When, in any agency proceeding to which Section 556 of this title applies,¹¹⁷ the adoption of a new or significantly altered or expanded rule of law, policy, or statutory interpretation, which would have significant impact on other persons in addition to the parties to the proceeding, becomes an issue or is proposed by the agency as a basis for its decision, the agency shall unless impracticable give public notice thereof and make available an appropriate means for such persons to participate in the proceeding.

. . . .

(j) Every agency which issues orders affecting substantial interests of private persons, whether after hearing or through informal action without hearing, shall, as far as is feasible in the circumstances, state through formal decisions or general rules, or if that is impractical through policy statements other than rules, the standards that guide its discretionary determination in each type of agency action, and from time to time shall review its rules and policy statements so that they will reflect the agency's developing experience and understanding.

Statutory amendment along these lines is, no doubt, remote. But each of the above texts could serve equally well as a headnote statement of developing law which both agencies and courts may, and should, apply.

substance of which, however, did appear as a hortatory recommendation. A statutory section in the terms of the above text would seem more effective to overcome the undue judicial diffidence in the waiver area. The Committee's 1971 resolution suggests that the problem be resolved *following* the agency adjudication, by a "rulemaking proceeding to determine the extent to which such decision should be applicable to persons other than the parties to the adjudication. Alternatively, prior to making such a decision the agency might publish a tentative decision and invite comment, *inter alia*, on the extent to which such decision should be applicable to persons other than the parties. The agency should provide appropriate procedures (whether or not such procedures are required by statute) whereby affected persons may participate in such subsequent or enlarged proceedings."

117. That is, a formal adjudication.