majority felt constrained to uphold the ICC's freedom of action. Here the Commission seemed bent on frustrating its own procedure for the disposition of minor matters.[49] "[C]onstant re-examination and endless vacillation may become ludicrous, self-defeating, and even oppressive."[50] Surely, the question of whether a small trucker should be allowed to transport tractors from factory to dealer could be decided without the full ICC's wisdom. No one would contest the undesirability of limiting consideration of issues of general transportation importance to an appellate division. However, the ICC should be prepared to live with the decisions of its appellate divisions when it initially elects the procedure designed for review of less important matters, leaving to the courts the task of correcting any errors committed by an appellate division. Where a case has originally reached the highest stages of agency review, is decided by the agency, the losing party appeals, and the matter is pending in the courts, stability of regulatory policy is hardly served by an agency reversal long after the parties thought the decision final. Such vacillation only invites further appeal by the party who suddenly finds himself on the losing side and consequent loss in decision-making efficiency.

Change of Agency Practice Without Adequate Statement of Reasons

In *FTC v. Crowther*[51] the Court of Appeals for the District of Columbia Circuit held that the FTC must fully explain its reasons for departing from the approach adopted in a previous proceeding which governed the disclosure of business information usually regarded as confidential. The Commission had instituted Clayton Act[52] proceedings against the Lehigh Portland Cement Company challenging its acquisition of several ready-mix concrete companies. Lehigh requested that business information be subpoenaed from its competitors and potential competitors. On a motion by the competitors to quash the subpoena, the issue narrowed to the competitors' request that the information be furnished only to an independent accounting firm for compilation to prevent attribution to any single company. The examiner felt compelled to follow the

49. 49 ICC ANN. REP. 97; General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966).

50. Weiss, *Administrative Reconsideration: Some Recent Developments in New York*, 28 N.Y.U.L. REV. 1262 (1953).

51. 430 F.2d 510 (D.C. Cir. 1970).

52. Clayton Act § 7, 15 U.S.C. § 18 (1964).

recently established *Mississippi*[53] formula allowing return to independent accountants in precisely the manner requested by the competitors. The Commission apparently did not feel constrained to follow the *Mississippi* approach and sent the case back to the examiner for reexamination.[54] A second examiner,[55] on the basis of the same record, denied the motion to quash the subpoena and substituted an order that the information be made available to the discovering company's counsel; the district court granted enforcement. The court of appeals vacated the judgment of the district court and remanded for further consideration by the Commission.[56]

The stated purpose of the Federal Trade Commission Act is to promote a public policy of fair competition in the marketplace.[57] The Act establishes the FTC,[58] charges it with the task of effeetuating that policy,[59] and authorizes the issuance of investigative subpoenas by the Commission in its proceedings.[60] FTC rules further provide for the issuance of subpoenas at the request of any party to an agency proceeding.[61] In the administration of its subpoena powers, the FTC has occasionally been challenged when it denied motions to quash without findings or a statement of reasons.[62] Congress clearly intended to require findings and a statement of reasons only in specific categories—adjudications and rule-making procedures that result in final orders of an agency.[63] Although it has been generally held that

53. Mississippi River Fuel Corp., [1965-67 Transfer Binder] CCH TRADE REG. REP. ¶ 17,612 (FTC 1966).

54. 430 F.2d at 512.

55. The first examiner was about to retire, and a new examiner was appointed with the consent of the parties.

56. On remand, the FTC reinstated the provision of the first examiner's order granting *Mississippi* treatment but gave respondents the right to obtain full disclosure during the hearing if they show the requisite need. Although feeling compelled to adopt the *Mississippi* approach, the Commission again stressed the fact that the respondent here had retained independent counsel while the cement company charged in *Mississippi* was using house counsel. Lehigh Portland Cement Co., 27 AD. L.2D 659 (FTC 1970).

57. 15 U.S.C. § 45(a) (1964).

58. *Id.* § 41.

59. *Id.* § 45(a)(6).

60. *Id.* § 49. *See* FTC v. Bowman, 248 F.2d 456 (7th Cir. 1957); FTC v. Tuttle, 244 F.2d 605 (2d Cir. 1957).

61. 16 C.F.R. § 3.34(b)(2) (1970).

62. *See, e.g.*, FTC v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959); FTC v. Waltham Watch Co., 169 F. Supp. 614 (S.D.N.Y. 1959). Neither was successful.

63. APA § 8, 5 U.S.C. § 557 (Supp.V, 1970), provides in the case of rule-making procedures and adjudications that: "All decisions, including initial, recommended, and tentative decisions, . . . shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion . . . ."

the doctrine of *stare decisis* is without significant force in the field of administrative action,[64] it is well settled that when an agency departs from prior norms it must articulate its reasons for doing so, or its action probably will be found to be arbitrary[65] by a reviewing court.[66] While inconsistency in administrative decisions is not necessarily arbitrary, there is a judicial presumption of arbitrariness in such cases.[67] Indeed, an agency order, regardless of its relation to prior agency action, will likely be held to be arbitrary unless it has a rational and clearly stated basis.[68] When discretion is exercised in issuing an order, the agency must disclose its reasoning and show clearly that the exercise is within congressional authorization;[69] judicial review is then limited to deciding whether a rational basis and supporting evidence exist.[70] The requirement of findings and reasons is based on several practical grounds, including facilitation of judicial review, avoidance of judicial usurpation of administrative functions, protection against arbitrary action, assistance to parties in planning their cases for rehearing and judicial review, and confining agencies to their statutory jurisdictions.[71] The cease and desist orders of the FTC result from adjudications and are, therefore, embraced by the requirement of stated reasons.[72] They are final orders which directly

64. FCC v. WOKO, 329 U.S. 223 (1946); Optical Workers' Union v. NLRB, 227 F.2d 687 (5th Cir. 1955); State Airlines v. CAB, 174 F.2d 510 (D.C. Cir. 1949); Kentucky Broadcasting Corp. v. FCC, 174 F.2d 38, 40 (D.C. Cir. 1949). *See also* Dixie Highway Express, Inc. v. United States, 242 F. Supp. 1016 (D. Miss. 1965); Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (D. Neb. 1965); U.S.A.C. Transport, Inc. v. United States, 235 F. Supp. 689 (D. Del. 1964). *But see* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.403, at 352-53 (2d ed. 1965).

65. Section 10(e) of the APA, 5 U.S.C. § 206(2)(A) (Supp. V, 1970), commands courts which review final rules and orders to reverse them if agency action is, *inter alia*, arbitrary or capricious. *See generally* Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

66. Secretary of Agriculture v. United States, 347 U.S. 645 (1954); Matson Navigation Co. v. Connor, 258 F. Supp. 144 (N.D. Cal. 1966). *See also* Herbert Harvey v. NLRB, 385 F.2d 684 (D.C. Cir. 1967); Greensboro-High Point Airport Auth. v. CAB, 231 F.2d 517 (D.C. Cir. 1956).

67. NLRB v. Mall Tool Co., 119 F.2d 700 (7th Cir. 1941); Dixie Highway Express, Inc. v. United States, 242 F. Supp. 1016 (D. Miss. 1965).

68. *See, e.g.*, Louisville & N.R.R. v. United States, 268 F. Supp. 71 (D. Ky. 1967) (alternative holding); Matson Navigation Co. v. Connor, 258 F. Supp. 144 (N.D. Cal. 1966).

69. NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

70. Gilbertsville Trucking Co. v. United States, 371 U.S. 115 (1962) (dictum). *But see* Matson Navigation Co. v. Connor, 258 F. Supp. 144 (N.D. Cal. 1966). *See also* SEC v. Chenery Corp., 318 U.S. 80 (1943); Kahn v. SEC, 297 F.2d 112 (2d Cir. 1961); Berko v. SEC, 297 F.2d 116 (2d Cir. 1961).

71. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05 (1958); *see* Greater Boston Television Corp. v. FCC, ___ F.2d ___ (D.C. Cir. 1970).

72. See note 63 *supra*.

affect the parties and effectuate the policies of the Act. However, there is some authority that a *denial* of a motion to quash a subpoena is not such an adjudication and thus is not reviewable.[73]

Courts have struggled with the question of whether the particular agency action sought to be reviewed is within the APA provision requiring a statement of reasons.[74] In each of the cases cited as supporting the requirement of reasons, the court was reviewing agency action properly classified as a final order.[75] And, since the Supreme Court established the presumption favoring reviewability of administrative actions,[76] the tests of formality and finality need not be rigorous. For example, in a recent decision the Court of Appeals for the District of Columbia Circuit held reviewable the refusal of the SEC to proceed on a complaint which the Commission had felt insignificant.[77] Where administrative subpoenas are concerned, no cases have been found holding rulings on motions to quash as final adjudications within the purview of the reasons requirement.[78] The Seventh Circuit has held that FTC denial of a motion to quash without a hearing or statement of reasons did not violate the Administrative Procedure Act since a ruling on a motion to quash was not an adjudication as defined by the APA.[79] That court reasoned that the action came under the exception which excludes from adjudications all matters "subject to trial of the law and the facts *de novo* in a court."[80] Denial of a motion to quash without a hearing has also been held not to be a denial of due process, since a full hearing de novo is available at the district court level in enforcement proceedings.[81] Thus, the requirement of stated reasons varies with the degree of formality of the administrative proceeding and with the availability of de novo treatment in court.

The court of appeals in *Crowther* did not disagree that the doctrine of stare decisis is less applicable to administrative agencies than to courts. However, it noted that its duty under the Ad-

73. FTC v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959).

74. *See, e.g.*, United States v. St. Regis Paper Co., 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961).

75. See cases cited notes 66-70 *supra*.

76. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

77. Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970).

78. See notes 79-80 *infra* and accompanying text.

79. FTC v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959).

80. *Id.* at 436-37.

81. FTC v. Waltham Watch Co., 169 F. Supp. 614 (S.D.N.Y. 1959).

ministrative Procedure Act and under the directives of the Supreme Court was to guard against arbitrary and capricious agency action which results when an agency does not adequately explain its departure from prior norms.[82] After finding a judicial disposition to accord wide latitude to administrative actions, the court reaffirmed the necessity of adequate explication of reasons lest the action appear arbitrary and the review be meaningless. The degree of parallelism of the facts at bar and those in *Mississippi* was said to give the parties and the court the right to a fuller explanation. The FTC argued before the court that the facts of *Mississippi* were distinguishable in that the company attorney in the earlier case had been house counsel, while Lehigh's counsel was independent. The court, while admitting the difference could possibly have been important in the agency decision, found the distinction insignificant, especially as the Commission had not concerned itself with the distinction in its order denying *Mississippi* treatment.[83] The court then noted that in the earlier case the Commission had rejected respondent's argument that an independent accountant would not be able to easily detect either the withholding of information or perjury. There had been no claim that the information would be any less useful because it could not be attributed to the individual responding companies. The rationalization by the Commission on appeal that the information would be as well protected in the hands of independent counsel as if it were given to independent accountants was rejected as unsupported and inaccurate. The court pointed out that once the information was disclosed in the form ordered, there would never be the same degree of assurance that it would not be disclosed to Lehigh.[84] Similarly, the additional assurance by Lehigh that it would not oppose *in camera* treatment of the information at trial was rejected because there was no guarantee that the examiner would accord such treatment.[85] The court's primary instruction on remand to the Commission was to identify and articulate its reasons for rejecting the approach that it had so strongly adopted two years before in a nearly identical proceeding.

Judicial response has always been to require adequate reasons for agency decisions which affect the rights of parties.[86] It is only proper

82. 430 F.2d at 514.
83. *Id.* at 514-15.
84. *Id.* at 515.
85. *Id.*
86. See cases cited notes 66-68 *supra.*

in such cases that the reviewing court have the advantage of all the expertise and judgment an agency can supply. But the *Crowther* court appears to have ignored the basic issue of whether a denial of a motion to quash a subpoena is even reviewable for alleged agency arbitrariness. Before remand for a statement of reasons is proper, a court must find itself permitted to review the action. Agency action on a motion to quash, because of de novo treatment in the district court, is exempt from treatment as an adjudication under the APA[87] and thus is not agency action subject to the requirement of a statement of reasons.[88] The order here in question was not retroactive and had no binding force in future proceedings; the companies had no vested interest in the preservation of the *Mississippi* approach without any deviation whatsoever. Of course the defendant in a Clayton Act action has a legitimate interest in availing itself of the subpoena powers of the FTC, and likewise, the subpoenaed companies have an interest in maintaining their competitive positions. Nevertheless, in the instant situation more than the conflicting interests of the immediate parties must be considered. Arguably, the court in *Crowther* ignored the public policy consideration militating against delay in the administrative process. In resolving the conflict between the right of the public and the parties to know reasons for administrative actions and the preservation of administrative flexibility in fulfillment of congressional purposes, courts are repeatedly called upon to balance interests. An apparently reasonable variation of a formerly approved ancillary procedure should not be made the cause of unreasonable delay in effectuating the policies of the Federal Trade Commission Act. Thus, in a subpoena enforcement case, it is arguable that even if the subpoena order is substantially different from the established form, once the district court has sustained it, a court of appeals should affirm in the interest of administrative expediency. A fortiori, in such a case, a court should not remand for more articulate reasons when there is not a significant departure from established practice. Both the court's authority and the wisdom of its decision are questionable.

Agency Decision which Ignores the Examiner's Decision

In *Cinderella Career & Finishing Schools v. FTC*[89] the Court of

87. APA § 5, 5 U.S.C. § 554 (Supp. V, 1970).

88. *See* FTC v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959). A statement of reasons is required by the APA only for agency action which qualifies as an adjudication. See note 63 *supra*.

89. 425 F.2d 583 (D.C. Cir. 1970).